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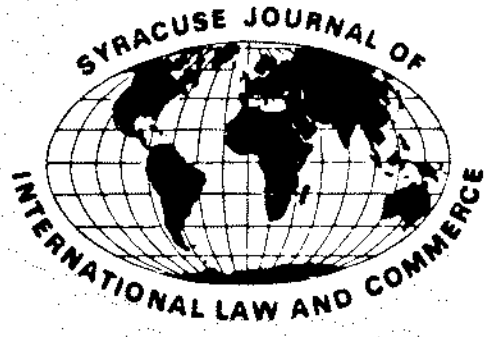

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CURTAILING SUBSIDY WARS IN GLOBAL TRADE: REVISITING THE ECONOMICS OF WORLD TRADE ORGANIZATION LAW ON SUBSIDIES

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ABSTRACT

The positive influence of subsidies on merchandise exports is well known from international trade theory literature. However, the empirical evidence on the relationship itself remains ambiguous. This article fills a gap in the existing pool of research by conducting a panel data empirical analysis over two decades for 140 countries to understand the relationship between their overall budgetary subsidies and aggregate merchandise export inclination. The detailed research findings of this paper underline the importance of going beyond the "Bali Package" agreed in December 2013 and concluding the Doha Round Negotiations of the World Trade Organization ("WTO"). The outline for the Bali agreement was that the Members of the WTO would exercise utmost restraint in using any form of export subsidy. Because of this inability to reach binding decisions, the Bali agreement is open ended and relies on good will and restraint. Fundamentally, this article stresses the positive impact of disciplining subsidies in particular in no uncertain terms. The results of this article lead to two important conclusions. First, the economic analysis shows that developing countries should realize that a subsidy-based trade war is more likely to put them in a disadvantageous position *vis-à-vis* the WTO developed members; and second, the legal analysis shows that the Agreement on Subsidies and Countervailing Measures ("ASCM") requires urgent clarification in the negotiating tables to ensure the global economy does not suffer major turbulences in the coming years.

I. INTRODUCTION

The objective of establishing the World Trade Organization ("WTO") in 1995 has been to enhance international trade flows through elimination or reduction of various unfair trade practices. While the WTO negotiations have been able to phase out the traditional trade barriers like import quotas and have been broadly successful in reducing the tariff barriers, limiting the trade distortions arising from subsidies still

remains an area of concern.[1] The situation before the Ninth Ministerial Conference[2] did not look promising.[3] "[A] number of countries opposed any legally binding decision in Bali, including lower limits on export subsidies."[4] The outline for the Bali agreement was that WTO countries would "'exercise utmost restraint' in using any form of export subsidy."[5] "Because of this inability to reach binding decisions, the Bali agreement is open ended and relies on good will and restraint."[6] "In all, the agricultural package in the Bali agreement has moved the stakes on very little."[7] "With no legally binding arrangements, the [gray areas in the] goodwill statements are open to abuse and the disputes' panel of the

1. To offset price advantages of imported products, states make specific monetary payments or provide tax relief to domestic producers, allowing them to lower domestic or export prices and obtain a competitive advantage *vis-à-vis* competing foreign products. Subsidies exist in different forms (export subsidies, domestic subsidies, production subsidies or decoupled subsidies [direct payments]). Subsidies are specific and different from general payments, such as social security to which the public at large or large segments of the population are entitled. *See generally* M.C.E.J. BRONCKERS, SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS: ISSUES OF PROTECTIONISM IN GATT EUROPEAN COMMUNITY AND UNITED STATES LAW (1985); T. Josling & S. Tangermann, *Production and Export Subsidies in Agriculture: Lessons from GATT and WTP Disputes Involving the US and the EC*, *in* TRANSATLANTIC ECONOMIC DISPUTES: THE EU, THE US, AND THE WTO 207 (Ernst-Ulrich Petersmann & Mark A. Pollack eds., 2003); James Rude, *Under the Green Box: The WTO and Farm Subsidies*, 35 J. WORLD TRADE 1015 (2001).

2. The WTO Ninth Ministerial Conference was held in Bali, Indonesia, from the 3rd to the 6th of December 2013. *See Ministerial Declaration of 7 December 2013*, WORLD TRADE ORG., *available at* http://www.wto.org/english/thewto_e/minist_e/mc9_e/bali_texts_combined_e.pdf (last visited Jan. 6, 2014)[hereinafter *Bali Declaration*]; *see generally* Julien Chaisse & Mitsuo Matsushita, *Maintaining the WTO's Supremacy in the International Trade Order – A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism*, 16 J. INT'L ECON. L. 9 (2013); Julien Chaisse, *Compliance with International Law as a Process— Deconstructing the Obligation of Conformity*, 38 FORDHAM INT'L L.J. (forthcoming 2015).

3. *World Trade Organisation Truly Delivers*, DAIRYVIETNAMCO., LTD., *available at* http://www.dairyvietnam.com.vn/en/News/World-Trade-Organisation-Truly-Delivers.html (last visited Nov. 16, 2014). "In May, the G–20 group of developing countries had called on developed countries to [reduce in half] their ceilings on the money they spend on export subsidies by the end of 2013 and phase in a 540-day limit in the repayment period for export credit." *Id.* "The final target is 180 days." *Id.* "The G-20 also called for a limit on the quantities of subsidized exports, at the average actually exported with subsidies for 2003–2005." *Id.*

4. "The United States in particular wanted to grant this exception on a temporary basis only." Christian Ignatzi, *WTO Bali Agreement Expected to Boost Growth*, DW (July 12, 2013), *available at* http://www.dw.de/wto-bali-agreement-expected-to-boost-growth/a-17278088 (last visited Nov. 16, 2014). Also, "India wanted to make sure that food would remain affordable for its poor population of 800 million and therefore had insisted on permission to subsidize rice and grain." *Id.*

5. *See generally Bali Declaration*, *supra* note 2.

6. *World Trade Organisation Truly Delivers*, *supra* note 3.

7. *Id.*

[WTO] could be just as busy as it has been with countries arguing over subsidies and tariffs and quotas as much as they have over the last [two decades.]"[8]

The present analysis contributes to the understanding of the relationship between overall government financial transfers (i.e., budgetary subsidies) and aggregate merchandise exports as a percentage of gross domestic product ("GDP") in two ways. First, it shows that the Agreement on Subsidies and Countervailing Measures ("ASCM") requires clarification in the negotiating tables. Second, developing countries should realize that a subsidy-based trade war is more likely to put them in a disadvantageous position *vis-à-vis* the developed WTO members.

Provision of subsidies to local players can be explained by several underlying motivations from the standpoint of national governments, namely, industrial development, facilitating innovation, supporting national champions, securing environment-related objectives, ensuring redistribution, etc.[9] The subsidies can be provided to the local players through interventions both in the input as well as output markets. The efficacy of subsidy policy as a strategic trade instrument is however crucially linked with the local industry's learning capability and the extent to which the domestic and foreign goods are substitutable.[10] The trade theoretic literature notes that in a scenario characterized by fast capital mobility, imposition of import tariffs leads to better welfare implication as compared to export subsidies.[11] Nevertheless, presence of domestic distortions in lower income countries result to frequent deployment of subsidy measures to further long-term goals, as they function as more efficient trade policy instrument *vis-à-vis* import tariffs.[12]

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8. *Id.*

9. *See* Terry Collins-Williams & Gerry Salembier, *International Disciplines on Subsidies: The GATT, the WTO and the Future Agenda*, 30 J. WORLD TRADE 5 (1996); *see also* Simon Lester, *The Problem Of Subsidies as a Means of Protectionism: Lessons From the WTO EC — Aircraft Case*, 12 MELBOURNE J. INT'L L. 1, 5 (2013).

10. *See* Marc J. Melitz, *When and How Should Infant Industries be Protected?*, 66 J. INT'L ECON. 177 (2005); Kym Anderson, *Subsidies and Trade Barriers* (paper presented at a roundtable in Copenhagen on 24-28 May 2004, as a part of the Copenhagen Consensus project) *available at* http://www.copenhagenconsensus.com/sites/default/files/cp-tradefinished.pdf (last visited Nov. 16, 2014).

11. *See* Tanapong Potipiti, *Import Tariffs and Export Subsidies in the World Trade Organization: A Small – Country Approach* (ARTNeT Working Paper No. 119, Bangkok, ESCAP, 2012), *available at* http://www.unescap.org/sites/default/files/AWP%20No.%20119.pdf (last visited Nov. 16, 2014).

12. *See generally* Jagdish Bhagwati & V. K. Ramaswami, *Domestic Distortions, Tariffs*

Apart from the aforesaid determinants, promoting exports of domestic players who are in competition with their foreign counterparts in the global market is a major driving motive for providing subsidies.[13] The standard trade analysis observes that the subsidies provided by national governments enable the domestic producers suffering from cost disadvantage to sell their products in the international markets at a relatively cheaper price, thereby resulting in a rise in their exports.[14] The theoretical relationship between subsidies and exports is clearly observed, irrespective of market structure, as the policy is capable of delivering both in the presence of competitive, as well as oligopolistic, markets.[15] Several export subsidy programs are operational in European countries and the U.S., which provide their firms greater advantage *vis-à-vis* their foreign competitors.[16] The adoption of export subsidies as a strategic policy instrument has been reported extensively in the literature.[17] For instance, production and export subsidies in a home country may motivate multinational corporations from abroad to locate production facilities there.[18]

The trade-distorting effects of subsidies in general, and export subsidies in particular, are widely acknowledged to be in conflict with core WTO principle of fair trade. The mandate of the ongoing WTO negotiations under the Agreement of Agriculture ("AoA") and the Agreement on Subsidies and Countervailing Measures ("ASCM") are to ensure better discipline on both direct (e.g. direct payment) as well as indirect (e.g. revenue foregone by preferential electricity and fuel price, lowered interest payment on restructured loans) financial transfers.[19] As

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and the Theory of Optimum Subsidy, 71 J. POL. ECON. 44, 44-50 (1963).

13. *See generally* Gary N. Horlick, *A Personal History of the WTO Subsidies Agreement*, 47 J. WORLD TRADE 447 (2013); *see also* James A. Brander & Barbara J. Spencer, *Export Subsidies and International Market Share Rivalry*, 18 J. INT'L ECON. 83 (1985).

14. *See generally* Horlick, *supra* note 13; *see also* Brander & Spencer, *supra* note 13.

15. *See* Cees van Beers, Jeroen C. J. M. van den Bergh, André de Moor & Frans Oosterhuis, *Determining the Environmental Effects of Indirect Subsidies: Integrated Method and Application to the Netherlands*, 39 APPLIED ECON. 2465 (2007); *see also* Avinash Dixit, *International Trade Policy for Oligopolistic Industries*, 94 ECON. J. 1 (1984).

16. *See* INTERNATIONAL TRADE CENTRE, NATIONAL TRADE POLICY FOR EXPORT SUCCESS, U.N. Doc. P248.E/DCP/BTP/11-XI, U.N. Sales No. E.12.III.T.3 (2011).

17. *See* Kyle Bagwell & Robert W. Staiger, *Strategic Trade, Competitive Industries and Agricultural Trade Disputes*, 13 ECON. & POL. 113 (2001); *see also* Andrew Y. Lemon, *The Peril of Implementing Export Subsidies in the Presence of Special Interests* (Feb. 21, 2003) (preliminary draft) (on file with the Yale University Department of Economics), *available at* http://economics.yale.edu/sites/default/files/files/Workshops-Seminars/Industrial-Organization/lemon-030225.pdf (last visited Nov. 16, 2014).

18. *See generally* Davin Chor, *Subsidies for FDI: Implications from a Model with Heterogeneous Firms*, 78 J. INT'L ECON. 113 (2009).

19. *See generally Legal Texts: A Summary of the Final Act of the Uruguay Round*,

per AoA and ASCM provisions, subsidies are classified under two broad categories, namely, actionable (i.e. subsidies which are directly linked with production and hence trade-distorting) and non-actionable (i.e. subsidies which are not directly linked with production and hence have lesser impact on trade). The goal of the current WTO negotiations is to limit the actionable subsidies[20] (e.g. certain forms of fisheries subsides, amber and blue box subsidies in agriculture) and discontinuation of all forms of agricultural export subsidies.[21] While the Doha Development Agenda ("DDA") negotiations have been broadly successful in reforming the export subsidies scenario, the prevalence of domestic subsidies in several member countries remains a major concern area.[22]

In this context, the present analysis intends to contribute to the literature by exploring the relationship between government financial transfers (i.e., budgetary subsidies) and merchandise exports as a percentage of GDP in a cross-country framework. The aim is to provide some policy recommendations (or at least orientation) which could guide current negotiations for the benefit of all WTO members.

The paper is arranged along the following lines. First, a brief discussion on the research frontier on subsidies and their potential implications on exports is conducted. Secondly, the reflection of this understanding in the regulatory context provided by the WTO's Agreement on Subsidies and Countervailing Measures ("ASCM") is analyzed in its key dimensions. Third, the data sources are explained and macro trends of the principal variables are illustrated. A cross-country empirical analysis is undertaken next for understanding the influence of budgetary subsidies on export inclination. Finally on the basis of the empirical results, a few policy conclusions are drawn.

WORLD TRADE ORG., *available at* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#kAgreement (last visited Nov. 16, 2014).

20. *See generally* Debashis Chakraborty, Julien Chaisse & Animesh Kumar, *Doha Round Negotiations on Subsidy and Countervailing Measures: Potential Implications on Trade Flows in Fishery Sector*, 6 ASIAN J. WTO & INT'L HEALTH L. & POL. 201, 201-34 (2011).

21. *See* Ian F. Fergusson, *World Trade Organization Negotiations: The Doha Development Agenda*, CONG. RESEARCH SERV. (2011).

22. *See generally* Alan O. Sykes, *The Economics of WTO Rules on Subsidies and Countervailing Measures*, (U. Chi. L. & Econ., Olin Working Paper No. 186, 2003), *available at* http://www.law.uchicago.edu/files/files/186.aos_.subsidies.pdf (last visited Nov. 16, 2014); *see also* Julien Chaisse & Puneeth Nagaraj, *Changing Lanes: Trade, Investment and Intellectual Property Rights*, 37 HASTINGS INT'L & COMP. L. REV. 223, 223-70 (2014).

II. UNDERSTANDING THE ECONOMICS OF WTO RULES ON SUBSIDIES

Although subsidies specifically geared towards export promotion contribute more in boosting exports, even domestic subsidies may cause over-production and lead to enhanced exports for releasing the downward pressure on prices in domestic market. The positive relationship between subsidies and exports is observed both in case of agricultural and manufacturing sectors.

A. The Agricultural Sector

Agricultural export subsidies have emerged as a major policy instrument adopted in both developed and developing countries during the General Agreement on Tariffs and Trade ("GATT") period and WTO days. Both agricultural input subsidies (e.g. fertilizer subsidy, irrigation subsidy in terms of free electricity) and output subsidies (e.g. per unit support at higher than market price) may lead to over-production, thereby fueling export opportunities.[23]

Agricultural export subsidies have been extensively used in the U.S. during pre-WTO days. In 1993, the payments under the Export Enhancement Program ("EEP") crossed U.S. $1 billion.[24] The support to U.S. players in terms of export credit arrangements, including deferred interest payments, government guarantees for securing loans at lower interest rates, etc. have also played crucial roles.[25] Similarly in the EU, the primary sector (e.g. dairy and poultry sector) received export subsidies in the order of €1 billion and €650 million in 2008 and 2009 respectively through the Common Agricultural Policy ("CAP").[26] It has been noted that developing countries like Brazil, India, Mexico, South Africa, Thailand, Venezuela, etc. also provide considerable volume of agricultural subsidies.[27]

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23. *See generally* Sacchidananda Mukherjee & Debashis Chakraborty, *Relationship Between Fiscal Subsidies and CO_2 Emissions: Evidence from Cross-Country Empirical Estimates*, ECON. RES. INT'L, Vol. 2014 (2014).

24. *See* Howard D. Leathers, *Agricultural Export Subsidies as a Tool of Trade Strategy: Before and After the Federal Agricultural Improvement and Reform Act of 1996*, 83 AM. J. AGRIC. ECON. 209 (2001).

25. *See generally* James Rude, *Reform of Agricultural Export Credit Programs*, 1 ESTEY CTR. J. INT'L L. & TRADE POL. 66 (2000).

26. *See* Dirk Willem te Velde et al., *The EU's Common Agricultural Policy and Development*, 79 OVERSEAS DEV. INST. PROJECT BRIEFINGS 1, 3 (2012).

27. *See* Arvind Panagariya, *Agricultural Liberalisation and the Least Developed Countries: Six Fallacies*, 28 WORLD ECON. 1277, 1285 (2005).

B. The Industrial Sector

The subsidies given to the industrial sector and their implications for exports constitute another major branch of literature. The positive influence of government subsidies in Japan for promotion of progressive industries and exports deserves mention.[28] Apart from the direct subsidies, indirect subsidies like fuel subsidies can significantly lower the variable cost of production in capital-intensive sectors like iron and steel etc., which also provide them substantial edge in the export markets over competitors.[29] Incidence of high volume of fuel subsidies both in developed[30] and emerging countries[31] and their potential export implications has been reported in the literature.

C. The Positive Relationship as Classic Analysis

The literature on the subsidy-export interrelationship in developed countries has generally showed a positive relationship between the two. Agricultural export subsidies have significantly boosted exports from the recipient countries.[32] The evidence of subsidized wheat exports from the U.S. displacing the same from competitor countries deserves mention here.[33] Similarly, the dairy subsidies in both Canada and the U.S. have enhanced their global exports.[34] Empirical estimates for Portugal[35] and

28. *See* David De Meza, *Export Subsidies and High Productivity: Cause or Effect?*, 19 CANADIAN J. ECON. 347, 347 (1986).

29. *See* Peter Thomas in der Heiden, *Chinese Sectoral Industrial Policy Shaping International Trade and Investment Patterns – Evidence from the Iron and Steel Industry*, 18 (Inst. of E. Asian Studies, Univ. of Duisburg-Essen, Working Paper No. 88, 2011), *available at* http://www.uni-due.de/in-east/fileadmin/publications/gruen/paper88.pdf (last visited Nov. 16, 2014).

30. *See* David Victor, *The Politics of Fossil Fuel Subsidies*, GLOBAL SUBSIDIES INITIATIVE 11-13 (2008), *available at* http://www.iisd.org/gsi/sites/default/files/politics_ffs.pdf (last visited Nov. 16, 2014).

31. *See Reforming Energy Subsidies: Opportunities to Contribute to the Climate Change Agenda*, UNITED NATIONS ENV'T PROGRAMME (2008), *available at* http://www.unep.org/pdf/pressreleases/reforming_energy_subsidies.pdf (last visited Nov. 16, 2014).

32. *See* Bernard Hoekman, Francis Ng & Marcelo Olarreaga, *The Impact of Agricultural Support Policies on Developing Countries*, *in* 1 REFORMING AGRICULTURAL TRADE FOR DEVELOPING COUNTRIES: KEY ISSUES FOR A PRO-DEVELOPMENT OUTCOME OF THE DOHA ROUND 100, 100-31 (Alex F. McCalla & John Nash eds., 2007).

33. *See generally* H. G. Brooks, S. Devadoss & W. H. Meyers, *The Impact of the U.S. Wheat Export Enhancement Program on the World Wheat Market*, 38 CANADIAN J. AGRIC. ECON. 253 (1990).

34. *See* Kenneth W. Bailey, *Comparison of the U.S. and Canadian Dairy Industries* (The Pa. State. Univ. Dep't of Agric. Econ. & Rural Soc'y, Staff Paper No. 349, 2002), *available at* http://www.agmrc.org/media/cms/staffpaper349_42eab16a91e4f.pdf (last visited Nov. 16, 2014).

35. *See* Oscar Afonso & Armando Silva, *Non-Scale Endogenous Growth Effects of*

West Germany[36] also confirm the positive relationship between subsidies and exports.

The positive relationship between subsidies and exports has been observed in several developing and emerging countries as well. In South Korea, the implementation of a preferential tax system and subsidy allocation for export activities led to a transformation of the export basket of the country towards more value-added manufacturing products.[37] The massive export growth in China has caused researchers to focus on its subsidy policy as an explanatory variable. The firm-level panel estimation results show that production subsidies facilitate exports, and the effect is more evident for profit-making firms as well as capital-intensive industries.[38] The influence of subsidies on Chinese manufacturing exports has been established under heterogeneous firm structure as well.[39] In addition to macro-level analysis, panel data regressions with Chinese provincial data reveal the strong influence of subsidies on state owned enterprises ("SOEs") exports, as the government financial devolution helps them to overcome the high production costs.[40] In the Malaysian context, the positive long-run relationship between subsidies and exports has been confirmed through a cointegration test.[41] Interestingly, while the positive influence of firm-specific subsidies on exports in Colombia has been observed, the impact is found to be diminishing in subsidy size.[42]

Nevertheless, a section of the literature questions the influence of export subsidies, in particular their quantum, on exports.[43] In the East German context, no relationship between subsidies and exports has been

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Subsidies for Exporters, 29 ECON. MODELLING 1248 (2012), *available at* http://www.etsg.org/ETSG2012/Programme/Papers/32.pdf (last visited on Nov. 14, 2014).

36. *See* Sourafel Girma, Holger Görg & Joachim Wagner, *Subsidies and Exports in Germany: First Evidence from Enterprise Panel Data*, 55 APPLIED ECON. Q. 179 (2009).

37. *See* Wontack Hong, *Export-Oriented Growth and Trade Patterns of Korea*, *in* TRADE AND STRUCTURAL CHANGE IN PACIFIC ASIA 273, 273-306 (Colin J. Bradford, Jr. & William H. Branson eds., 1987).

38. *See* Surafel Girma et al., *Can Production Subsidies Explain China's Export Performance? Evidence from Firm-level Data*, 111 SCANDINAVIAN J. ECON. 863 (2009).

39. *See* Fabrice Defever & Alejandro Riaño, *China's Pure Exporter Subsidies* (Ctr. for Econ. Performance, London Sch. of Econ. & Pol. Sci., Working Paper No. 1182, 2012), *available at* http://cep.lse.ac.uk/pubs/download/dp1182.pdf (last visited Nov. 16, 2014).

40. *See generally* Richard S. Eckaus, *China's Exports, Subsidies to State Owned Enterprises and the WTO*, 17 CHINA ECON. REV. 1 (2006).

41. *See* Bakri Abdul Karim & Shazali Abu Mansor, *Subsidy and Export: Malaysian Case*, sec. 4 (Dec. 6, 2011) (unpublished manuscript), *available at* http://mpra.ub.uni-muenchen.de/37025/1/MPRA_paper_37025.pdf (last visited Nov. 16, 2014).

42. *See* Christian Helmers & Natalia Trofimenko, *The Use and Abuse of Export Subsidies: Evidence from Colombia*, 36 WORLD ECON. 465, 481-83 (2013).

43. *See* Girma, Görg & Wagner *supra* note 36, at 2.

established.[44] The weak influence of export subsidies on exports has been confirmed in Turkey[45] and Japan[46] as well. Empirical estimates with respect to U.S. firms have also revealed that the effect of subsidies on exports is not statistically significant.[47] Similarly, the firm-specific analysis on the interrelationship between subsidies and export decisions in Ireland fails to find any significant relationship between the two.[48] Adoption of export subsidies has turned out to be a suboptimal policy instrument in Latin American countries like Argentina, Mexico[49] and Costa Rica as well.[50]

The absence of statistically significant relationship between subsidies and exports in several developing countries and least developed countries ("LDCs") can be explained by the poor implementation performance by the national governments. Kenya had been a prominent example of this phenomenon.[51] The underlying reason of the failure to promote exports even after adopting the subsidization strategy in Bolivia has been accorded to the decision of non-discretionary implementation of the policy. Conversely, Korea and Brazil have succeeded in their attempt by following a path of discretion and selectivity.[52]

III. EXPLORING THE REFLECTION OF TRADE THEORY PREDICTIONS INTO THE WTO REGULATORY FRAMEWORK

The existing literature notes the possibility of trade diversion from efficient producers due to an export-oriented focus and other forms of subsidies received by their competitors, which may lead to subsidy and

44. *See id.* at 7.

45. *See* Ismail Arslan & Sweder van Wijnbergen, *Export Incentives, Exchange Rate Policy and Export Growth in Turkey*, 75 REV. ECON. & STAT. 128, 132 (1993).

46. *See* Hiroshi Ohashi, *Learning by Doing, Export Subsidies, and Industry Growth: Japanese Steel in the 1950s and 1960s*, 66 INT'L ECON. 297, 319 (2005).

47. *See* Andrew B. Bernard & J. Bradford Jensen, *Why Some Firms Export*, 86 REV. ECON. & STAT. 561, 569 (2004).

48. *See* Holger Görg, Michael Henry & Eric Strobl, *Grant Support and Exporting Activity*, 90 REV. ECON. & STAT. 168, 173 (2008).

49. *See* Julio Nogués, *The Experience of Latin America with Export Subsidies*, 126 REV. WORLD ECON. (WELTWIRTSCHAFTLICHES ARCHIV) 97, 104-05 (1990).

50. *See generally* Alexander Hoffmaister, *The Cost of Export Subsidies: Evidence from Costa Rica*, 39 INT'L MONETARY FUND STAFF PAPERS 1, 138 (1992).

51. *See* Patrick Low, *Export Subsidies and Trade Policy: The Experience of Kenya*, 10 WORLD DEV. 293, 302 (1982).

52. *See* Dani Rodrick, *Taking Trade Policy Seriously: Export Subsidization as a Case Study in Policy Effectiveness*, (Nat'l Bureau of Econ. Research, Working Paper No. 4567, Dec. 1993), *available at* http://www.nber.org/papers/w4567.pdf (last visited Nov. 3, 2014).

countervailing duty wars for reversing that advantage.[53] Such subsidies are specific and different from general payments, such as social security related expenses to which the public at large or large segments of the population are entitled. On one hand, they can improve the returns to domestic producers, but on the other hand, they can distort trade.[54] The additional concern here comes from the fact that the developing country and LDCs firms do not receive the same level of supports received by their developed country counterparts, which significantly constrain their market access both in home and foreign markets.[55] This is reflected in the negotiations and the text of the ASCM.[56] The compromise at the heart of the WTO regulation of subsidies resulted in an agreement which required the WTO Dispute Settlement Body ("DSB") to clarify a number of concepts in the case law. Export subsidies are indeed quite susceptible to abuse.[57]

A. The Policy and the Law

The evolution on subsidy regulation in international trade system started with the Havana Charter, which became the basis for future agreements on subsidies, such as: the GATT, Subsidies Code of the Tokyo Round and the ASCM of the Uruguay Round.[58] The ASCM Agreement defines the term 'subsidy' in detail in Article 1.[59] Moreover, it classifies subsidies into three broad categories: i) prohibited; ii)

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53. *See generally* KYLE BAGWELL & ROBERT W. STAIGER, THE ECONOMICS OF THE WORLD TRADING SYSTEM (2002); *see* Renee Sharp & Ussif R. Sumaila, *Quantification of the U.S. Marine Fisheries Subsidies*, 29 N. AMER. J. FISHERIES MGMT. 18 (2009); Anne Tallontire, *Trade Issues on Background Paper: The Impact of Subsidies on Trade in Fisheries Products*, (Food and Agric. Org. of the United Nations, Project Paper No. 26109, July 2004); Donald J. Boudreaux, *Do Subsidies Justify Retaliatory Protectionism?*, 31 ECON. AFF. 4 (2011).

54. The striking example of trade distorting subsidies, the upland cotton subsidies granted by US government for local farmers which had more adverse consequences away from its shores. The efforts of rural farmers in developing countries are being undermined by these subsidies. However, econometric findings have questioned the compensation judgment of WTO in Brazil's favor. For details see Kilungu Nzaku, Matt Vining & Jack E. Houston, *U.S. Cotton Subsidies: Are Brazil's Accusations True?* (presented at S. Agric. Econ. Ass'n Annual Meeting, No. 6749, (2008) *available at* http://ageconsearch.umn.edu/bitstream/6749/2/sp08nz11.pdf (last visited Nov. 16, 2014).

55. *See generally* Erich Supper, *Is There Effectively A Level Playing Field For Developing Country Exports?*, U.N. Sales No. E-00-II-D-22 (2001).

56. *See generally Agreement on Subsidies and Countervailing Measures*, WORLD TRADE ORG., *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf (last visited Nov. 13, 2014).

57. *See* Nogués, *supra* note 49, at 112.

58. *See* Chakraborty, Chaisse & Kumar, *supra* note 20, at 204.

59. *See* Gary N. Horlick & Peggy A. Clarke, *The 1994 WTO Subsidies Agreement*, 17 WORLD COMPETITION 41, 42 (1993).

actionable; and iii) non-actionable subsidies.[60] This categorisation is sometimes referred to as a 'traffic light' approach. Prohibited subsidies are "red light" subsidies, which are harmful to trade per se.[61] Non-actionable subsidies are "green light" subsidies, which are considered to be permitted on the grounds of an explicit reference in the legal text.[62] Lastly, actionable subsidies are "yellow light" subsidies, which are open to be challenged only if they are considered to cause adverse effects on international trade.[63]

In the present ASCM, some uncertainties remain as to the meaning and legal implications of some basic concepts. In this connection, the ASCM architecture has been challenged at times from the perspective of efficiency. The lack of purpose in the agreement itself has come under heavy criticism on the ground that the countries may be forced to remove socially beneficial subsidies as well.[64] In particular, the sensitivity of the agreement with economic considerations is strongly questioned.[65] Questions have also been raised on the optimality of disciplining subsidies beyond the non-violation doctrine.[66] In addition, it is held that WTO's subsidy rules would have yielded greater result only after substantial tariff reductions under GATT.[67]

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60. Hyung-Jin Kim, *Reflections on the Green Light Subsidy for Environmental Purposes*, 33 J. WORLD TRADE 167, 167 (1999).

61. *Id.*

62. *Id.* This category unfortunately was applied only for a period of five years beginning with the entry into force of the WTO, since developing countries were afraid it would be excessively used by industrialized countries. Today efforts are under way to put it back, as the category is important for the promotion of small and medium-sized enterprises ("SMEs") in developing countries as well. *See id.*

63. *Id.* The definition of a subsidy within the meaning of Articles 1 and 3 of the SCM Agreement (prohibited subsidies) was addressed by the Appellate Body in various cases, most prominently in US – Tax Treatment for 'Foreign Sales Corporations' (WT/DS108/AB/R), as well as in Canada - Certain Measures Affecting the Automotive Industry (WT/DS139/AB/R, WT/DS142/AB/R 994). *See Appellate Body Report Canada, Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R 994 (May 31, 2000), *available at* http://www.wto.org/english/tratop_e/dispu_e/2823d.pdf; *Appellate Body Report, United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/RW (Jan. 14, 2002), *available at* http://www.wto.org/english/tratop_e/dispu_e/108abrw_e.pdf (last visited Nov. 16, 2014).

64. *See* Kyle Bagwell & Robert W. Staiger, *Will International Rules on Subsidies Disrupt the World Trading System?*, 96 AM. ECON. REV. 877 (2006).

65. *See generally* PETROS C. MAVROIDIS, PATRICK A. MESSERLIN & JASPER M. WAUTERS, THE LAW AND ECONOMICS OF CONTINGENT PROTECTION IN THE WTO (Edward Elgar Publ'g 2008).

66. *See generally* Alan O. Sykes, James Kowal & Patricia Kowal, *The Questionable Case for Subsidies Regulation: A Comparative Perspective*, 2 J. LEGAL ANALYSIS 475, 473-523 (2010).

67. *See* David R. DeRemer, *The Evolution of International Subsidy Rules*, (Universitè

Hence, in recent period international trade governance has been characterised by a progressive regulation on subsidies, tightening disciplines over time in order to avoid such distortions. These rules essentially seek to balance the need for redistribution and implementation of legitimate policy goals and to avoid protectionism and unnecessary distortions of conditions of competition on domestic markets. Trade-restrictive border measures apply to countervail unlawful subsidies but are not at the heart of legal rules relating to this important field of international trade law.

It is argued that the subsidies are often sector-specific and their "narrowly tailored" nature, as well as government legal arrangements pertaining to data dissemination, may prohibit circulation of full information on them in the public domain.[68] The problem gets further compounded in case of the indirect subsidies (i.e., income foregone rather than budgetary transfers). The subsidies data reporting also suffers from a "forum bias", as several countries have reported relatively higher fisheries subsidies figures to the OECD and APEC as compared to the corresponding figures reported to WTO.[69] This kind of massive under-reporting makes 'disciplining' of subsidies through the multilateral negotiations all the more difficult.[70]

B. The Practice of Countervailing Duty[71]

The alleged continuation of subsidies in foreign countries have often led countries to take recourse to trade remedial measures. In order to

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Libre de Bruxelles: ECARES, Working Paper No. 2013-45, 2013), *available at* https://dipot.ulb.ac.be/dspace/bitstream/2013/153041/1/2013-45-DEREMER-theevolution.pdf (last visited Nov. 16, 2014).

68. *Government Subsidies: Revealing the Hidden Budget*, PEW ECON. POL'Y GROUP (2013), *available at* http://www.pewtrusts.org/~/media/legacy/uploadedfiles/pcs_assets/2013/Subsidyscope20Framing20Paperpdf.pdf (last visited Nov. 16, 2014).

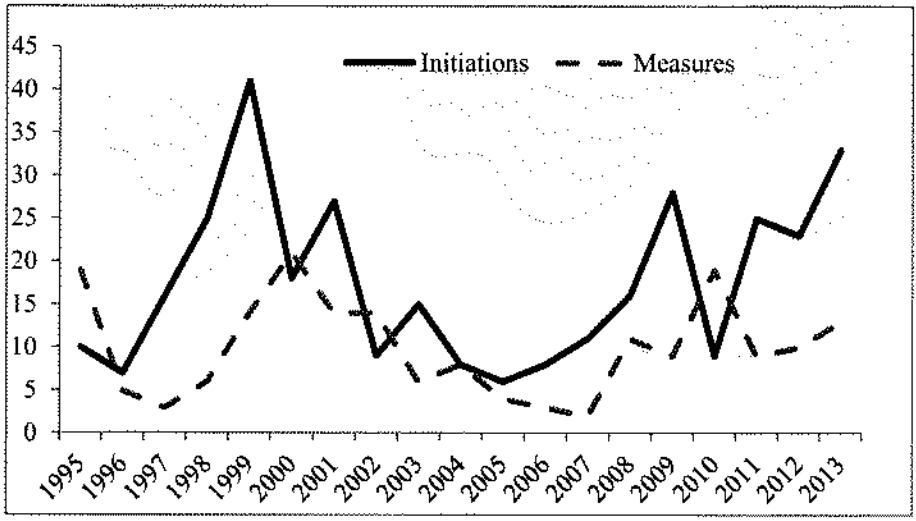
69. *Hard Facts, Hidden Problems: A Review of Current Data on Fishing Subsidies*, WORLD WILDLIFE FUND (2001); *see* Ussif Rashid Sumalia et al., *Catching More Bait: A Bottom-up Re-estimation of Global Fisheries Subsidies*, 12 J. BIOECONOMICS 201, 201-25 (2010).

70. *See Exploring the Links Between Subsidies, Trade and the WTO*, WORLD TRADE ORG. (2006), *available at* http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report06_e.pdf (last visited Nov. 16, 2014).

71. The analysis undertaken in this section draws from the methodology developed by Chaisse and Chakraborty (2007) and Chakraborty and Khan (2008). *See* Julien Chaisse & Debashis Chakraborty, *Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System*, 28 U. PA. J. INT'L ECON. L. 153 (2007); *see also* DEBASHIS CHAKRABORTY & AMIR ULLAH KHAN, THE WTO DEADLOCKED: UNDERSTANDING THE DYNAMICS OF INTERNATIONAL TRADE (Los Angeles and London: Sage Publications 2008).

further the analysis, we constructed **Figure 1** in which all countervailing duty investigations initiated from 1995 to 2013 have been reported.

Figure 1: Countervailing Duty Investigations Initiated from 1995 to 2013 (December), Worldwide



Source: Constructed by the authors from WTO SCM database

Figure 1 allows us to observe that the number of global Countervailing Duty ("CVD") initiations and CVD measures in response to subsidies has shown a fluctuating trend during 1995-2013. The number of CVD initiations exhibited a continuous increasing trend from 1996 to 1999 and was at its peak in 1999 with 41 initiations during that year. Since 1999 however a cyclical pattern is being observed. The scenario improved considerably in 2005, when the number of initiations reached a minimum of 6. However, SCM initiations have increased ever since and reached 28 and 25 initiations during 2009 and 2011 respectively. The trend indicates that CVD activism has been influenced strongly by the global recession, with increase in initiation incidence during crisis years. However, the sharp rise in CVD initiations during 2013 indicates grievances among countries, which causes serious concern. The imposition of CVD measures has also shown a similar cyclical pattern. While an increasing trend has been observed in CVD measures during 1996-2000, an overall decreasing trend was noticed during 2001-2007 with minor fluctuations. However, the number of measures increased to 11 in 2008 and further to 19 in 2010. The CVD

measures, like initiations, have also shown an increasing trend during 2013.

In order to understand the SCM imposing behavior of the major trading countries with respect to each other during the period of January 1, 1995 to December 31, 2013, **Table 1** has been constructed from WTO data. While the countries facing the SCM measures are noted row-wise, the countries initiating the same are reported column-wise. A total of 335 SCM actions have been cumulatively initiated during this period. The United States (U.S.) topped the list by accounting for 41.19% of the total CVD initiations, followed by the EU (21.49%). Interestingly, a significant proportion of the initiations made by the U.S. have taken place against major Asian economies like China (28.26%) and India (12.32%). On the other hand, only 15 SCM initiations has been undertaken against the U.S, of which 3 were initiated by Canada and the EU each and 4 by China.

A similar trend has been noticed in case of the EU as well. Among the 72 SCM cases initiated, 27.78% of the total number of cases has been lodged against India. The other countries suffering from the EU SCM initiations include China (11.11%), South Korea (9.72%) and Taiwan (8.33%), where the last two countries are not reported in the table. On the contrary, the EU has faced only 14 initiations on SCM ground against its exports. The lower SCM activism against the EU or U.S. can hardly be considered as evidence signifying lesser devolution of subsidies within their territories.

Table 1: Subsidy and Countervailing Duty Initiation and Measure Matrix for Major Countries (1.1.95 – 31.12.13)

Exporting Country	Reporting Country												
	Australia	Brazil	Canada	China P.R.	European Community	India	South Africa	Turkey	United States	Venezuela	Total
Argentina	0	0	0	0	1	0	0	0	4 (2)	0	8 (4)
Brazil	0	0	2 (1)	0	0	0	0	2	4 (3)	0	7 (8)
Canada	0	0	0	0	0	0	0	0	8 (3)	0	8 (3)
China, P.R.	0	0	18 (15)	0	8 (3)	1 (0)	1 (0)	0	39	0	76 (52)
European Community	2 (2)	0	1 (1)	3 (0)	0	0	0	0	(27)	1 (0)	14 (11)
India	0	5 (2)	6 (5)	0	20 (13)	0	9 (4)	1 (1)	17 (8)	0	61 (34)
South Africa	0	1 (0)	0	0	1 (0)	0	0	0	2 (2)	0	7 (4)
Turkey	0	0	0	0	0	0	0	0	4 (1)	0	4 (1)
United States	0	0	3	4 (3)	3 (1)	0	0	0	0	0	15 (5)
Venezuela	0	0	0	0	0	0	0	0	2 (0)	0	2 (0)
Total	3 (4)	9 (7)	37 (24)	7 (4)	72 (33)	1 (0)	13 (5)	1 (1)	138 (79)	2 (1)	335 (190)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

Looking at the other end of the spectrum, it is observed that China presently tops the list of the countries suffering from the SCM initiations (22.69% of the total cumulative initiations), followed by India (18.21%) and South Korea (5.97%) (not shown in Table 1). Canada, the EU and the U.S. jointly initiated 85.53% and 70.49% of all the SCM initiations against China and India respectively. However, other developing countries like South Africa have also targeted Indian exports on SCM grounds. On the whole an interesting picture emerges from the analysis; while Canada, the EU and the U.S. account for 73.73% of all SCM initiations, China, India and South Korea account for 46.87% of the affected cases. If Indonesia and Thailand are also added to the list of the affected developing countries, the corresponding figure reaches 56.12%. Clearly the low cost economies of Asia are emerging as the major targets of SCM activism in leading developed countries.

The SCM measures are reported in the parenthesis of the same table and a similar conclusion emerges from the analysis. The calculations reveal that Canada, the EU and the U.S. jointly account for 71.58% of all SCM measures during the study period. On the other hand, among the target economies, China, India and South Korea account for 50.00% of the total SCM measures.

The finding underlines the need to have a closer analysis of the SCM activism followed by Canada, the EU and the U.S., which is reported at Harmonized System ("HS") sectional level in **Table 2**. Section XV, which consists of Base Metals and articles of Base Metals, is found to attract most of the SCM initiations for these three players. It deserves mention that the sector is the recipient of subsidies in several countries, especially fuel subsidies. The triad has jointly initiated 89.31% of the total SCM initiations and 82.42% of the total measures in this sector. The SCM activism for base metals is particularly high in the U.S. The other major sectors facing SCM challenges in the triad include low-tech products in Section VII (Plastics and articles thereof; Rubber and articles thereof), Section VI (Products of Chemical or allied industries) and Section IV (prepared foodstuff, etc.). However, a relatively sophisticated product group like machinery and electrical appliances (Section XVI) has also been subject to SCM actions. While the EU has adopted several SCM actions on plastic and rubber products and textile products, U.S. actions on chemical products are significant.

Table 2: Canadian, EU and U.S. Countervailing Initiations / Measures by Product Type – A Comparative Analysis (1.1.95 – 31.12.13)*

HS Section	Product Description	Canada	EU	US
I	Live Animals; Animal Products	0	1 (1)	4 (1)
II	Vegetable Products	2 (0)	0	3 (1)
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	3 (1)	0	10 (2)
V	Mineral Products	0	4 (1)	4 (4)
VI	Products of the Chemical or Allied Industries	2 (1)	6 (2)	14 (6)
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	0	16 (8)	7 (3)
X/IX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	1 (1)	0	4 (2)
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Recovered (Waste and Scrap) Paper or Paperboard; Paper and Paperboard and Articles Thereof	0	1 (1)	8 (5)
XI	Textiles and Textile Articles	0	13 (5)	2 (2)
XII	Footwear, headgear etc.	0	0 (0)	0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	4 (0)	1 (1)
XV	Base Metals and Articles of Base Metal	28 (20)	19 (10)	70 (45)
XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers; and Parts and Accessories of Such Articles	1 (1)	7 (5)	10 (7)
XVII	Vehicles, Aircraft, Vessels and Associated Transport Equipment	0	1 (0)	1 (0)

Total		37 (24)	72 (33)	138 (79)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

Table 3 looks at the other side of the coin, i.e., the distribution of the sectors affected by SCM actions in exporting countries. Six entities, namely, Brazil, China, EU, India, Indonesia and South Korea are considered here for the analysis. China and India have been affected most by SCM actions and in both cases a major proportion of the initiations have been related to Section XV (Base Metal and articles of Base Metal). The other affected sectors include Section VI (Products of Chemical or allied industries) and Section VII (Plastics and articles thereof; Rubber and articles thereof). It is observed from the data that the base metal sector in Brazil, Indonesia and South Korea are also suffering heavily from the SCM initiations and measures in manufacturing products. Interestingly, the EU has faced no SCM initiation or measure against its base metal products, but rather witnessed initiations against its Section III (Animal or Vegetable Fats and Oils) and Section IV (Prepared Foodstuffs) exports. The emerging difference can be explained in line with the subsidy provisions under Common Agricultural Policy ("CAP").

Despite the fact that more than half a century have passed since trading countries started discussions on subsidies issue since the Havana Charter in order to regulate their misuse, there exists ample room for further development. The number of SCM related cases demonstrates that the consequences of granting of subsidies by a government could have serious repercussions on international trade. The DSB of WTO has so far played a significant role in curbing the adverse effects of subsidies on foreign countries. For instance, "successive appeals by the European Union, the United States and other member countries at the WTO has forced China to scrap several export support programs and preferential treatment for its exporters."[72] The proven WTO incompatibility of the U.S. system for taxing foreign export earnings[73] and modifications in Export Credit Guarantee Program for Cotton[74] in light of DSB ruling also

72. *See* Fabrice Defever & Alejandro Riano, *China's Pure Exporter Subsidies*, 1182 CENTRE FOR ECON. PERFORMANCE 1, 5 (2012).

73. *See* Gary Clyde Hufbauer, *The Foreign Sales Corporation Drama: Reaching the Last Act?*, PETERSON INST. FOR INT'L ECON., No. PB02-10 (2002), *available at* http://www.iie.com/publications/pb/pb02-10.pdf (last visited Nov. 16, 2014).

74. *See* John Baffes, *Cotton Subsidies, the WTO, and the 'Cotton Problem'*, 34 WORLD ECON. 1534 (2011).

deserve mention. This scenario demonstrates the necessity to improve the existing regulations on subsidies at the multilateral level.

Table 3: Countervailing Measures by Product Type – A Comparative Analysis of Major Affected Countries (1.1.95 – 31.12.13)

Hs Section	Product Description	Brazil	China	EU	India	Indonesia	South Korea
I	Live Animals; Animal Products	0	0	1 (1)	0	0	0
II	Vegetable Products	0	0	2 (2)	0	0 (1)	0
III	Animal or Vegetable Fats and Oils and Their Cleavage Products etc.; Animal or Vegetable Waxes	0	0	3 (3)	0	0	0
IV	Prepared Foodstuffs; Beverages, Spirits and Vinegar; Tobacco and Manufactured Tobacco Substitutes	0	1 (0)	7 (5)	1 (0)	1 (0)	0
V	Mineral Products	0	0	0	0	1 (0)	0
VI	Products of the Chemical or Allied Industries	0	9 (5)	1(0)	13 (6)	1 (0)	0
VII	Plastics and Articles Thereof; Rubber and Articles Thereof	0	1 (1)	0	11 (6)	2 (0)	1 (0)

XIX	Wood and Articles of Wood; Wood Charcoal; Cork and Articles of Cork; Manufactures of Straw, of Esparto or of Other Plaiting Materials; Basketware and Wickerwork	0	3 (2)	0	0	0	0
X	Pulp Of Wood or of Other Fibrous Cellulosic Material; Paper or Paperboard; Paper and Paperboard and Articles Thereof	0	5 (3)	0	1 (1)	4 (2)	1 (0)
XI	Textiles and Textile Articles	0	3 (2)	0	5 (2)	4 (1)	2 (0)
XII	Footwear, headgear etc.	0	0	0	1 (0)		0
XIII	Articles of Stone, Plaster, Cement, Asbestos, Mica or Similar Materials; Ceramic Products; Glass and Glassware	0	3 (1)	0	0		0
XV	Base Metals and Articles of Base Metal	6 (8)	40 (30)	0	23 (17)	5 (4)	9 (4)

XVI	Machinery and Mechanical Appliances; Electrical Equipment; Parts Thereof; Sound Recorders and Reproducers etc.	1 (0)	8 (7)	0	6 (2)	0	7 (5)
XVII	Vehicles, Aircraft, Vessels and Associated Transport Equipment		3 (1)				
Total		7 (8)	76 (52)	14 (11)	61 (34)	18 (8)	20 (9)

Source: Constructed by the authors from WTO SCM database

* - the figures in the parenthesis show the final measures.

IV. REJUVENATING THE ANALYTICAL FRAMEWORK

The influence of government subsidies on export performance is estimated here for 140 countries over 1990-2011. Subsidies included in the present analysis include only direct budgetary transfers reported by the government of a country. The indirect or implicit subsidies (i.e., income foregone in terms of tax rebate, fuel subsidy etc.) are not included in the analysis due to non-availability of consistent cross-country data. The current analysis considers subsidies provided by a country expressed as percentage of its GDP for ensuring comparability of data across countries, which is accessed from Government Finance Statistics ("GFS") of IMF.[75]

A. The Economic Data

As per the GFS Manual of 2001, the IMF reported data on subsidies are:

> [C]urrent transfers that government units pay to enterprises either on

75. *See generally Government Finance Statistics*, IMF ELIBRARY- DATA (2013), *available at* http://elibrary-data.imf.org/DataExplorer.aspx (last visited Nov. 16, 2014).

> the basis of the levels of their production activities or on the basis of the quantities or values of the goods or services that they produce, sell, or import. Included are transfers to public corporations and other enterprises that are intended to compensate for operating losses.[76]

Clearly, such subsidies can include actionable transfers and may significantly influence exports. Moreover, even de-linked subsidies, which are provided solely based on domestic considerations, rather than external motivations, may end up providing export boost through indirect effects.

It is observed that GFS compiles the government subsidy figures for countries from different government sources as per their reporting practice.[77] Three types of government reporting have been observed in the GFS data.[78] First, the *General Government* ("GG") includes all the Central Government ("CG") transfers plus budgetary expenses of all the Central Ministries / Departments and the same for the State Governments ("SG") (including provincial or regional) and Local Governments.[79] The *Central Government* ("CG") transfers on the other hand represent the consolidated transfers of the Central Government (including transfers of Central Ministries / departments).[80] Finally, subsidies reported under *Budgetary Central Government* ("BCG") covers, "[a]ny central government entity that is fully covered by the central government budget."[81] In addition, the GFS generally reports the budgetary statistics for countries adopting cash accounting standards, but for several countries, accrual (non-cash) accounting standards for extra-budgetary units and social security funds has been reported. In order to understand the differential effects of the data reporting differences, suitable dummy variables have been included in the empirical model.

76*Government Finance Statistics Manual*, IMF 40 (2001), *available at* https://www.imf.org/external/pubs/ft/gfs/manual/pdf/all.pdf (last visited Nov. 16, 2014).

77. *See Government Finance Statistics Manual 2001 - Companion Material: Instructions for Compiling the Institutional Table*, IMF (2005), *available at* http://www.imf.org/external/pubs/ft/gfs/manual/intbin.pdf (last visited Nov. 16, 2014); *see generally Government Finance Statistics, supra* note 75.

78. *See Government Finance Statistics Manual 2001 - Companion Material: Instructions for Compiling the Institutional Table*, *supra* note 77, at 4; *see generally Government Finance Statistics, supra* note 75.

79. *See Government Finance Statistics Manual 2001 - Companion Material: Instructions for Compiling the Institutional Table*, *supra* note 77, at 4; *see generally Government Finance Statistics, supra* note 75.

80. *See Government Finance Statistics Manual 2001 - Companion Material: Instructions for Compiling the Institutional Table*, *supra* note 77, at 4; *see generally Government Finance Statistics, supra* note 75.

81. *Government Finance Statistics Manual 2001 - Companion Material: Instructions for Compiling the Institutional Table*, *supra* note 77, at 4.

Several control variables, e.g., the per capita income of the countries, the share of agriculture, industry and services in their economies, merchandise imports, inward foreign direct investment ("FDI") stock and political freedom, are included in the analysis in line with existing literature. With the growing size of the economy, the relative importance of trade is expected to decrease. Furthermore, the contribution of various sectors to GDP may show interesting dynamics with exports in the presence of subsidies in the model. Inward FDI stock is generally favorable for enhancing exports from the recipient country.[82] In addition, merchandise imports (both raw materials and semi-processed products) can boost exports of a country.[83] Finally, political freedom leads to economic efficiency, which in turn may enhance exports.[84]

Gross GDP figures in current prices and current exchange rates are obtained from the United Nations Conference on Trade and Development ("UNCTAD") Statistics. Merchandise exports and imports in a country are considered in the current analysis by expressing them as a percentage of its GDP, where all variables (at level) are measured in U.S. Dollars at current prices and current exchange rates in millions. The same data is accessed from UNCTAD Statistics as well.[85] The share of the three sectors in GDP of a country has been obtained from World Development Indicators ("WDI") database of the World Bank.[86] The data on political freedom is obtained from Freedom House, where the country scores range over 1 to 7 (where 1 represents the highest and 7 the lowest level of freedom).[87]

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82. *See* Tadashi Ito, *Export Platform Foreign Direct Investment: Theory and Evidence*, 378 INST. DEVELOPING ECON. 4 (Dec. 2012).

83. *See* Tahir Mukhtar & Sarwat Rasheed, *Testing Long Run Relationship Between Exports and Imports: Evidence from Pakistan*, 31 J. ECON. COOPERATION & DEV. 41, 41-42 (2010); *see generally* Biswajit Ng & Jaydeep Mukherjee, *The Sustainability of Trade Deficits in the Presence of Endogenous Structural Breaks: Evidence from the Indian Economy*, 23 J. ASIAN ECON. 519, 519-26 (2012); *see generally* Ramona Dumitru et al., *Analysis of the Relationship between the Romanian Exports and Imports*, 8 ANNALS UNIV. PETROSANI – ECON. 177, 177-82 (2008).

84. *See* Andre Liebenberg, *The Relationship Between Economic Freedom, Political Freedom and Economic Growth* (Nov. 7, 2012) (M.B.A. thesis, Gordon Inst. of Bus. Science, Univ. of Pretoria), *available at* http://upetd.up.ac.za/thesis/available/etd-02232013-123734/unrestricted/dissertation.pdf (last visited Nov. 16, 2014).

85. *See generally* UNITED NATIONS CONFERENCE ON TRADE & DEV., *available at* http://unctadstat.unctad.org/ReportFolders/reportFolders.aspx (last visited Nov. 16, 2014) (to access data used).

86. *See generally World Development Indicators*, WORLD BANK, *available at* http://databank.worldbank.org/databank/download/WDIandGDF_excel.zip (last visited Nov. 16, 2014).

87. The country scores can be accessed using Freedom House's Index of Democracy. *See Freedom in the World*, FREEDOM HOUSE (2014), *available at*

In addition, the analysis incorporates a number of constructed dummy variables (e.g. country type dummies, financial system reporting dummies, a dummy for the year 1999 and the year dummies) to capture their effects on the proposed relationship. However, to avoid perfect multicollinearity, only any two of the government dummies (GG, CG and BCG) have been simultaneously used at a time in the estimated models. Similarly, cash and non-cash dummies have not been used in the regression models together. To understand the export implications of subsidies in countries situated at different levels of economic achievements, four country group dummies are considered separately in the model on the basis of Per Capita Gross National Income ("PCGNI", atlas method, in current U.S. dollars). The four country groups are as follows: low-income economies ("LIE") (PCGNI: US $1,005 or less), lower-middle-income economies ("LMIE") (PCGNI: US $1,006-3,975), upper-middle-income economies ("UMIE") (PCGNI US $3,976-12,275) and high-income economies ("HIE") (PCGNI US $12,276 or more).[88] To avoid perfect multicollinearity, UMIE was dropped from the analysis.

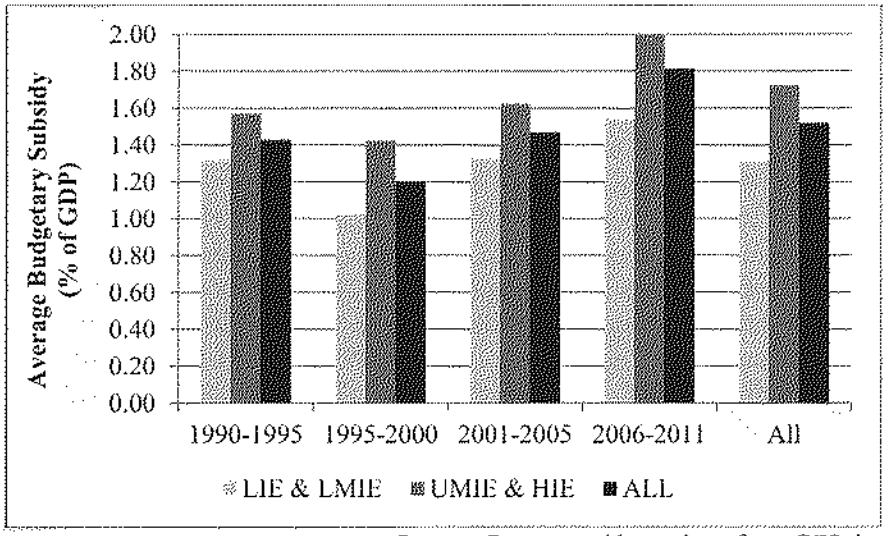
B. The Macro Trends

The macro scenario in the two key series considered in the current analysis, namely, budgetary subsidies and merchandise exports, are illustrated with the help of **Figures 2-4**. The time period is divided into four equal segments for understanding the temporal perspective. It is observed from **Figure 2** that the average allocation of budgetary subsidies (expressed as percentage of GDP) has understandably been higher in UMIE and HIE countries as compared to their LIE and LMIE counterparts during all four periods reported in the diagram. The average subsidy figure in 1995-2000 declined vis-à-vis the corresponding 1990-1995 figures, but the same increased both during 2001-2005 and 2006-2011 as compared to the preceding periods. In addition, the gap between the two groups of economies has widened during 2006-11.

http://www.freedomhouse.org/report-types/freedom-world#.VDr7OmRdWi2 (last visited Nov. 16, 2014).

88. Income brackets are in line with the World Bank classification. *See Data-Countries and Economies*, WORLD BANK (2014), *available at* http://data.worldbank.org/country (last visited Nov. 16, 2014).

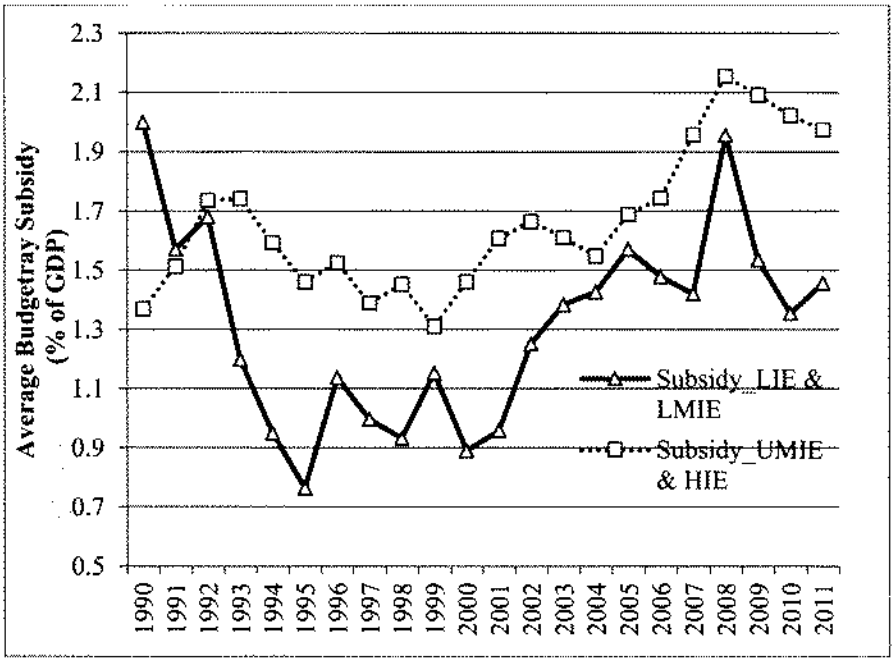
Figure 2: Subsidy Scenario in Countries Under Different Income Group



Source: Constructed by authors from GFS data

An annual time trend reported in **Figure 3** reveals that from 1999 onwards, the average subsidy devolution in proportional terms has intensified in the developed countries (HIE and UMIE). A similar upward trend is noted in their relatively poorer counterparts (LIE and LMIE) from 2000 onwards. The trend line drawn for both series (not shown in figure) reveals a clear upward trend from 1999 onwards, as a result of which a 1999 year dummy (1 for year 1999 onwards, 0 for others) has been incorporated in the regression models. Another important observation from the figure is that for both developed and developing countries alike, budgetary transfers (as % of GDP) increased in the face of recession (2008). Though the size of the bailout package was larger for developed countries, increase in budgetary transfers for developing countries also increased substantially. Nevertheless, given budgetary constraints, the withdrawal of special package for recession was faster for developing countries from 2009 onwards.

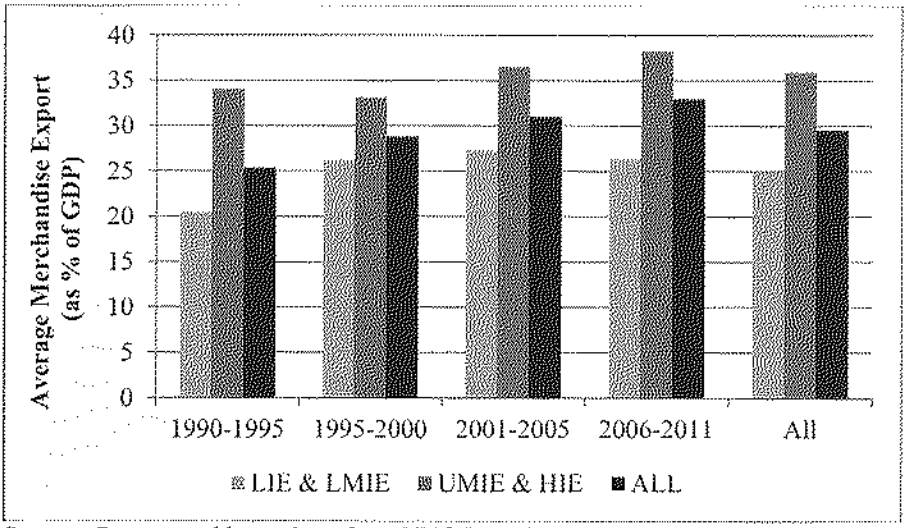
Figure 3: Time Trend in Subsidy Figures Across Country Groups by Income



Source: Constructed by authors from GFS data

Figure 4 reveals the average merchandise export scenario (expressed as percentage of GDP) for the two groups of countries. The exports have increased for UMIE and HIEs for all the four periods. However, there has been a marginal decline in proportional importance of exports for LIE and LMIEs during the last period, 2006-2011. The proportional importance of exports in GDP has been higher in UMIE and HIEs as compared to their LIE and LMIE counterparts during all four periods reported in the diagram.

Figure 4: Merchandise Export Scenario in Countries Under Different Income Group



Source: Constructed by authors from UNCTAD data

Finally, **Table 4** illustrates the data availability for the present analysis as per the government data reporting practices (i.e., GG, CG or BCG). The first three columns segregate the total observations as per the cash and non-cash (accrual) reporting practices, while the next three columns summarize the average subsidy scenario (as percentage of GDP) as per the country groupings. The last three columns represent the average export figures expressed as percentage of GDP. It is observed that the subsidies and export inclination figures are generally higher for countries reporting GG data as compared to corresponding ones following CG and BCG reporting practices, barring the exception of UMIE and HIE countries in case of BCG data on average subsidy.

Table 4: Description of Data by Availability

	Data reporting Types (Number of Observations)			Average Subsidy (% of GDP): 1990-2011			Average Merchandise Export (% of GDP): 1990-2011		
Level of Government	Cash	Non-cash	Total	LIE & LMIE	UMIE & HIE	All	LIE & LMIE	UMIE & HIE	All
General Government	309	554	863	1.68	1.64	1.65	28.35	36.01	33.85
Central Government	659	37	696	1.28	1.56	1.40	26.94	34.04	30.00
Budgetary Central Government	508	102	610	1.12	2.28	1.47	22.85	33.59	26.13
All	1476	693	2169	1.31	1.73	1.52	24.88	34.72	29.10

Source: prepared by the authors from the constructed dataset

V. RUNNING THE EMPIRICAL TESTS

Currently, the WTO member countries are engaged in multilateral negotiation so as to limit the usage of actionable subsidies in international trade, which needs to draw from empirical findings on this front. A cross-country empirical analysis is undertaken next for understanding the influence of budgetary subsidies on export inclination. First, the regression model is explained, while the empirical results are subsequently presented.

A. Empirical Model for the Cross-Country Empirical Analysis

The following panel data regression model is estimated here in order to analyze the effect of subsidies on export performance. The advantage of using the log-linear model in the current context is that the estimated coefficients can be interpreted as the elasticity between budgetary subsidy and exports.

$$LMERX_{it} = \alpha + \beta_1 LPCGDP_{it} + \beta_2 LPCGDP_{it}^2 + \beta_3 LSUBSIDY_{it} + \beta_4 LMERM_{it} + \beta_5 LGDPIND_{it} + \beta_6 LGDPSER_{it} + \beta_7 LGDPAGRI_{it} + \beta_8 LFDIINSTK_{it} + \beta_9 LFHIPR_{it} + GOVDUM + Non\text{-}Cash + Dum1999 + T_t + \varepsilon_{it} \quad \ldots\ldots\ldots\ldots (1)$$

where,

α	represents the constant term
βs	*are coefficients*
$LMERX_{it}$	represents log of Merchandise Export (expressed as percentage of GDP) of country *i* for year *t*
$LPCGDP_{it}$	represents log of Per Capita Gross Domestic Product (PPP, current international $) of country *i* for year *t*
$LSUBSIDY_{it}$	represents log of budgetary subsidy (as percentage of GDP) of country *i* for year *t*
$LMERM_{it}$	represents the log of Merchandise Import (expressed as percentage of GDP) of country *i* for year *t*
$LGDPIND_{it}$	represents the log of share of industry in GDP (expressed as percentage of GDP) of country *i* for year *t*
$LGDPSER_{it}$	represents the log of share of services in GDP (expressed as percentage of GDP) of country *i* for year *t*
$LGDPAGRI_{it}$	represents the log of share of agriculture and allied activities in GDP (expressed as percentage of GDP) of country *i* for year *t*
$LFDIINSTK_{it}$	represents the log of inward stock of Foreign Direct Investment (expressed as percentage of GDP) of country *i* for year *t*
$LFHIPR_{it}$	represents the log of Freedom House Index of Political Rights of country *i* for year *t*
GOVDUM	represents government dummy, of which *GG* represents a dummy for countries, when the subsidy data is reported by the general government *CG* represents a dummy for countries, when the subsidy data is reported by the central government *BCG* represents a dummy for countries, when the subsidy data is reported by the budgetary central government
Cash	represents a dummy when countries practice cash accounting standards for budgetary reporting
Non-Cash	represents a dummy when countries practice accrual accounting standards for budgetary reporting

Dum1999	is a dummy whose value is 0 before 1999 and 1 for 1999 onwards
T_t	represents the time dummies (i.e., T_1=1 for 1990 and 0 otherwise)
ε_{it}	represents the disturbance term

B. Results

A panel data regression analysis has been undertaken here with help of the STATA software (version 10.1). To understand the working of the model for the proposed relationship in equation (1), a Hausman specification test is first conducted. It is observed that the Chi-square test statistic of 125.13 (Prob>chi2: 0.0000) is statistically significant. The Hausman test suggests the presence of a fixed effect model. Next, we have conducted a Wooldridge test for autocorrelation in panel data and the test statistics is 78.815 (Prob>F: 0.0000), which implies the presence of autocorrelation of first order. A Breusch-Pagan / Cook-Weisberg test is conducted next and the test statistic is 109.67 (Prob>chi2: 0.0000), which points to the presence of heteroskedasticity. The mean Variation Inflation Factor ("VIF") is 2.88, which indicates that the variables included in the model are within the tolerance level of multicollinearity. Based on these diagnostics, the present analysis estimates Feasible Generalized Least Square ("FGLS") regressions with time and country group fixed effects and reports results for equation (1) with heteroskedasticity and first order autocorrelation [AR(1)] corrected coefficients and standard errors in **Table 5**.

The estimation results summarized in **Table 5** clearly indicate the positive influence of government subsidies on export performance across country groups. In both the Fixed Effect ("FE") and FGLS regression models, the coefficient of logarithmic transformation of subsidies is observed to be positive and significant.

The results indicate that in both lower and higher income countries, the devolution of subsidies are helping them to promote exports, in line with the theoretical predictions. The LIE, LMIE and HIE dummies included in most of the regression models are all found to be positive and significant, implying that all countries, irrespective of their income levels, benefit from the provision of subsidies. Interestingly, the coefficient for the LIE dummy is found to be non-significant in the fixed effect model, but larger as compared to the corresponding figures for LMIE and HIE country group dummies under the FGLS models. In addition, the coefficients of the LMIE dummies are found to be larger than the HIE dummies. In other words, greater devolution of subsidies in lower

income group countries leads to greater export growth. The result can be explained by the structural (e.g., poorer infrastructure, imperfect factor markets) and operational bottlenecks (e.g., lower margins, scale disadvantages) prevalent in LDCs and other poorer economies, and greater devolution of budgetary support can overcome these constraints and effectively promote exports from their territories. However, the dummies are found to be statistically non-significant under some model specifications.

Table 5: Estimation Results on the Relationship Between Subsidy and Merchandise Exports

Independent Variables	Dependent Variable: LMERX				
	Fixed Effect	*Feasible Generalized Least Square (FGLS)*			
	Model 1	*Model 2*	*Model 3*	*Model 4*	*Model 5*
Constant	1.4388**	0.8255	2.1654***	0.6785	0.7779
	(0.5793)	(0.6103)	(0.7556)	(0.6282)	(0.6634)
lpcgdp	-0.1894***	-0.5537***	-0.3933**	-0.8073***	-0.518***
	(0.0514)	(0.1478)	(0.1753)	(0.1456)	(0.1593)
lpcgdp2		0.0395***	0.0303***	0.0509***	0.0374***
		(0.0082)	(0.0096)	(0.0083)	(0.0088)
lsubsidy	0.0173***	0.0069*	0.0093**	0.0067*	0.0088**
	(0.0048)	(0.0036)	(0.0039)	(0.0037)	(0.0037)
lmem	0.6772***	0.7222***	0.7163***	0.7036***	0.6768***
	(0.0304)	(0.0159)	(0.017)	(0.0168)	(0.0174)
lgdpind	0.5435***	0.7816***	0.5601***	0.9097***	0.7859***
	(0.0575)	(0.0425)	(0.0534)	(0.0315)	(0.0457)
lgdpser	-0.2284***	-0.2913***	-0.5681***		-0.284***
	(0.076)	(0.0609)	(0.0778)		(0.0636)
lgdpagri				-0.025	
				(0.0156)	
ldtrade	0.0208**	0.0436***	0.0262***	0.0367***	0.0415***
	(0.0092)	(0.0062)	(0.0051)	(0.0061)	(0.0064)
Hhipc					0.0105
					(0.0139)

cg	-0.0692***	0.0201	0.0132	0.0182	0.0188
	(0.0212)	(0.0138)	(0.0137)	(0.0149)	(0.0139)
lncg	-0.0529*	-0.0293	-0.0074	-0.0105	-0.0196
	(0.0287)	(0.0192)	(0.0189)	(0.0197)	(0.0193)
noncash	0.0182	0.0363**	0.0246*	0.0312**	0.027*
	(0.0214)	(0.0146)	(0.0142)	(0.0153)	(0.0148)
lic	0.0021	0.0765***	0.0429	0.0691**	0.0639**
	(0.0407)	(0.0295)	(0.0332)	(0.0309)	(0.0302)
lmic	0.0611***	0.0451***	0.0418**	0.0449***	0.0445***
	(0.0233)	(0.0157)	(0.0164)	(0.0171)	(0.0158)
hic	0.0472*	0.0352*	0.0139	0.023	0.0272
	(0.0259)	(0.019)	(0.0181)	(0.0187)	(0.019)
dum1999	0.1102***	0.0638***	0.0598***	0.064***	0.0763***
	(0.0397)	(0.0227)	(0.0223)	(0.0244)	(0.0242)
Time Effects	Yes	Yes	Yes	Yes	Yes
No. of Obs	1792	1788	1573	1773	1764
No. of Grs	139	135	120	134	133
Wald Chi2	44.67#	4846.05	3517.11	4194.69	3807.22
Prob (Wald chi2)	0.0000@	0.0000	0.0000	0.0000	0.0000

Notes: # - implies F-Stat (instead of Wald chi2 for Model 1)

@ - implies Prob (F-Stat) (instead of Prob (Wald chi2) for Model1)

Figure in the parenthesis shows the heteroskedasticity and first order autocorrelation [AR(1)] corrected standard error of the estimated coefficient

***, ** and * implies estimated coefficient is significant at 0.01, 0.05 and 0.10 level respectively.

Among the control variables, log of per capita GDP of a country is found to be negatively related with log of export inclination, while the square term is positively significant. The result implies that the growth rate of exports declines with rise in growth rate of GDP, which is higher for the low income countries starting from a lower base. The result is in line with the coefficient of country dummies and clearly signifies that higher economic size is more favorable for outward orientation. Log of

merchandise import ("LMERM") bears a positive coefficient with the dependent variable, indicating that higher merchandise import growth rate leads to higher merchandise exports. The relationship can be explained by the fact that deeper association with integrated production networks with trade partners lead to higher import of quality raw material and semi-processed inputs, which contributes to the rise in value-added final exports.

The independent variable GDPIND is positively related with export inclination, as generation of greater manufacturing (including mining, construction, electricity, water supply and gas) output leads to higher export surplus. Share of agriculture is, however, not significant in any of the regression models. As per expectation, FDI inward stock variable is positively related to export inclination, signifying presence of "export-platform" FDI in the cross-country framework. Finally, political freedom variable is found to be non-significant, owing to the fact that both countries characterized by deeper democratic practices (e.g. U.S.) and more stringent regimes (e.g. China) demonstrate higher export inclination.

Capturing the influence of the level of government that provides budgetary subsidy for a particular country is important. Following the GFS reporting principle, in absence of information on GG budgetary subsidy for a country, the current analysis considers CG or BCG in the estimated model. It is observed that in all reported models the coefficient of both CG and BCG bear a negative sign. The result strongly underlines the significance of the reported layer of government subsidies on exports, as CG and BCG subsidies are associated with differential intercept shifts. The dummies represent the information at a more disaggregated level of government, which are associated with lesser export inclination. The coefficient of the non-cash dummy is found to be positive in sign. The result underlines the importance of the accounting system and implies that adoption of accrual accounting across the countries is desirable. The coefficients of both the set of support category dummies strongly indicate that the layer of government data reporting system and their accounting technique considerably influence the relationship. The 1999 dummy has been found to be positive and significant, indicating that subsidy-export relationship received a boost in the post 1999 period.[89] Finally, the reported coefficients of the time dummies are also significant.

89. It may be noted that the year 1999 has been marked by the failure of the Seattle Ministerial meeting of the WTO.

VI. CONCLUDING REMARKS: LESSONS FOR THE CURRENT WTO NEGOTIATIONS

The waves of globalization during the last decade have led to deepening of international trade flows in general and in manufacturing products in particular.[90] On one hand, the evolving trade dynamics have created an urge in developing countries and LDCs to enable the domestic players to enjoy a level-playing field in the international markets and also to actively attract production-related foreign investment. Provision of subsidies for augmenting advantages for local players has played a crucial role in this context. On the other hand, declining competitiveness has forced their developed counterparts to contemplate continuation of subsidy policies within their territories. In addition to the direct export subsidies, the indirect subsidies may also positively influence export pattern. The empirically observed subsidy-exports interrelationship in the current analysis needs to be viewed in this wider context.

Firstly, the number of cases in international trade practice demonstrated that the consequences of granting of subsidies by a government could have serious adverse effects on international trade. This situation strongly underlines the necessity to improve the regulation on subsidies at the multilateral level. Despite the fact that more than half a century passed since trading countries started negotiations on subsidies issues, it seems international trade law still have room for further development. The discussion of the completed disputes on ASCM indicates that several major provisions of the agreement have been liberally misused by WTO members by targeting low-cost Asian countries. As a result, the CVD activism effect has been felt more seriously by the middle income developing countries and the emerging economies, who have also witnessed an increasing share of manufacturing sector in their respective GDP. Therefore, the current negotiation on rules should attempt to prevent such misuse through relevant modification of the ASCM text.

In particular, the data reporting practices across countries differ widely, often providing some economies with the flexibility to hide the quantum of subsidies devolution to the local players. The negotiation on fisheries subsidies is a case in point, where such data reporting practices mismatch largely contributes to the delay in curbing the 'Article 1' subsidies. Hence, the subsidies data reporting framework of countries needs to be harmonized. The empirical observations of the current

90. *See* Julien Chaisse, *'Exploring the Confines of International Investment and Domestic Health Protections'*, 39 AM. J. L. AND MED. 332, 332-361 (2013).

analysis, underlining the importance of data reporting framework in determining the 'export-effect' of the subsidies, is of crucial policy relevance in that context.

Secondly, supporting the domestic players through subsidy policy has been a traditional policy tool adopted by both developed and developing countries. The developed countries, with their greater financial strength, has enabled the local players to have an edge *vis-à-vis* the foreign players, not only in the domestic market, but also in the third markets. Such policies have been practiced in Australia, Canada, the EU and the U.S., i.e., the Quad countries, for a long time. These developments have motivated several developing and emerging countries since the 1970s onward to mimic the subsidy-led export success of their developed counterparts. The empirical results indicate a successful adoption of the subsidy-led export growth policy in both lower-income and lower-middle income economies as well.

The empirical results underline that continuing subsidies makes economic sense from the selfish standpoint of an individual country, irrespective of its development status. However, given the economic discrepancy between developed and developing country exports, a subsidy-based trade war is more likely to put the latter group in a disadvantageous position *vis-à-vis* their developed counterparts. In particular, continuation of subsidy policies in developing countries and LDCs end up only providing moral justification for the higher SCM activism in their developed counterparts. The evidence presented from the base metal sector is a case in point. Moreover, provision of subsidies create diverging influence on exports of countries belonging to different income groups, as evident from the significance of the country group dummy coefficients, adds further to the disadvantages of the poorer economies. The empirical findings of the current paper therefore underline the importance of concluding the Doha Round Negotiations of WTO in general and disciplining subsidies in particular in no uncertain terms.

"The third major issue that has caused political turmoil in the negotiations surrounding the Doha Agreement and the post Uruguay round of talks at the WTO is in the area of export refunds and subsidies. At Bali, the ministers agreed to ensure export subsidies and other measures with similar effect are [reduced]."[91] "With no legally binding

91. *World Trade Organisation Truly Delivers*, *supra* note 3; *see also Ministerial Conference of 7 December 2013*, WT/MIN(13)/40-WT/L/915 (2013), WORLD TRADE ORG., *available at* http://wto.org/english/thewto_e/minist_e/mc9_e/balipackage_e.htm (last visited Nov. 16, 2014).

arrangements, the good will statements are open to abuse and the disputes' panel of the [WTO] could be just as busy as it has been with countries arguing over subsidies and tariffs and quotas as much as they have over the last [two decades]."[92] "The fact that the U.S. has opted out of the tariff quota arrangements also forewarns of arguments and trouble and it appears that the current trend for bilateral negotiations for free trade agreements will be the route forward and the work in the WTO."[93]

92. *World Trade Organisation Truly Delivers*, *supra* note 3.
93. *Id.*

LEGAL CASES ON POSTHUMOUS REPUTATION AND POSTHUMOUS PRIVACY: HISTORY CENSORSHIP, LAW, POLITICS AND CULTURE

Dr. Bo Zhao†

"One's good name determines the manner in which one perceives oneself and how one's peers and society relate to one. In effect, the only asset of many people, both public servants and those working in the private sector, is their reputation, which they cherish as life itself. This applies to both the living and the dead. We must protect the dignity of the deceased and their good name."[1]

"The dead have no rights, and they suffer no wrongs."[2]

CONTENTS

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† Faculty of Law; University of Groningen, The Netherlands. This article is based on my research report, *Legal Cases on Posthumous Reputation and Posthumous Privacy in History Censorship*, which was presented at the Seminar on Censorship of History: Law, Education and Archives, held on the 14th of Oct., 2013 at the University of Groningen, the Netherlands. Special thanks to Prof. Antoon De Baets for his help in case collection and generous permission to access his case database, as well as his numerous valuable suggestions. My gratitude to Prof. Ray Madoff (Boston College Law School) for being my commentator at the seminar and her precious remarks, as well as to Prof. Jeanne Mifusud Bonnici (University of Groningen) for her inspirations and insights as my second commentator. Also my appreciation to my colleagues Ms. Anja Hansen and Mr. Jan Blaauw at Groningen, as well as to other seminar participants for their various comments and suggestions, including Prof. Theo Thomassen (University of Amsterdam), Prof. Kaat Wils (University of Leuven) and Dr. Procter (University of Leeds). More importantly, it is not possible for this paper to take shape without the support of The Netherlands Organization for Scientific Research (NWO) of the research project *Legal Cases on Posthumous Reputation and Posthumous Privacy*. Finally, I want to express my gratitude to the anonymous journal editors for their excellent editorial work and certainly all faults remain my own.

1. HCJ 6126/94 Szenes v. Broadcasting Authority 53(3) PD 817 [1999] (Isr.).

2. James Stephen, *Libels on the Dead*, *in* 11 VA. L.J. 260, 261 (James C. Lamb ed., vol. 11 1887).

ABSTRACT

It is a well-established doctrine in common law countries that law does not protect the reputation and privacy of the deceased. However, many countries, including Western European democracies, protect them

to various extents by confining free expression and exchange of information and ideas regarding the dead and the past. Such an instrumental use of defamation law and privacy law can provide censorship of history with justifiable legal grounds. Based on an analysis of representative legal cases on posthumous reputation and posthumous privacy collected across the world, this article tries to offer *a thorough analysis* of the phenomenon of how legal protection of posthumous reputation and privacy can be used to carry out censorship of history.

After a brief introduction, Section II will explain the concepts of posthumous reputation and posthumous privacy and their relationship with history censorship in theory, so that it is clear why history censorship can be achieved via protection of the two posthumous interests. Section III will briefly discuss the related legal apparatuses that can be used to protect the deceased's reputation and privacy in different jurisdictions, whose abuse or misuse may lead to history censorship. Section IV will classify the collected legal cases on posthumous reputation and privacy into eight categories and discuss the circumstances of history censorship in each category. Section V will deepen the case analysis by illustrating the international criteria of free speech right protection, defining the icons of history censorship, explaining the dilemma between historical truth and judicial truth confronted by judges, and clarifying the negative impacts on law itself. Section VI will further explore the interactions among law, politics and culture, which may account for the differentiated legal treatments of the two posthumous interests in different jurisdictions. The article concludes with an invitation to re-consider the law's role in resolving posthumous defamation and privacy controversies when historical narratives are involved, and proposes how to achieve better decisions in future cases.

I. INTRODUCTION

In *Responsible History*, Antoon De Baets drew a vivid scenario of how history censorship can be achieved in three effective ways. They are control of history archives, censorship of school history textbooks, and legal protection of the dead's reputation and privacy.[3] According to

3. *See* ANTOON DE BAETS, RESPONSIBLE HISTORY 14 (2008) (explaining censorship of history is a category of abuse of history, which in more abstract sense, according to De Baets, is "the use of history with intent to deceive"); MARGARET MACMILLAN, THE USES AND ABUSES OF HISTORY xiii (Profile Books Ltd. 2010)(2008) (explaining that the abuse of

the author, defamation law functions, in particular, "as disguised instruments of censorship,"[4] creating "a chilling effect on the expression and exchange of historical information and ideas."[5] This is well observed in the author's detailed analysis of twenty-two legal cases on posthumous defamation and privacy invasion collected from eight Western European countries from 1965 to 2000.[6]

Beyond these legal cases and across the world, posthumous reputation and posthumous privacy under many circumstances are never simple or trivial issues, as they seem to be at first sight. To regard the two in such a way is *both naive and a blind denial of the complexity of communal life*. In reality, they involve too many other important issues beyond merely the dignity and respect of the deceased, ranging from collective memory, family repute and honor, monetary interests, group honor, national identity, religious dignity, diplomatic controversies, posthumous justice of war crime victims, biography writing, history controversies, free expression rights, euthanasia, etc. They do matter, especially for many communities where legal cases on reputation and privacy of the deceased have been brought before courts for resolution on the following grounds.

First, families of the deceased usually care not only about the dead's reputation and privacy, but also more about their own reputation or honor and privacy affiliated with the dead's, not even mentioning the economic interests in connection with the deceased's names, which is particularly true in the case of dead public celebrities. Family members thus are the most strongly motivated protectors of the deceased's reputation and privacy. Second, people like close friends, colleagues or even unknown strangers who enjoyed benevolence and friendship of the deceased, admired their past achievements, or shared similar beliefs and memories with the deceased, or those who once participated in and supported joint projects, may all defend the deceased's reputation and honor to various extents against destruction of such goodness that they cherish in life. Furthermore, when leading politicians, national heroes (or heroines), military or religious martyrs, and public celebrities are affiliated with collective honor or reputation of a social, religious or political group, their reputations will not be only a personal or family issue, but rather a constituent of group honor and identity. Their

history is defined as for the purposes of "creating one-sided or false histories to justify treating others badly, seizing their land, for example, or killing them.").

4. *See* DE BAETS, *supra* note 4, at 3.

5. *See id.* at 90.

6. *See id.* at 3.

reputation will be under close monitoring and protection of the social group, or even political state.

Lastly and most importantly, the protection of posthumous reputation and privacy depends eventually on how a society treats the deceased in general. If a society treats them seriously with considerable respect, dignity, and authority, and the society is willing to follow the traditions and conventions well established in communal life, it will have stronger protection of posthumous interests, including reputation and privacy of the dead. In general, a society with an individualist nature prefers less protection of the dead than one of communal nature.

Moreover, moving from morality to legality, while common law countries in general firmly deny protection of posthumous reputation and privacy, this is not the case in other countries. For instance, in Germany, France, Malta, China, Israel, Taiwan, and Spain, the deceased's reputation and privacy are protected under the fundamental right to human dignity, or under more general rules protecting leaders of political state, or under memory laws, etc. Other countries, like Thailand and Turkey, even have specific regulations forbidding defamation of dead monarchs and political leaders. Albeit being taken as fundamental to democracy, free speech does not always win the battle against reputation and privacy – including those of the dead – even in democracies such as Germany and France. While protection is the case, how such laws balance the two posthumous interests with the right of free speech, and what make up the boundaries of protection deserve more detailed analysis. Though such legal practices and the underlying rationales seem eccentric to common law lawyers, they can be well explained and justified in specific political-social contexts.

In light of this, a discussion of the above issues will help illustrate the fact that while law has its own internal morality and logic,[7] it can never be separated from specific political contexts, social ethos, and cultural backgrounds. It makes sense to analyze the related various legal apparatuses for protecting posthumous reputation and privacy, ranging from traditional blasphemy law, insult law and sedition law, to defamation law and privacy law, and to modern memory law and oblivion law. In explaining and comparing different approaches to posthumous reputation and privacy across the world, what is well observed in legal development is a general tendency shifting from privileged protection of reputation and privacy of the nobles and aristocrats, to more equal protection of ordinary people, from protection of the collective and political state, to more liberal protection of

7. *See generally* LON L. FULLER, THE MORALITY OF LAW 4 (Yale Univ. Press 1969).

individuals.

Following De Baets' initiative, this paper intends to bring his research of legal protection of posthumous reputation and privacy in history censorship a step further in three directions. First, it will broaden his analysis beyond Western Europe by analyzing more representative legal cases collected from across the world. Second, it will provide a more structured analysis of the law's potential role and various mechanisms in implementing history censorship via protecting posthumous reputation and privacy, as well as the accompanied problems. It will also explain the political and cultural backgrounds that have shaped the use of law for this purpose. Third, this paper will offer a more thorough explanation of the phenomenon by engaging in theoretical discussion of posthumous reputation and privacy and their general role in the social order. Thus, this paper is both analytical and descriptive, both theoretical and practical, with the main purpose to ***offer a thorough analysis*** of how legal protection of the deceased's reputation and privacy can be used to restrict free speech and achieve history censorship.

Section II will explain the concepts of posthumous reputation and posthumous privacy and their relationship with history censorship in theory, so that it is clear why history censorship can be achieved by protection of the two posthumous interests. Section III discusses the legal apparatuses that can be manipulated to protect the deceased's reputation and privacy in law development, whose abuse or misuse may lead to history censorship to different extents. Section IV will classify the collected legal cases on posthumous reputation and privacy into eight categories and discuss the circumstances of history censorship in each category. Section V will deepen the case analysis by discussing regional and international criteria of free speech right protection, defining the icons of history censorship in such legal cases, illustrating the dilemma confronted by judges between historical truth and judicial truth, and explaining the negative impacts on law itself. Section VI will further explore the interactions of law, politics and culture, which can account for the differentiated legal treatments of the two posthumous interests in different jurisdictions. It concludes with an invitation to re-consider law's role in resolving posthumous defamation controversies when history narratives are involved, proposing how related history controversies should be resolved in the future.

II. POSTHUMOUS REPUTATION AND HISTORY CENSORSHIP

A. Reputation and Posthumous Reputation

An individual's reputation is the societal-moral judgment of the person based on facts considered to be relevant by a community; such facts include personal acts and characteristics, and these judgments are based on certain moral standards of that community.[8] Reputation lies in reputational networks of various agents including friends, family members, colleagues, and all those who know a particular agent, even those who only read about the person but never meet him or her, or friends' friends.[9] Reputation is important to a community in terms of mutual trust and cooperation formation, mutual treatment, social learning, social control etc.[10] According to Robert Post, reputation can be understood as personal honor, indicating an individual's social status in a community, as intangible property consequent to personal achievements, and as human dignity based on equal respect.[11]

Reputation is a concept related to, or somewhat overlapped with other concepts such as honor, dignity, respect, privacy, and personal identity in general. An important aspect of reputation is identity. Identity comes into being usually when a sort of reputation of an individual or a social group becomes strong enough for one to be distinguished from others. Therefore reputation is vital to identity formation in individual life. Privacy as information control also plays a role in identity formation in individual life.[12] In particular, reputation and privacy cannot be separated from each other since both are effective means of personal information management and personal boundary control.[13]

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8. *See* LAWRENCE MCNAMARA, REPUTATION AND DEFAMATION 21–22 (Oxford Univ. Press 2007).

9. *See* KENNETH H. CRAIK, REPUTATION: A NETWORK INTERPRETATION 6-9 (Oxford Univ. Press 2009) (noting in Craik's terms, social networks and "the outer tires").

10. JOHN WHITFIELD, PEOPLE WILL TALK: THE SURPRISING SCIENCE OF REPUTATION 7, 64, 102, 121 (John Wiley & Sons, Inc. 2011).

11. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 691, 700 (1986); *see also* JAMES BOWMAN, HONOR: A HISTORY (Encounter Books 2007) (explaining a more detailed discussion of honour history and culture developments).

12. *See, e.g.*, Mireille Hildebrandt, *Privacy and Identity*, *in* PRIVACY AND THE CRIMINAL LAW 43 (Erik Claes et al. eds., 2006); Jonathan Kahn, *Privacy as a Legal Principle of Identity Maintenance*, 33 SETON HALL L. REV. 371 (2011); Clare Sullivan, *Privacy or Identity?*, 2 INT'L J. INTELL. PROP. MGMT. 289 (2008); Lisa M. Austin, *Privacy, Shame and the Anxieties of Identity* (Jan. 1, 2012) (unpublished manuscript), *available at* http://papers.ssrn.com/abstract=2061748 (last visited Oct. 12, 2014).

13. *See generally* Thomas Nagel, *Concealment and Exposure*, 27 PHIL. & PUB. AFF. 3

Plainly, they are just two opposite presentations of one's self.[14] In many cases, disclosure of private matters that deviate from commonly accepted social morals,[15] can harm reputation,[16] even if such disclosure is true, as seen in common law torts of public disclosure of private issues and false light.[17] "Still, some invasion of privacy causes of action," according to Iryami, "do primarily involve loss of reputation and may inevitably lead themselves into defamation action."[18] Reputation and privacy are closely affiliated with each other in that both are crucial components of human dignity, protected by constitutions and international treaties as fundamental human rights. Under the European Convention of Human Rights ("Convention"), a right of reputation is a right derived from Article 8, which prescribes the protection of family life or private life, or the right to privacy.[19]

(1998).

14. *See, e.g.*, ERVING GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (Anchor 1959) (explaining the external self and internal self).

15. *See, e.g.*, Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1 (1978); Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393 (1977) (arguing privacy is meant for personal secrecy that shall not be protected by law in general since it increases costs of market exchanges).

16. A telling example is the American *Steinbuch* case in which Steinbuch's graphic bed stories were disclosed by his ex- girlfriend Jessica Cutler in her blog and publicized on the Internet before millions of people. Steinbuch sued for invasion of privacy, which damaged his reputation meanwhile. *See* Steinbuch v. Cutler, 463 F. Supp. 2d 4 (D.D.C. 2006).

17. *See* ANITA L. ALLEN, PRIVACY LAW AND SOCIETY 103–29 (Thomson West 2007). Disclosure of private matters and false lights are two of the major aspects of privacy invasion according to Prosser; the other two are appropriation of images and the like, and the trespass of private spheres. *See* William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960).

18. Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statues*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083, 1099 (2006).

19. Since *Chauvy v. France*, the right to reputation has been gradually established by the Eur. Ct. H.R. under Article 8, which was followed in its sequent rulings. *See* Pfeifer v. Austria, App. No. 12556/03, para 35 (Eur. Ct. H.R. Feb. 15, 2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx#{"fulltext":["12556/03"],"itemid":["001-83294"]} (last visited Dec. 3, 2014); *see* White v. Sweden, App. No. 42435/02, para. 26 (Eur. Ct. H.R. Sept. 19, 2006), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-76894 (last visited Dec. 3, 2014). The judgment was followed and strengthened later. *White*, App. No. 42435/02, para. 26. In the most recent *Lindon v. France*, for instance, Judge Loucaides in his concurring opinion criticized the over protection of freedom of speech in past cases by the Court and expressed the right to reputation should always be considered as safeguarded by Article 8, "as part and parcel of the right to respect for one's private life." Lindon v. France, App. Nos. 21279/02, 36448/02 (Eur. Ct. H.R. Oct. 22, 2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-82846 (last visited Dec. 3, 2014).

Posthumous reputation, by analogy, is the social evaluation and assessment of the deceased's acts and characteristics. Plainly, posthumous reputation is what we think about the dead and their past acts. Our reputations "outlive us," Whitfield noted, "advancing or damaging our interests[, just as they did during our lives, for instance,] influencing the way people treat our children."[20] Posthumous defamation accordingly refers to the communications or expressions that bring disrepute or dishonor to the deceased, degrading their social status, or making others think less of them. Posthumous reputation has been used to support the concept of posthumous harm in philosophical debates.[21] According to the proponents, the deceased's reputation could be damaged.[22] However, the philosophical arguments of posthumous harm is apparently not enough to provide a justification for legal protection in Western democracies, unless the dead occupy a special status so that their reputations must be protected for other reasons like social ordering or public order.[23]

After death, one's reputation in general will diminish or disappear gradually, as his or her reputational networks become weakened, information regarding the dead stops disseminating, and less and less people know the deceased. In certain circumstances, however, the deceased's reputation could grow even stronger.[24] Similar to the living, the dead's reputation closely relates to concepts of privacy, honor, respect, and dignity. For instance, the disclosure of the deceased's private issues can alter their posthumous reputations in significant ways, in particular, the reputations of public figures and celebrities.[25] When we discuss posthumous reputation and the related legal issues, those

20. WHITFIELD, *supra* note 11, at 7.

21. *See generally* DANIEL SPERLING, POSTHUMOUS INTERESTS: LEGAL AND ETHICAL PERSPECTIVES 15–23 (Cambridge Univ. Press 2008) (discussing the philosophical debate of posthumous harm); JOHN MARTIN FISCHER, THE METAPHYSICS OF DEATH 53, 126, 160, 179–83 (Stanford Univ. Press 1993).

22. *See* Joel Feinberg, *The Rights of Animals and Unborn Generations*, *in* PHILOSOPHY AND ENVIRONMENTAL CRISIS 43, 57-60 (William T. Blackstone ed., 1974); 1 JOEL FEINBERG, *Harm to Others*, *in* THE MORAL LIMITS OF THE CRIMINAL LAW 79-82 (Oxford Univ. Press 1984).

23. *See generally infra* Section VI.B.

24. For instance, through biography and "the chorus of survivors", the deceased may be known by more people than before their death. *See* CRAIK, *supra* note 10, at 173-99.

25. A more recent example is the swift of the public attitudes to Jimmy Savile, the famous British entertainer, after the posthumous disclosure of his sexual abuse cases. *See Savile Abuse Claims: BBC Must 'Command Credibility'*, BBC NEWS (last updated Oct. 8, 2012, 11:13 PM), *available at* http://www.bbc.com/news/uk-wales-south-east-wales-19878433 (last visited Dec. 3, 2014); *see generally* Bo Zhao, *Public Figures and Their Posthumous Reputation*, 59-60 STORIA DELLA STORIOGRAFIA 87 (2011) (discussing public figures posthumuous reputation).

concepts are usually mentioned in plaintiffs' complaints and court verdicts to justify their claims. The big difference is that after death, the dead are no more and have no control of their own reputation and privacy in person, which mostly are at the mercy of the living.

B. Posthumous Reputation and History Censorship

"The dead belong to history[,]"[26] and "history is replete with tales of people[,]"[27] in particular dead people. This is true first with respect to dead public figures, especially political figures. When a defamation claim concerns a public figure, the related truth is relevant to narratives of public history.[28] No one would deny that human history is made by such persons and filled with their names and stories, although unknown ordinaries certainly are no less important. It is not exaggerated to say that the study of our past is the study of those who have left traces in history and memory.[29] Therefore history is in a sense the narrative composed of reputations of the deceased, the record of their past deeds, and the assessment of such deeds and their characteristics by the living. Intentional control of speeches and expressions regarding the dead's reputation, either facts or opinions, may lead to censorship of history in different degrees on the following grounds.

Posthumous reputation matters to the dead's family and acquaintances in view of individual memories.[30] Changes in individual reputations of the deceased can threaten or alter the memory of their family members, which is possibly not satisfactory and therefore will encounter the living's resistance and interference. Another important dimension of posthumous reputation lies in a collective sense. It is true that not only do individuals have personal reputations, but many collectives such as commercial institutions and NGOs also have personal reputations.[31] We also talk about reputation of a people or a

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26. *See* Pierre Guillaume, *Law and History*, VHO 31 (2008), *available at* http://www.vho.org/aaargh/fran/livres7/PGLawhistory.pdf (last visited Dec. 3, 2014).

27. RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 119 (2010).

28. Daphne Barak-Erez, *Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court*, 16 CAN. J. LAW & SOC. 93, 95 (2001).

29. *See* Ariela J. Gross, *The Constitution of History and Memory*, *in* LAW AND THE HUMANITIES 416, 416-23 (Austin Sarat et al. eds., 2010) (explaining the relationship between memory and history is controversial among historians and sociologists).

30. *See id.* at 416-31 (discussing collective memory and individual memory and law's role in their formation).

31. For instance, reputation of the American FDA was regarded as a powerful instrument in drug regulation. *See generally* David T. Zaring, *Regulating by Repute*, 110 MICH. L. REV 1003 (2012).

national state, in more collective sense, such as the reputation of Jews and Chinese, or the Americans, or the French. Here, reputation is more related to *collective identity* or *collective honor* in that it can distinguish one ethnic group of people from another. The victim status of the Nazi Holocausts, for example, has been deemed a strong collective identity of the Jewish community.[32] Even for private associations, such as local clubs, collective reputation and honor matters when members act in improper ways, posing threats to internal order.[33]

In some cases, individual reputations and identities are regarded as heritage or legacy of ethnic groups, social groups or religious groups, so that as the representatives of collective identities, such reputations and identities deprive protection from well-accepted mores and ethics. In this regard, strong historical figures, such as Mao and Stalin, are not always approached in negative ways by their own nationals; many hold great respect for the two deceased and regard them as inviolable, great heroes. Similarly, Washington and Lincoln are icons of the American's national characters and their reputations are public goods, albeit still under public scrutiny.[34] Their posthumous reputations are significant parts of national history and national identities.

Since the dead are important to our understanding and assessment of the past,[35] they are important targets of history censorship. Thus an unavoidable part of history censorship is the "systematical control" of posthumous reputation. This includes a control of both factual accounts of the dead's past behaviors and the related judgments. This includes a twist of "well established truth of the past", or as selective use of the past, or as intended blurs of facts or opinions, etc. Political states are not the sole censor. Posthumous reputation is related to history censorship in the following ways.

First, the dead themselves are the censors of *post mortem*

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32. Amit M. Schejter, '*The Pillar of Fire by Night, to Shew Them Light*': *Israeli Broadcasting, the Supreme Court and the Zionist Narrative*, 29 MEDIA CULTURE SOC. 916, 929 (2007) (arguing the significance of Holocaust victims status in the creation of a shared collective identity for the Jewish community).

33. In *Bath Club*, the plaintiff was expelled for his defaming another member's deceased father, which was deemed as injurious to the character and interests of the club. *See generally* F.P. Walton, *Libel upon the Dead and the Bath Club Case*, 9 J. COMP. LEGIS. & INT'L L. 1 (1927); *see also* Götz Böttner, *Protection of the Honour of Deceased Persons – A Comparison Between the German and the Australian Legal Situations*, 13 BOND L. REV. 5 108, 116 (2001).

34. Robert N. Bellah, *The Meaning of Reputation in American Society*, 74 CAL. L. REV. 743, 745 (1986).

35. For instance, see Craik's explanation of how biography studies relate closely to cultural history and their relationship with posthumous reputation. *See* CRAIK, *supra* note 10, at 194-99.

reputations. Before death, those who cherish their own names would destroy, hide, or alter the materials and information that may have negative impacts on their reputation afterwards. Such efforts include autobiography or biography writing under the control of the protagonists themselves, so that their desired portraits or images can preclude the negative judgment of others after death.[36] This is a kind of self-censorship for self-protection, or for a protection of their legacy and family interests, when the deceased's names matter a lot to surviving families.

Second, close relatives, family members, and heirs have direct interests in the dead's good reputation. Not only will they protect the dead's reputation, but they also are more willing to protect their own and their family's reputations that are in most cases closely-affiliated with the deceased.[37] Those people may encounter mental distress and personal, emotional harm consequent to defamation of their beloved deceased. There are monetary interests involved in the dead's reputation and privacy as well.[38] The dead's family may be the most motivated censors and they can intimidate critics who dare to stand out against their memory of the dead. This is especially true when the deceased's families hold high social status that may be even more degraded by posthumous defamation, were there no strong defense from the families *before the public*. Such families can censor negative information regarding the dead with considerable economic and political resources available.[39]

Third, many people other than family members and designated heirs bear no less strong motivations to defend the deceased's reputation. Numerous foundations, institutions and associations of non-governmental nature are ready to take necessary steps to protect the dead for whose remembrance they have been established. They are

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36. *Id.* at 190; *see also* Mary Sarah Bilder, *The Shrinking Back: The Law of Biography*, 43 STAN. L. REV. 299 (2011) (discussing the relation between law and biography writing in the U.S.).

37. Following Brewer, family is the first natural honor groups, which we are all, affiliated with. *See* BOWMAN, *supra* note 12, at 4.

38. Especially in the cases of publicity rights and copyrights involve. *See* MADOFF, *supra* note 28, at 130-51.

39. According to Post, there is a shift from government silencing powerless people to powerful people silencing the powerless behind state power. *See* ROBERT POST, CENSORSHIP AND SILENCING: PRACTICES OF CULTURE REGULATION (Getty Research Inst. 1998). MacKinnon has a similar expression: "The operative definition of censorship accordingly shifts from government silencing what powerless people say, to powerful people violating powerless people into silence and hiding behind state power to do it." CATHARINE A. MACKINNON, ONLY WORDS 10 (Harvard Univ. Press 1996)(1993).

history museums, private foundations, war crime memorial associations, victims associations, religious groups, and even commercial institutions.[40] This also includes determined individual supporters of deceased politicians, war heroes (heroines), religious martyrs, or even celebrities like Diana, Princess of Wales. They make open protests on streets,[41] publish advocates in newspapers,[42] initiate petitions against defamers of their religion,[43] and participate in litigation.[44] In many cases, their motivations could be their love of and trust in the deceased politicians, such as Gandhi, and dead religious leaders, such as the Vatican Pope,[45] or merely sympathy and determination to seek justice for the deceased, or shared contribution to the same ideal or project,[46] etc.

Fourth, a community as a whole can play the role of censorship in

40. For example, to protect Jobs' likeness, Apple considered suing in California against a Chinese company that made toy products by illegal appropriation of Jobs' likeness. Tecca, *Apple May File Lawsuit Against the Makers of Disturbingly Realistic Steve Jobs Doll*, YAHOO NEWS (Jan. 6, 2012, 9:06 PM), *available at* http://news.yahoo.com/blogs/technology-blog/apple-may-file-lawsuit-against-makers-disturbingly-realistic-020637702.html (last visited Dec. 3, 2014).

41. As seen in the recent popular protests against describing Trayvon Martin as a potential killer and a convict, as well as George Zimmerman's acquittal. Lizette Alvarez & Cara Buckley, *Zimmerman is Acquitted in Killing of Trayvon Martin*, N.Y. TIMES (July 14, 2013), *available at* http://www.nytimes.com/2013/07/15/us/george-zimmerman-verdict-trayvon-martin.html (last visited Dec. 3, 2014).

42. As seen in *Lehideux and Isorni v. France*, in which the plaintiffs published an advertisement on the local newspaper to remind the French people of Philippe Pétain, the formal collaborator of Nazi occupation. *See* Lehideux & Isorni v. France, App. No. 24662/94, para. 45 (Eur. Ct. H.R. Sept. 23, 2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58245 (last visited Dec. 3, 2014).

43. As seen by the numerous protests of Muslims against defamations of their religious prophets.

44. Across the world, many associations consisted of lawyers, activists, academics and veterans are actively supporting the victims of comfort women from Japan, Korea, China and other Asian countries to seek legal remedies in Japan. For a detailed discussion of the international support, see PEIPEI QIU, CHINESE COMFORT WOMEN: TESTIMONIES FROM IMPERIAL JAPAN'S SEX SLAVES 184–90 (Oxford Univ. Press 2014).

45. See the libel trial of Robert Katz regarding the accused silence of Pope Pius XII in Nazi occupation. *See* Bruce Weber, *Robert Katz, Who Wrote of Nazi Massacre in Italy, Dies at 77*, N.Y. TIMES (Oct. 22, 2010), *available at* http://www.nytimes.com/2010/10/22/arts/22katz.html (last visited Dec. 3, 2014) (the case will be further discussed in Section IV(H)).

46. As such in the military struggles of the Partisans in Spain, Italian and France against German occupation, which were overlooked or underestimated during the Cold War Period, many partisans have sued to correct the "wrong version" of the past military conflicts. *See, e.g.*, Chauvy v. France, App. No. 64915/01 (Eur. Ct. H.R. June 29, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861 (last visited Dec. 3, 2014).

order to protect its collective identities and honor, so that the past may only be portrayed in a much-favored way and the deceased are forbidden to be criticized. In this context, collective morals are a firm source and confirmation of potential censorship. For instance, a German local community tried to silence a young researcher who investigated its previous support of the Nazi regime, and her research would downplay the previous collective identity of resisting Nazi policies.[47] Another situation involves "vulnerable" racial or religious communities (groups) that are sensitive and paranoid to certain expressions and speeches about their past, so that they need official protection for control.[48] Such collective identity and emotional interest may generate a strong atmosphere or ethos to support censorship.

Finally, the strongest censors are the political state in abstract. Political states and ruling parties need political legitimacy and justification of their ruling. For totalitarian or dictatorial states, history plays a considerable role in providing legitimacy for political leaders such as Stalin and Saddam Hussein.[49] In China and North Korea, history has been tightly controlled for political use.[50] In such countries, open discussion of the dead's name, and of dead political figures in particular, is not allowed. Some countries, such as Turkey, even have direct statutes to protect dead leaders' reputation and honor. In sharp contrast, most democracies draw legitimacy from ballots and rule of law. They do not have a strong motive to censor history for legitimacy. This, however, does not say that they do not conduct history censorship or similar activities. It only means that there is no systematic history

47. See the story of German author Anja Rosmus-Wenninger, which will be discussed below. Corinna Coulmas & Saul Friedlander, *Memory and Identity Problems in Post-War Germany According to Age Groups*, *available at* http://www.corinna-coulmas.eu/memory-and-identity-problems-in-post-war-germany-according-to-age-groups.html (last visited Dec. 3, 2014).

48. For instance, Canadian Human rights jurisprudence supports the concept that "Islam needs singular protection against defamatory speech." Allison G. Belnap, *Defamation of Religions: A Vague and Overbroad Theory that Threatens Basic Human Rights*, BYU L. REV. 635, 676 (2010).

49. MACMILLAN, *supra* note 4, at 17-18.

50. For example, children of North Korea were taught that the South started the Korean War in 1950s and was defeated by the North; with the interference of Soviet Unions and China also not mentioned as the critical support of its war efforts. *See* Sarah Buckley, *North Korea's "Creative" History*, BBC (July 25, 2003), *available at* http://news.bbc.co.uk/2/hi/asia-pacific/3096265.stm (last visited Dec. 3, 2014). China's official history is no better than the North Korean's version, however. Howard W. French, *China's Textbooks Twist and Omit History*, N.Y. TIMES (Dec. 6, 2004), *available at* http://www.nytimes.com/2004/12/06/international/asia/06textbook.html (last visited Dec. 3, 2014). As the high school history teacher Chen Minghua said in Shanghai, the closer the Chinese history gets to the present, the more political it becomes. *Id.*

censorship in Western democracies. Instead they have been troubled by other problems of a different nature at different historical periods.[51]

III. THE LEGAL APPARATUSES FOR PROTECTION

Be it interests of the dead, their surviving families, their associates, affiliated social groups, special communities, or political states, nowadays the control (or censorship) of speeches and information regarding the past has to be carried out through legal means; otherwise, it lacks legitimacy and cannot be accepted in modern politics. In the following, different legal apparatuses that can be used to protect posthumous reputation and privacy will be briefly discussed for the further case analysis.

A. Blasphemy Law, Insult Law and Sedition Law

As an old legal instrument, blasphemy laws protect religious belief and dead religious figures in many countries.[52] Many Western countries, such as the United States, have abolished blasphemy laws while others keep such laws merely on paper, a step away from abolishment.[53] Some countries, such as Ireland and Russia, have recently enacted blasphemy laws.[54] As Uta Melzer noted, such laws exist in Asia and the Middle East, particularly in Islamic countries that

51. For instance, history can be controlled to strengthen national identity formation and to enhance political transition by avoiding hatred and revenge among previously conflicted social groups in a community. *See* Josep Maria Tamarit Sumalla, *Transition, Historical Memory and Criminal Justice in Spain*, 9 J. INT'L CRIM. JUST. 729 (2011). For example, see the court's role in Israeli state formation (Barak-Erez) and the use of oblivion law in Spain's restoration of democracy. *See id.*; Miren Gutierrez, *Spain: Historical Amnesia on Display*, INDEX ON CENSORSHIP (Nov. 28, 2012), *available* at http://www.indexoncensorship.org/2012/11/spain-historical-amnesia-on-display/ (last visited Dec. 3, 2014).

52. They "act as a sanctioned limitation on the right of expression." Belnap, *supra* note 49, at 670-71. Note that many UN commission resolutions over years "have asked state governments and international bodies to provide protection against defamation of religions in increasingly robust terms." *Id.* at 664.

53. *See generally id.* at 670-79 (discussing such laws in most OIC (Organization of Islamic Cooperation) member states and other western countries). For a country-to-country list of Blasphemy laws in the Middle East see *Country-by-Country Blasphemy Laws in the Middle East,* SELFSCHOLAR (Dec. 19, 2012), *available at* http://selfscholar.wordpress.com/2012/12/19/blasphemy-laws-in-the-middle-east/ (last visited Dec. 3, 2014).

54. Though Ireland decriminalized defamation, Article 36 of the 2009 Defamation Act introduced blasphemy as an offense. PATTI MCCRACKEN, INSULT LAWS: INSULTING TO PRESS FREEDOM-A GUIDE TO EVOLUTION OF INSULT LAWS IN 2010, at 16 (Ronald Koven ed., 2012), *available at* Freedom House.

campaign to criminalize defamation of religion, and such laws usually reach beyond religious protection, restricting calls for political reform.[55] For religious reasons, dead religious figures are not allowed to be criticized and commented about negatively, which is a strong category of repression of free speech.

Some jurisdictions directly protect honor and reputation of the nobles by insult laws without even concealing the intention, which criminalizes posthumous defamation. Such laws usually protect monarchs, kings or state heads (nowadays) not necessarily in non-democracies. Rulers, as De Baets commented, "have recorded [certain] version[s] of history to secure their posthumous fame[s,] and their successors often abide by [such] version[s]."[56] For instance, the 1959 Thai legislation protects the deceased Monarchs,[57] the 1951 Turkish law secures the legacy of Ataturk,[58] and Iranian law punishes insults against the memory of Imam Khomeini.[59] Meanwhile, Kings and emperors "proved sensitive" in other countries such as Morocco, Kuwait and Bahrain.[60] Furthermore, insult laws also protect the honor of political figures and public officials in some European countries, including the dead. For example, Article 490 and Article 491 of the Spanish Penal Code punish insults of the royal family and use of their images, including the king's ancestors.[61] French law prohibited insult of heads of state under its 1881 legislation for a long period until the annulations by European Union ("EU") judges that French law has violated a protestor's right to freedom of expression.[62] In general, as Whiteman

55. UTA MELZER, INSULT LAWS: IN CONTEMPT OF JUSTICE, A GUIDE TO EVOLUTION OF INSULT LAWS IN 2009, at 8-11 (Ronald Koven ed., 2010), *available at* World Press Freedom Committee.

56. DE BAETS, *supra* note 4, at 77.

57. MELZER, *supra* note 56, at 165-69.

58. *See id.* at 40 (describing the Law on Crimes Committed Against Atatürk (Law No. 5816)).

59. *See id.* at 192 (describing Article 514 of the 1991 Islamic Penal Code of Iran).

60. *Id.* at 9.

61. CÓDIGO PENAL [C.P.] art. 490, 491 (Spain), *available at* https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444 (last visited Dec. 3, 2014).

62. A Parisian bystander at a parade uttered the words "Hoohoo" when President Charles de Gaulle passed by, and this merited a conviction for insult under article 26 of the 1881 Law on Freedom of the Press. But this law has been challenged by the verdict of the ECtHR in March 2013 in that France has violated a protester's right to freedom of expression by fining him. *See* Eon v. France, App. No. 26188/10 (Eur. Ct. H.R. March 14, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-117742 (last visited Dec. 3, 2014); *see also* Peter Allen, *French President Insults no Longer an Automatic Criminal Offence*, TELEGRAPH (Jul. 25, 2013), *available at* http://www.telegraph.co.uk/news/worldnews/francois-hollande/10203142/French-president-insults-no-longer-an-automatic-criminal-offence.html (last visited Dec. 3, 2014).

pointed out, there is a long tradition in European countries of protecting the nobility of upper classes, which is represented by France and Germany.[63]

With a long tradition, sedition law, in particular seditious libel and seditious words,[64] can be manipulated for history censorship while sought to protect reputations of selected people to prevent social disorder and public incitement. "The point of sedition law was to protect the status quo, the regime—and the reputation of elite people, respectable people in general."[65] As Mayton said, the law of seditious libel has shifted its emphasis from protecting "government or governmental officials" to restricting "the potential of dissident speech to bring about illegal acts" in modern times.[66] "In most of the mature democracies, the law of sedition has now either formally been rescinded or is largely defunct",[67] but some democracies still keep such a law or even revive it.[68]

B. Defamation Law

Defamation is both a criminal offense and a civil offense,[69] and can be conducted by means of libel in written forms and slander in spoken forms. Defamation of the dead can be punished in some jurisdictions.

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63. *See* James Q. Whitman, *Enforcing Civility and Respect: Three Societies*, 109 Yale L.J. 1279 (2000).

64. Post, *supra* note 12, at 736.

65. LAWRENCE FRIEDMAN, GUARDING LIFE'S DARK SECRETS: LEGAL AND SOCIAL CONTROLS OVER REPUTATION, PROPRIETY, AND PRIVACY 54 (Stanford Univ. Press 1st ed. 2007).

66. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 91 (1984).

67. *Memorandum on the Malaysian Sedition Act 1948*, ARTICLE 19, at 6 (2003), *available at* http://www.article19.org/data/files/pdfs/analysis/malaysia-sedit.03.pdf (last visited Dec. 3, 2014).

68. For instance, the Australian Federal Parliament passed a law about sedition in late 2005, which was criticized by scholars. *See, e.g.*, George Williams, Op-Ed., *Speak up in Defence of Free Speech*, SYDNEY MORNING HERALD (May 30, 2006), *available at* http://www.smh.com.au/news/opinion/speak-up-in-defence-of-free-speech/2006/05/29/1148754937566.html?page=fullpage (last visited Dec. 3, 2014). For a list of these countries, mostly common law countries, updated to 2010 at the official website of Australian Federal Parliament see Roy Jordan, *In Good Faith: Sedition Law in Australia*, PARLIAMENT OF AUSTRALIA (2010), *available at* http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/archive/sedition (last visited Dec. 3, 2014).

69. There are only about a dozen of countries that decriminalize defamation while the majority keeps it, even if for most democracies they are merely laws on paper. See an analysis of criminal defamation by ARTICLE 19. *See Defamation Maps*, ARTICLE 19, *available at* http://www.article19.org/defamation/map.html (last visited Dec. 3, 2014) (analysis of criminal defamation).

In the first instance, when there are no particular laws protecting the deceased's reputation and honor, they might still be protected by courts under ordinary defamation law. In general, continental law jurisdictions protect the deceased's reputation and dignity to different extents. For instance, French courts protected the deceased's reputation and privacy especially when public figures are involved.[70] Maltese courts protected the reputation of the deceased Prime Minister, Dr. Bofa, when he was alleged by Journalist Mizzi of abusing power in land planning for private interest.[71]

In the second instance, there are direct clauses in criminal law and civil law to protect the deceased's reputation and privacy in some jurisdictions. For instance, the Indonesian Penal Code explicitly protects the deceased's reputation and likeness.[72] Sections 305 and 306 of the Cameroon Penal Code prescribe that defamation of the dead is punishable if the intent is "to injure the honor or reputation" of a living spouse or heirs.[73] Similar laws can be found in Turkey, although the intention is to protect the affiliated living's reputations.[74] One may also note that the Sudanese Penal Code punishes any person who "imputes to any honorable living or dead person by express words, implicitly, by writing or via indicative signs accusations of *Zina* or Sodomy, or illegitimacy commits *Qadhf*."[75] This is not limited to developing countries. Article 188 of German Penal Code prescribes that the deceased's parents and children have the legal standing to sue[76]; Article 175 of the Swiss Criminal Code punishes defamation of the dead who have been deceased no less than thirty years.[77] Israeli defamation law

70. For instance, see the French *Plon* case regarding the late President Mitterrand. *See* Éditions Plon v. France, App. No. 58148/00, para. 71 (Eur. Ct. H.R. May 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014) (case regarding the late French President Mitterrand).

71. Mizzi v. Malta, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Nov. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

72. MELZER, *supra* note 56, at 157–58.

73. *See id.* at 74.

74. *See id.* at 37-40 (highlighting Article 130 of the Turkish Penal Code).

75. *Id.* at 211 (quoting Article 157 of the Sudanese Penal Code).

76. *See, e.g.*, Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKELEY J. INT'L L. 153 (2008); Götz Böttner, *Protection of the Honour of Deceased Persons-A Comparison Between the German and the Australian Legal Situations*, 13 BOND L. REV. 121, 121 (2001), *available at* epublications.bond.edu.au/cgi/viewcontent.cgi?article=1199&context=blr (last visited Dec. 3, 2014).

77. SCHWEIZERISCHES STRAFGESETZBUCH [StGB], CODE PÉNAL SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, AS 311 (2014), art. 175 (Switz.), *available at* http://www.admin.ch/ch/e/rs/311_0/a175.html (last visited Dec. 3, 2014).

also accepts complaints against defamation of the dead.[78]

In contrast, common law countries do not protect posthumous reputation and privacy. The rationale is that since the dead are no longer living, they cannot be harmed after death.[79] In common law jurisdictions, particularly in the U.S., reputation is a personal matter and the right cannot be inherited by the living.[80] "Though most rules in modem defamation law defy mechanical application, the centuries-old rule against liability for defamation of dead people kicks in automatically."[81] Family members or heirs of the dead have no legal standing to sue on the deceased's behalf.[82] Also, "defamation of a deceased person generally does not give rise to a right of action at common law in favor of the surviving spouse, family, or relatives who are not defamed."[83] However, they can initiate lawsuits to protect their own reputation and privacy, so that the deceased's name could be restituted to some extent.[84]

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78. Section 5 of the 1967 Defamation Law (amended version) prescribes that "[d]efamatory statements regarding a Deceased Person that are published after his or her death shall be treated as the defamation of a living person, but do not constitute cause for a civil claim or a private criminal complaint, and no indictment shall be submitted for an offense under this section unless it is requested by the deceased's spouse or one of his children, grandchildren, parents, brothers or sisters." Defamation Law, 5725-1965, 19 LSI 254, Sec. 5 (1967) (Isr.), *available at* www.nevo.co.il/law_html/Law01/019_002.htm (last visited Dec. 3, 2014); *see also* Elad Peled, *Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 735, 753 (2011), *available at* www.uiowa.edu/~tlcp/TLCP%20Articles/20-3/Peled%20Final.pdf (last visited Dec. 3 2014).

79. *See* Iryami, *supra* note 19, at 1088 ("the rule on defamation of the dead is consistent through-out common law jurisdictions.").

80. *Libel. Defamation of Dead Person. Injury to Reputations of Surviving Relatives*, 40 COLUM. L. REV. 1267, 1268–69 (1940), *available at* www.jstor.org/stable/1117780 (last visited Dec. 3, 2014) (describing the rationales underlying the denial in majority of American cases).

81. Lisa Brown, *Dead but not Forgotten: Proposals for Imposing Liability for Defamation of the Dead*, 67 TEX. L. REV. 1525, 1525 (1989).

82. Iryami *supra* note 19, at 1089–95.

83. Smolensky, *supra* note 82, at 23 (quoting 50 AM. JUR. 2D *Libel and Slander* § 336 (2014)).

84. This indirect approach is successful at least in the U.S. in some occasions. *See* Iryami, *supra* note 19, at 1095-96. In the UK, there are a couple of cases in which the living family of the dead won in exceptional cases. For instance, Mrs. Sukarno won an apology in court from a publisher alleging her husband having sexual relations with a call girl when he was a guest of the British Government. *See News in Brief: Mrs. Sukarno Wins Libel Suit*, MILWAUKEE J., June 21, 1974, part 1 pg. 3, *available at* http://news.google.com/newspapers?nid=1499&dat=19740621&id=TwgqAAAAIBAJ&sjid=8SgEAAAAIBAJ&pg=4238,14080 (last visited Dec. 3, 2014). The case was the first time in British court that any one not directly implicated in the publication successfully sued over defamatory statements made about a dead person. *Id.* (Mrs. Sukarno won an apology in court from a publisher

C. *Privacy Law and Others*

Reputations during life are also protected by the right of privacy.[85] Due to the close affiliation of privacy with reputation,[86] the dead's privacy is also closely related to their posthumous reputation. In particular, laws regarding public disclosure of private affairs and false lights may protect the dead's reputations to a certain degree.[87] After death, disclosure of private issues can have a great impact on the dead's reputation, which we can observe in many real cases.[88] To put the dead under a false light by disclosing their names, private activities, or their likeness can be against the dead's will to be left alone post mortem and can create a misleading impression of the dead, harming their dignity and reputation, and in many occasions, also the honor and dignity of the dead's family in the eyes of the living.[89]

In continental law countries, the dead's privacy may have been protected and the living family members are allowed to sue on their behalf. For example, French courts protect the dead's privacy and reputation even if there is no statutory law explicitly protecting the interest of the dead.[90] Another example is that privacy laws of the Czech Republic and Slovakia; both protect the privacy of the dead on the ground of human dignity.[91] However, common law countries do not protect the privacy of the dead, since privacy is a personal issue and one

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alleging her husband having sexual relations with a call girl when he was a guest of the British Government. The case was the first time in British court that any one not directly implicated in the publication successfully sued over defamatory statements made about a dead person).

85. MADOFF, *supra* note 28, at 123.

86. *See supra* Section II.A.

87. For a more detailed discussion of posthumous privacy in light of Prosser's categorizations, see DE BAETS, *supra* note 4, at 124-26.

88. Again, for example, see that case of the British Jimmy Savile. *See* Reuters, *Jimmy Savile: NSPCC Say Report May Help Victims to Come to Terms with Abuse*, TELEGRAPH (Jan. 12, 2013), *available at* http://www.telegraph.co.uk/news/uknews/crime/jimmy-savile/9796852/Jimmy-Savile-NSPCC-say-report-may-help-victims-to-come-to-terms-with-abuse.html (last visited Dec.3, 2014).

89. *See* Hachette Filipacchi Associés v. France, App. No. 71111/01 (Eur. Ct. H.R. June 14, 2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81066 (last visited Dec. 3, 2014) (see for instance, the French case in which a dead local politician's death scene pictures were published by a newspaper after his assassination).

90. Éditions Plon v. France, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

91. Analysis and Translation by Martin Duchac, Student Research Assistant (June 23, 2011) (on file with author).

cannot sue on the dead's behalf.[92] Obviously the dead cannot feel humiliation and shame *post mortem*.[93] The living may lodge cases because their own privacy is directly involved or they may suffer from emotional distress upon privacy invasion of the dead.[94] In this regard, even the American law protects the living family's privacy involving death-scene photographs to provide "refuge from a sensation-seeking culture."[95]

Privacy laws that can indirectly protect the dead's reputation are laws protecting publicity rights after death, including illegal appropriation of the dead's likeness, illegal use of the dead's names, false lights, and publication of private affairs.

Closely related to illegal appropriation of personal likeness are the right to publicity and copyright that make it possible to generate revenue after one's death. The first allows a person to control the exploitation of his image and the later to control his creations.[96] For example, the protections from the right to publicity and copyright can continue after death in the U.S. In recent years such protections (rights), according to Madoff, "have grown in strength and duration, providing posthumous protections never before seen in history", though strictly limited to economic interests, as opposed to reputational interests.[97] But, as the author argued, in the U.S. context at least, both rights co-exist with reputation and personality, and they cannot be separated from each other with clear-cut lines.[98]

Furthermore, confidentiality rules of some special professions request service providers to keep personal data of the deceased from

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92. Iryami, *supra* note 19 at 1097–99 (arguing "the common law rule that prohibits a cause of action for defamation of the dead is analogous to its rule for invasion of privacy upon the dead", and "courts and authorities have long assumed that one's legal interest in privacy ends upon death.").

93. Paul Roth, *Privacy Proceedings and the Dead*, 11 PRIV. L. & POL'Y REP. 50 (2004); *see also Australian Law Reform Commission, For Your Information: Australian Privacy Law and Practice*, AUSTRALIAN L. REFORM COMMISSION 355 (2008), *available at* http://www.alrc.gov.au/publications/8.%20Privacy%20of%20Deceased%20Individuals/introduction#_ftn1 (last visited Dec. 3, 2014).

94. *See also* Daily Mail Reporter, *Westboro Baptist Church Vows to "Quadruple' its Protests at Military Funerals After Supreme Court Rules in its Favour*, MAILONLINE, *available at* http://www.dailymail.co.uk/news/article-1362288/Westboro-Baptist-Church-victory-Supreme-Court-rules-favour-protests-military-funerals.html (last visited Dec. 3, 2014) (describing the story of Matthew Snyder, a deceased American soldier).

95. National Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

96. See MADOFF, *supra* note 28, at 131 for Madoff's account of the two rights under the U.S. law that protects the dead's interest.

97. *Id.* at 131.

98. *Id.* at 131–40, 148–49.

unintended disclosure, which can pose potential harm to the dead and their families. For example, medical data of the deceased and personal information of customers in hands of their lawyers is under protection of confidentiality law, so that those professions would not be destructed by such breach.[99]

D. Memory Law and Oblivion Law

Privacy law and defamation law are the two major legal instruments to protect the deceased's reputation. Their locus is at the individual level. In contrast, there are also legal instruments protecting the dead's reputation in a collective sense. Such laws protect reputation, honor, identities, or dignity of various social groups and communities whose degradation naturally lowers the reputation and honor of their members as a consequence.

The first category includes memory laws that are widely criticized as against international human rights law. For instance, the 1990 French Memory Law criminalizes denial of the Jewish Holocaust.[100] The law, on the one hand, punishes the denial of the Holocaust that particularly amounts to a rejection of the Jewish victims' social status and harm to their dignity. On the other hand, a court-supported historiography functions as a tool to combat racism, negationism, and revisionism.[101] Similar laws can be found in European countries such as Belgium, Poland, Germany, Austria, Lithuania, and the Czech Republic.[102] Other countries, such as Spain, Portugal, Luxembourg, and Switzerland, take a more general approach to cope with denials of all

99. For medical data confidentiality, see D. S. James & S. Leadbeatter, *Confidentiality, Death and the Doctor*, 49 J. CLINICAL PATHOLOGY 1, 1–4 (1996); Jessica Wilen Berg, *Grave Secrets: Legal and Ethical Analysis of Postmortem Confidentiality*, 84 CONN. L. REV. 81 (2001); Mary Donnelly & Maeve McDonagh, *Keeping the Secrets of the Dead? An Evaluation of the Statutory Framework for Access to Information About Deceased Persons*, LEGAL STUDIES (2010).

100. Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xenophobe [Law No. 90-615 of 13 July 1990 on the Punishment of All Racist, Anti-Semitic or Xenophobic], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Feb. 24, 2004 (also known as the Gayssot Act, Law No. 90-615 of July 13, 1990); *see also* Roger W. Smith, *Legislating against Genocide Denial: Criminalizing Denial or Preventing Free Speech*, 4 ST. THOMAS J. L. & PUB. POL'Y 128, 133 (2009).

101. Raffi Wartanian, *Memory Laws in France and Their Implications: Institutionalizing Social Harmony*, HUMANITY IN ACTION, *available at* http://www.humanityinaction.org/knowledgebase/117-memory-laws-in-france-and-their-implications-institutionalizing-social-harmony (last visited Dec. 3, 2014).

102. *See* Jacqueline Lechtholtz-Zey, *The Laws Banning Holocaust Denial*, GPN BULLETIN (2012), *available at* http://www.genocidepreventionnow.org/Portals/0/docs/Holocaust_Denial_Updated_2.8.pdf (last visited Dec. 3, 2014) (discussing such domestic laws and international treaties).

crimes against humanity, including the Holocaust.[103]

Protection of posthumous reputation and dignity can be found in rehabilitation laws that aim to relieve the deceased victims and their surviving families from unjust political accusations. In the early 1990s, most former communist countries in Eastern Europe promulgated rehabilitation laws.[104] Since then, family members of the dead victims have started to bring justice to the deceased, trying to restore their honor and dignity by law.[105] In addition, posthumous rehabilitation also involves the dead victims of atrocities and massacres such as Katyn, who are still denied victim status by the Russian authority.[106]

A similar situation involves the truth commissions established in many countries by law after political traumas and military conflicts. Whether the dead victims can be offered restoration and justice, and the dead perpetrators would be prosecuted, is crucial not only for future peace construction, but also for the dead victims' dignity and reputation, and their remaining families.

In this respect, however, amnesty laws may function as a shield to retroactively exempt political leaders and military leaders from criminal charges of their past crimes against humanity and human rights abuses. For instance, the Spanish Amnesty Law was democratically voted and is still valid today.[107] In the deeply wounded Spanish community, reprisals and revenges would have led to social disorder and distracted its transition to democracy without this law.[108] In some truth

103. *Id.* (under the rubric of hate speech, incitement speech, and racial discrimination).

104. LAVINIA STAN, TRANSITIONAL JUSTICE IN POST-COMMUNIST ROMANIA: THE POLITICS OF MEMORY 163–65 (Cambridge Univ. Press 2012). For instance, the Russian Rehabilitation Act's purpose is "the rehabilitation of all victims of political repression who were prosecuted on the territory of the Russian Federation after 7 November 1917, and restoration of their civil rights." *Id.*; *see* Janowiec v. Russia, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. Oct. 21, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684 (last visited Dec. 3, 2014).

105. Kurzac v. Poland, App. No. 31382/96 (Eur. Ct. H.R. Feb. 22, 2001) (for instance, a brother of the dead victim of the political conviction by the previous Polish Communist regime, appealed before the ECtHR for a violation of his right to fair trial under Article 6 of the Convention and won).

106. *See* Janowiec v. Russia, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. Oct. 21, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684 (last visited Dec. 3, 2014).

107. Ackar Kadribasic, *Transitional Justice in Democratization Processes: the Case of Spain from an International Point of View*, 1 INT'L J. RULE L., TRANS'L JUST. & HUM. RTS. 132, 132–33 (2010).

108. *Id.* at 132–33 (in contrast, the Chilean amnesty law is a product of the military before the end of totalitarian ruling in contrast to exempt military leaders from future charges).

commissions' reports, even names of the perpetrators were not mentioned because of the existence of such amnesty law.[109] This means that the dead perpetrators cannot be singled out or named responsible for past crimes and their reputations remain somehow intact.

However, the recent practice of international law has challenged such an approach to promote political transition at the price of justice and human rights. The Special Court for Sierra Leone decided that the amnesties granted by a peace agreement are no bar to prosecutions before it.[110] Also, the 2005 UN General Assembly Resolution 60/147 prescribes, as one of the ways of giving satisfaction, "an official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim."[111]

What's related to the deceased's reputation in a fundamental sense is human dignity and respect, which have been protected by the laws both at the national level and at the international level. The idea is that even if the dead are no longer living, they still deserve the minimum respect and decent treatment as passed human beings.[112] In constitutions of many Western countries, in particular European countries, human dignity has been regarded as the fundamental right to include individual honor, reputation and private life (family life). For example, German law recognizes dignity of human beings covering not only the living, but also the dead.[113]

A last note is the legal protection of the dead's dignity and reputation after enforced disappearance that has been recognized in an important international treaty promulgated in December 2010: The International Convention for the Protection of All Persons from Enforced Disappearance. Article 24, clauses 4 & 5(c), of the law prescribe that "the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation", and

109. *Id.* at 132.

110. *See* Simon M. Meisenberg, *Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone*, 86 INT'L REV. RED CROSS 837, 843 (2004) (as the first decision to deny the validity of amnesty law, this decision is of critical importance for the development of International Humanitarian Law).

111. 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, U.N. Doc. A/RES/4/1 (Mar. 21, 2006).

112. A reason why in most communities we are asked to keep silence in graveyards and cannibalism is regarded as against humanity even in times of war and famines. *See* DE BAETS, *supra* note 4, at 124–25.

113. *See* Hannes Rösler, *Dignitarian Posthumous Personality Rights – An Analysis of U.S. and German Constitutional and Tort Law*, 26 BERKLEY J. INT'L L. 153, 196 (2008).

reparation includes not only material and moral damages, but also other forms such as "satisfaction, including restoration of dignity and reputation." This law defines victims as "the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance."[114]

The above are the relevant domestic laws and international laws regarding protection of the dead's reputation, privacy and dignity from different perspectives. Laws protecting the free speech rights of individuals shall also be considered in this context, since on the contrary, their stronger protection means a weaker protection of the dead's reputation and dignity. Protection of free speech and its relationship to posthumous reputation protection will be further discussed in Section V.

IV. LEGAL CASES ON POSTHUMOUS REPUTATION AND PRIVACY

History censorship has been conducted by state authority not only in totalitarian and authoritarian countries, but also in democracies. This is reflected in legal cases in which state authority tries to support official versions of history, and restrict its critics to protect public figures, in particular political leaders. The state has done this by passing special laws to prevent public scrutiny, by protecting religious identity by punishing certain expressions, and by refusing rehabilitation of victims of crimes against humanity for national pride, etc.

Since it is impossible to discuss all the cases that have been collected by this research, this section will classify them into eight categories for analysis. It will try to explain the circumstances of such cases, including the disputed history at stake, complaints of plaintiffs, political-social settings, court rulings with regard to interference, etc. to check possible history censorship involved and the underlying reasoning.

A. Posthumous Reputation and Collective Memory

Posthumous reputation is an important element to national identity formation, national history, and collective memory.[115] This is the

114. International Convention for the Protection of All Persons from Enforced Disappearance art. 24(1), Dec. 23, 2010, 2715 U.N.T.S (validated since Dec. 23, 2010, with 92 signatories and 38 parties).

115. Though history and collective memory are perceived differently by many historians. *See* GROSS, *supra* note 30, at 6–9.

reason why many states demonstrate great interest in its protection. First of all, reputations of deceased heroes, heroines, or martyrs, who are regarded as icons of the national identities by their communities, are good targets for recounting the stories of history.

In the Israeli case of *Szenes,* the deceased heroine is "one of the prominent icons of the Zionist narrative."[116] Fifty years after her brave death in 1944, Chana Szenes was ridiculed and defamed by the Broadcasting Authority and others posthumously in a fictional drama.[117] The petitioners claimed the tale of Szenes' bravery belongs to the history of the Jewish nation and is part of national folklore,[118] demanding protection of the dead's reputation for public interest. Chief Justice Barak of the Israeli Supreme Court, on behalf of the majority, first explained the importance of posthumous reputation to the Israeli community, expressing that "the only asset of many people, both public servants and those working in the private sector, is their reputation, which they cherish as life itself. This applies to both the living and the dead."[119] He further explained "[w]e must protect the dignity of the deceased and their good name."[120] He recognized that the alleged paragraph "offended the memory of Chana Szenes[,] . . . maligned her dignity and the myth surrounding her", and injured the feelings of the public in general and that of Holocaust survivors in particular, and also injured those who "cherish the memory" of the dead Szenes.[121] Also, Chief Justice Barak confirmed that the defamation of Szenes harmed national values[122] and the public interest for Israeli law to protect includes collective identity and national history.[123]

Justice Cheshin, in the dissenting opinion, clarified that human dignity and the right to liberty, the right to reputation and the right to freedom of expression are of equal legal status under the Israeli Basic Law.[124] He further stated that "human dignity includes a person's reputation",[125] while stressing the importance of Freedom of speech as

116. Schejter, *supra* note 33, at 924.

117. HCJ 6143/94 Szenes etc. v. Broadcasting Authority [1999] (Isr.).

118. *See id.* para. 4.

119. *Id.* para. 12.

120. *Id.*

121. *See id.* para. 12-14.

122. HCJ 6143/94 Szenes etc. v. Broadcasting Authority para. 12-14 [1999] (Isr.).

123. *See id.* para. 13-14 ("Each state has its own collective identity; each state has its national history and its own social goals, the realization of which forms part of the public interest.").

124. *Id.* para. 18, 21, 26 (Cheshin, J. dissenting).

125. *Id.* para. 29 (Cheshin, J. dissenting).

one of the State of Israel's fundamental values as a democratic state.[126] Cheshin ruled that "[w]e are dealing with a right of dimensions struggling against a smaller right. The dignity and reputation of Chana easily prevail over the rights of the playwright and the Broadcasting Authority."[127] However, the majority of the court disagreed that only a near certainty of grave and severe harm to public interest, the reputation and dignity of the deceased and public feelings, can warrant the court's intervention.[128] Since this is not the situation in the instant case, the majority refused to protect the dead's reputation, even noting the importance of the dead's reputation to Israeli collective memory.[129]

Justice M. Cheshin made an important distinction between persons and historical figures of the Israeli Deformation Law (1967) regarding protection of the diseased.[130] Cheshin explained that the law protects only the dead persons' reputations and dignity, not historical figures.[131] Cheshin explained that persons are those dead who have relatives to sue for protection of their interests, namely heirs, family members and close relatives.[132] Another criterion to define a dead person is whether there are people alive who knew the dead personally; if there are persons still knowing him or her, the dead continues to be a person.[133] The two criteria can define the confine of the protection of posthumous reputation and dignity by the Israeli law.

In contrast, following Justice Cheshin's distinction, Taiwanese courts went too far in 1976 to protect a Chinese poet's reputation, who died a thousand years ago.[134] The poet Han Yu holds an iconic status in Chinese classical literature and has been highly respected for his contribution to traditional Chinese culture. He was "defamed" by a historian in the latter's journal article that described the dead as a Lothario who died from abuse of poisonous chemicals. A distant descendent accused the author of libelling the dead and damaging the respect and memory of his ancestor. Both the trial court and the appeals

126. *See id.* para. 9.

127. HCJ 6143/94 Szenes etc. v. Broadcasting Authority para. 37 [1999] (Isr.) (Cheshin, J., dissenting).

128. *See id.* para. 20, 28, 34.

129. *See id.* para 24 (the court concluded: "However, a democratic society does not preserve the image of its heroes by repressing freedom of expression and artistic creation.). The legend must flow from free exchange of ideas and opinions. *See also id.* para. 27.

130. *Id.* para. 24 (Cheshin, J. dissenting).

131. *Id.*

132. HCJ 6143/94 Szenes etc. v. Broadcasting Authority para. 19, 24 [1999] (Isr.) (Cheshin, J., dissenting).

133. *Id.* para. 24 (Cheshin, J. dissenting).

134. *See* YANG RENSHOU (杨仁寿), FAXUE FANGFA LUN (法学方法论) 1-6 (1999).

court found the accused guilty, partially due to the reason that the defamation was a threat to the Chinese cultural identity. The posthumous protection has its deep origin in the long Chinese tradition to respect dead ancestors.[135]

After the death of many dictators and the collapse of their regimes, they have been re-evaluated by new communities with transformed morals and political ideologies. Their supporters have conflicted with dissenters over the problem of how to handle the memory and legacies of the deceased dictators. Many have lodged defamation cases in court. For instance, Franco, the deceased Spanish dictator, was recently mocked by an artist who put a sculpture of him in a refrigerator, indicating his still "being fresh" in modern Spain.[136] The artist was accused in 2012 by an organization called the Francisco Franco Foundation, claiming defamation of Franco and seeking 18,000 euros in damages. Supporters and opponents also bear different memories to the dead dictators and they have much departed views of the past. In such cases, judicial decisions are critical in confirming which view is justified before the public.

Under many circumstances, historians' research and publication regarding the deceased's reputation have challenged the memory and identity of *local communities* that have constructed a desired memory and identity by means of voluntary forgetting or hiding some dark past. When historian Anja Rosmus-Wenninger stood up to investigate what had happened to the Jews at her hometown Passau, Germany, she was shocked by her findings of the close cooperation of the locals with the Nazi regime. Instead, the local community, contrary to her findings, has proclaimed an identity of strong resistance against the Nazi policy. She discovered that two distinguished Paussau priests, whose names were under data protection, denounced Jews to the Gestapo in 1936, but one died with the reputation of a saint and the other as a resistant to the Nazi regime. The revelation of the facts led to the accusation of monstrous defamation by the locals. She was watched, molested and assaulted by her co-citizens. Though her victory in court helped her regain confidence in the German community,[137] she eventually migrated to the U.S.

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135. *See* XIAO ZESHENG (泽晟), MUDI SHANG DE XIANFA QUANLI (*墓地上的宪法权*), FAXUE(法学) 70–79 (2011).

136. Guy Hedgecoe, *Spanish Left Cold over "Franco in a Fridge"*, DW (Aug. 19, 2013), *available at* http://www.dw.de/spanish-left-cold-over-franco-in-a-fridge/a-17029255 (last visited Dec. 3, 2014)(the case was first rejected by a Spanish judge in July 2013 and now is pending on appeal).

137. *See* COULMAS, *supra* note 48.

B. Political Figures and History Controversies

As noted above, Anja Rosmus-Wenninger only conflicted with her local community. Reputations of dead political figures that bear more substantial connections with present politics will be under much closer watch by many, including the dead's families and their political allies, who are usually powerfully equipped with sufficient social resources to win defamation battles.

In the French case of *Editions Plon*, the family of the dead French President Mitterrand accused his former private physician of breaching medical confidentiality, and therefore invading the privacy of the dead and his family,[138] degrading the deceased's reputation and honor.[139] In his book *Le Grand Secret*, which was published shortly after Mitterrand's death, Dr. Gubler wrote that the dead president had been diagnosed with cancer a few months after his first election, but he ordered concealment of his illness and issued false health bulletins.[140] The French courts upheld the accusations and restricted the book's distribution with an interim injunction in the first instance.[141] The family also brought civil proceedings against Dr. Gubler and others, prohibiting the resumption of the book's publication, or deleting certain pages and paragraphs as alternative.[142]

The European Court of Human Rights ("ECtHR") found a violation of Article 10 of the Convention in that the legal measures restricting the publication of the book were not appropriate to the ends of the French law in pursuit after balancing them with the author's free speech rights protected by Article 10.[143] The Court recognized the interim injunction as a justified legal measure to protect the plaintiffs' privacy. It is rather clear in this case that posthumous publication would have big influences on the late President's reputation and his family pride. But, the Court defined that the disclosure is of public interest, "in particular the public's right to be informed about any serious illnesses suffered by the head of State, and the question whether

138. *See* Éditions Plon v. France, App. No. 58148/00, para. 34 (Eur. Ct. H.R. 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014). A breach of confidentiality in France is a criminal offense under Article 226-13 of the Criminal Code. *See also id.* para. 3.

139. *Id.* para. 34.

140. *Id.* para. 6.

141. *Id.* para. 12.

142. Éditions Plon v. France, App. No. 58148/00, para. 14 (Eur. Ct. H.R. Aug. 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

143. *Id.*

a person who knew that he was seriously ill was fit to hold the highest national office."[144] The information is important to transparency of government and there is no "pressing social need" to take the prescribed measures against the publishing company.[145]

In *Mizzi v. Malta*, the ECtHR quashed the judgements of Maltase courts, finding a violation of Article 10 of the Convention.[146] The Court did not directly reject the protection of the dead Prime Minister's reputation by the domestic courts. However, it argued that the protection is disproportionate, particularly in the view of the dead as a former politician and a public figure, who should be subject to wider limits of acceptable criticisms and that the disputed article covered a subject of public interest.[147]

In the Spanish case *Rosa MaríaLópe & Gutiérrez*, the author and editor of a newspaper were accused of violating the right of honor of the Moroccan King Hassan II due to their report of a drug trafficking issue, of which the ECtHR found the Spanish state violated the free speech rights under Article 10 of the European Convention on Human Rights ("Convention").[148] The Spanish courts took measures to restrict the publication of the newspaper article that reported the suspicious connection of the then-living King to a drug smuggling caught by Spanish police.[149] The Court quashed the domestic decisions and ruled that the measures taken by the Spanish authority cannot be proved that the interference claimed was "necessary in a democratic society" and could not meet "a pressing social need"; it simply did not find that the

144. *Id.* para. 44.

145. *Id.*

146. Mizzi v. Malta, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Feb. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

147. *Id.* para. 38; *see also* Lombardo v. Malta, App. No. 7333/06, (Eur. Ct. H.R. July 27, 2007), *available at* http://www.pfcmalta.org/uploads/1/2/1/7/12174934/7333-06.pdf (last visited Dec. 3, 2014) (ruling "the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual. Unlike the latter, the former Correct inevitably and knowingly lay themselves open to close scrutiny of their words and deeds by journalists and the public at large, and they must consequently display a greater degree of tolerance").

148. The monarch filed the case himself but later died during domestic proceeding. Gutierrez Suarez v. Spain, App. No. 16023/07 (Eur. Ct. H.R. 2012). Hereinafter, the English version of the verdict will be referenced. *Victory of Spanish Journalist at European Court Is Final*, WORLD PRESS FREEDOM COMM., Nov. 30, 2010, *available at*: http://www.wpfc.org/?q=node/447 (last visited Dec. 3, 2014).

149. The alleged article mentioned similar reports that were also published in *El Mundo*, *Le Monde*, and *Herald Tribune*, which stated that drug trafficking was the main source of foreign currency for Morocco and pointed to some Moroccan politicians close to the king. *Id.* para. 6.

information disclosed was capable of causing injury to the personal reputation of the king.[150] The Court prescribed that while journalist reports can be presented in different ways, "it is not for the Court of Justice or for the national jurisdictional authorities to otherwise replace the press to say what technique must the journalists adopt."[151]

The author and editor involved in the Spanish case above are not the only authors and journalists who were punished for defaming deceased kings and their families. In 2007, Swiss citizen Oliver Jufer was sentenced to ten years imprisonment in Thailand for insulting King Bhumibol Adulyadej by vandalising portraits of the monarch with black spray-paint during a drunken spree.[152] Citizens of democracies might have problems with the rationales to protect dead kings and state heads, as discussion of their past activities is of public interest and important for public discourse of state policy. Political figures of high status, such as state heads, are obviously important historical figures (or persons in the Israeli term), and shall be under public scrutiny. When defamation cases concern public figures, the truth that the defendants claimed to have spoken is relevant to the narration of public history.[153]

As indicated above, re-assessment of the dead's reputation can modify our view of the past and collective memory. In *Lehideux & Isorni v. France*,[154] the French judicial authority convicted the authors of an advertisement published in *Le Monde*. The text was read as defending the memory of Marshal Pétain, the famous collaborator of the Nazi Party who was responsible for the death of many French Jews in Nazi concentration camps. The ECtHR overruled the French decisions and found the criminal conviction unnecessary in a democratic society.[155] It made an important distinction between clearly established historical facts, such as genocide and Holocaust, and historical facts that are not clearly established, as in the instant case.[156] As a leading case, the Court set out the rule that denial of the Holocaust and atrocities

150. *Id.* para. 36.

151. *Id.* para. 33 (reiterating its previous ruling in Bladet & Stensaas v. Norway [GC], App. No. 21980/93, para. 63 (E. Ct. H.R. 1999)).

152. *World Briefing | Asia: Thailand: Man Who Insulted King Pardoned*, N.Y. TIMES (Apr. 13, 2007), *available at* http://query.nytimes.com/gst/fullpage.html?res=9A00E4D9133FF930A25757C0A9619C8B63&module=Search&mabReward=relbias%3As (last visited Dec. 3, 2014).

153. Barak-Erez, *supra* note 29, at 95 (arguing that defamation cases in which the defendant claims to have spoken the truth, may sometimes be the background for judgments of historical significance).

154. Lehideux & Isorni v. France, App. No. 55/1997/839/1045, (Eur. Ct. H.R. 1998).

155. *Id.* para. 58.

156. *Id.* para. 47.

should be excluded from protection of Article 10 of the Convention.[157]

By denying protection of revisionists and Holocaust deniers, the Court has obviously promoted a judicial narrative and forbids further challenges, which leads to a further question of the proper roles of court in general. Many have doubted the roles of courts in handling cases regarding historical controversies, questioning if courts are the right locus to address historical events. As Barak-Erez noted, courts may choose three roles to play: as judges and arbiters of historical events; as narrators of history; and as students and teachers of historical lesson.[158] In my view, courts of law can nevertheless avoid to play such roles either singly or simultaneously in handling defamation cases regarding historical events, though their capacities are under doubt.

We observe a similar role played by a Japanese court to affirm the official narrative, like the ECtHR, in reaffirming Japan's dark past during the WWII. Shortly before the notorious Nanjing massacre, two Japanese officers participated in a killing contest with swords to prove their military bravery or brutality. Both were executed after the war in Nanjing for their committed war crimes by the Nanjing War Crimes Tribunal. The story was reported in 1971 by two Japanese newspapers, *Mainichi Shimbun* and *Asahi Shimbun*. The dead's families sued for posthumous defamation, claiming fabrication of the story.[159] The Japanese court rejected their claims and confirmed the trueness of the reports, despite some minor mistakes. The case concerns Japan's war crimes in China that are well-established historical facts and unable to be overturned in the defamation case.

It is no doubt that the dead's families are the strongest defenders of their reputation since they are directly impacted in their daily life. Negative reputation of the dead will have passive influence on the living's life and repute. In the French case, *Fondation Franco-Japonaise dite Sasakawa vs. Karoline Postel-Vinay*,[160] Sasakawa Franco-Japanese Foundation accused French historian Karoline Postel-

157. *Id.* (prescribing that denial or revision of "clearly established historical facts – such as the Holocaust – . . . would be removed from the protection of Article 10 by Article 17.").

158. Barak-Erez, *supra*, note 29, at 91-100.

159. Mainichi Shimbun and another newspaper Asahi Shimbun. *Suit Denying Pair's Wartime Beheading Spree Fails*, JAPAN TIMES ONLINE (Aug. 24, 2005), *available at* http://www.japantimes.co.jp/news/2005/08/24/national/suit-denying-pairs-wartime-beheading-spree-fails/#.Uee836xoV10 (last visited Dec. 3, 2014).

160. Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, Sept. 22, 2010 (Fr.), *available at* http://www.concernedhistorians.org/content_files/file/LE/184.pdf (last visited Dec. 3, 2014).

Vinay for slurring on its respectability. Postel-Vinay sent an e-mail to participants of a symposium held on the big social event of the 150th anniversary of the diplomatic relations between Japan and France, of which the Foundation was a sponsor. The controversial e-mail was entitled "Sasakawa, a war criminal to celebrate 150 years of Franco-Japanese Diplomacy?"[161] The author explained that together with other sixteen historians and academics, she felt it was "quite inappropriate that a foundation fashioning its own name after that of a class A war criminal should sponsor such a gathering."[162] The Paris District Court found part of the e-mail text libellous, but dismissed the case due to a successful defense of good faith by the author.[163]

C. Rehabilitation and Posthumous Justice

As noted above, the Japanese court rejected the defamatory accusation of the journalists and affirmed the war crimes of the two executed military officers. However, Japanese courts have been very reluctant to deliver judgments in favor of the victims of Chinese comfort women, as some survivors have sued for remedies of past suffering.[164] In a collective sense, whether victims of war crimes, atrocities and the Holocaust are recognized by their victim status and offered proper compensations is important not only as a matter of justice, but also as a matter of human dignity and respect. The living victims should not be hurt a second time and those dead should not have their names lost in the dust of history. This is especially true for the dead victims of war atrocities during the Second World War, either conducted by Nazi Germany or by the former Soviet Union.

The Katyn tragedy shocked the world by the annihilation of almost a whole generation of Polish elites by the Russian military after its invasion. The tragedy left a deep wound in Polish people and human history. It is after the collapse of the Soviet Union that the truth came out. On November 26, 2010, the Russian State Duma issued a formal

161. *Id.*

162. *Id.* at 3.

163. *Id.*

164. After 1996 such victims are defined by United Nations as forced slaves. Many Korean victims acquired remedies and formal apology from the Japanese government. *See Japan Court Backs 3 Brothel Victims*, N.Y. TIMES (Apr. 28, 1998), *available at* http://www.nytimes.com/1998/04/28/world/japan-court-backs-3-brothel-victims.html?src=pm (last visited Dec. 3, 2014). However, the law suits lodged by Chinese victims ended only with recognition of the historical tragedy, but without any compensation since, among other justifications, the Japanese Supreme Court deferred to a 1972 bilateral treaty signed by the Chinese Communist government to abandon war compensation. PEIPEI QIU, *supra* note 45, at 175.

statement on the tragedy, declaring that "[i]t is necessary to continue studying the archives, verifying the lists of victims, restoring the good names of those who perished in Katyn and other places and uncovering the circumstances of the tragedy."[165] However, when some surviving family members of the deceased victims tried to seek the whereabouts of their beloved, time and again they were confronted with obstacles from the present Russian authorities. They were refused further help and serious replies from the Russian authorities,[166] and an official investigation ended prematurely and the related documents were classified afterwards. The case finally ended up in ECtHR to which the Russian state authorities still refused to provide key documents relating to the case upon the Court's request. The Chamber first found violations of some applicants' rights not to be subjected to inhumane or degrading treatment protected under Article 3 of the Convention, as well as a violation of Article 38 of the Convention.[167] The Chamber commented that the Court "is struck by the apparent reluctance of the Russian authorities to recognize the reality of the Katyn massacre" noting the fact that after the discontinuation of the investigation, "the Russian prosecutors consistently rejected the applicants' requests for rehabilitation of their relatives."[168] The Grand Chamber upheld the Chamber decision on a violation of Article 38, but overruled its decision of an Article 3 violation by the Russian State authorities.[169]

It seems that requesting rehabilitation from a foreign state is not easy for many reasons. Rehabilitation of dead victims consequent to communist political convictions was not an easy thing either even in their motherlands. In *Kurzac v. Poland*, a Polish-American tried to rehabilitate his deceased brother – a victim of the Polish Communist suppression – and to restore his own family's reputation.[170] However, the legal procedures had lasted for five years and were unbearable to the applicant, so that the case was eventually brought to ECtHR for a violation of Article 6-1 (hearing within a reasonable time).[171] In the admissibility judgment, the ECtHR decided that "the result of the

165. *See* Janowiec v. Russia, App. nos. 55508/07 & 29520/09 (Eur. Ct. H.R. 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-127684 (last visited Dec. 3, 2014).

166. *See id.* para. 39.

167. *See generally id.*

168. *Id.* para. 45-46.

169. *Id.* para. 50.

170. Kurzac v. Poland, App. No. 31382/96 (Eur. Ct. H.R. May 22, 2001), *available at* http://www.echr.coe.int (last visited Dec. 3, 2014).

171. *Id.* para. 1. In this case, the Court considered the possibility of extending its jurisdiction to cases of atrocity that happened more than half a century ago.

proceedings in issue was decisive for rights which by their very nature were civil, namely, the applicant's right to enjoy a good reputation and his right to protect the honour of his family and restore its good name."[172] The Court therefore puts the reputation of a surviving family under its consideration in the case of rehabilitation of dead victims.

In Spain, the 1977 Amnesty Law has blocked the road both to rehabilitate the deceased victims of the brutal Civil War and long dictatorship, and to condemn the responsible perpetrators, whether dead or alive. The law has been passed consequent to a compromise made among different social forces to facilitate the democratic transition.[173] But the amnesty law was defined by the UN as incompatible with the International Human Rights law with respect to crimes against humanity that should enjoy no statute of limitations.[174]

A Spanish judge's effort to apply such international human rights law was impeded when the Spanish Amnesty Law was under scrutiny. Judge Garzon issued the historical arrest warrant of former Chilean dictator Augusto Pinochet and contributed to legal proceedings against the perpetrator.[175] He also tried to apply the same standard to Spain's historical crimes, when some family members of the missing asked the Audiencia Nacional (National Court) to investigate the whereabouts of their remains for a decent burial.[176] Garzon conferred his jurisdiction to the local courts to answer such inquiries.[177] But this caused chaos and he was accused of flouting the Amnesty Law and committing the crime of *prevaricación*.[178] He was eventually exonerated by the Spanish Supreme Court, but the decision ended the legal approach of Civil War

172. Decision as to the Admissibility of Application no. 31382/96, para. 6 (Eur. Ct. H.R. May 25, 2000), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-5297 (last visited Dec. 3, 2014).

173. Or the pact of oblivion (*el pacto de olvido*). *See* Teresa Fernández Paredes, *Transitional Justice in Democratization Processes: the Case of Spain from an International Point of View*, 1 INT'L J. RULE L., TRANSITIONAL JUST. & HUM. RTS. 124, 125 (2010); Sumalla, *supra* note 52, at 733–37. This law was counter-balanced recently by a new Historical Memory Law in Spain (Ley de la memoria historica). *See* Sumalla, *supra* note 52, at 737–43.

174. See the relative comment from the UN Human Rights Office. *See Spain Must Lift Amnesty for Franco Era Crimes-U.N.*, THOMSON REUTERS FOUND. (Feb. 10, 2012), *available at* http://www.trust.org/item/?map=spain-must-lift-amnesty-for-franco-era-crimes-un (last visited Dec. 3, 2014).

175. Naomi Roht-Arriaza, *The Spanish Civil War, Amnesty, and the Trials of Judge Garzón*, 16 AM. SOC'Y INT'L L. (July 25, 2012), *available at* http://www.asil.org/insights/volume/16/issue/24/spanish-civil-war-amnesty-and-trials-judge-garzón (last visited Dec. 3, 2014).

176. *Id.*

177. *Id.*

178. *Id.*

Era claims.[179] This reaction indicates the difficulties in the implementation of the 2007 Law of Historical Memory, which addresses the need to honor the victims of the Civil War and Franco dictatorship and to provide them with reparation.[180]

What the living sought for the deceased are posthumous dignity and justice in the sense that they should have not been wronged. The deceased victims' names should be cleaned of political smears. The deceased should not die with wrongly charged crimes. In this sense, rehabilitation of the deceased victims relates more to the concept of justice, or historical justice, and historical truth or correct historical narrative.[181] Even deceased victims have the moral rights to truth, justice and reparation in a fair community and this explains why the British Government recently decided that the army should not have executed soldiers for cowardice in WWI and posthumously pardoned the deceased.[182] Similarly, the Americans have apologized for the mistreatments of Japanese migrants during WWII and of indigenous Indians for past injustice.[183]

Lastly, one must note that the rehabilitation of the dead victims in the above cases is possible because of changed social morals or ethos consequent to political changes or the advancement of humanity. This will be discussed further in Section VI, which illustrates how political change and cultural shift have influenced posthumous reputation and our understandings of the past.

D. Posthumous Privacy and Individual Dignity

The dead may be no more, but their past deeds are kept among the memories of those who know them in person or who have heard of them, or who read their diaries, letters or memoranda. More importantly, their images and likeness, as a crucial part of their past existence and the living's impression, can be kept in various forms such as photographs, newspapers, archival documents, films, or most recently, in digital forms on the Internet. In particular, their names and voices can be used commercially; their images and likeness may be

179. *Id.*

180. *See* Sumalla, *supra* note 52, at 743–44.

181. In this regard, reparation of injustice, according to the United Nations, includes five forms, namely: restitution, compensation, rehabilitation, guarantees of non-repetition, and satisfaction. Satisfaction includes symbolic reparation or posthumous rehabilitation. *See* G.A. Res. 60/147, *supra* note 112 at para. 22(d).

182. MACMILLAN, *supra* note 4, at 28.

183. *See generally* Janna Thompson, *Historical Injustice and Reparation: Justifying Claims of Descendants*, 112 ETHICS 114 (2001).

exhibited in history museums for public knowledge; or statues and monuments may be erected to keep their memory alive in community life; or foundations, cities and streets may be named after the deceased for their remembrance or collective memory.

In many occasions, such uses may cause conflicts with their surviving family's interest as well as the dead's privacy and reputation (or in abstract, dignity). For instance, the likeness could be used in a defamatory way, or the dead's families are not willing to disclose such materials to the public, whether for commercial use or for public knowledge; or they are reluctant for such disclosure because the end products are not in favor of the dead. The most extremist version of this category of "defamation" is the defamatory treatment of the likeness of political figures to present political opinions. When the deceased are treated as the icons or pride of a national state and under protection, such "mistreatment" can be handled seriously.

During the 1989 Beijing Student Protest in June, to advocate their anti-dictatorship opinion, three young Chinese threw ink-filled eggs to deface the great portrait of Mao hung on the Tian'an Gate overseeing the Tiananmen Square. They were caught and sentenced to long-term imprisonments for crimes of anti-revolution and defamation of the founder of the communist state.[184] We can find a similar situation in Turkey where acts against the late Ataturk were punished by Law No. 5816 with harsh imprisonment.[185] Many journalists and historians have been accused of defamation of Ataturk in the past under this special legislation, which has been criticized by international society.[186]

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184. Mao was and still is the icon and pride of the national state to many Chinese today. The three convicts got, respectively, sixteen, twenty and life imprisonment. *China Is Accused of Torturing 3 Who Defaced Mao Portrait*, N.Y. TIMES (June 1, 1992), *available at* http://www.nytimes.com/1992/06/01/world/china-is-accused-of-torturing-3-who-defaced-mao-portrait.html (last visited Dec. 3, 2014); *Mao Portrait Protesters Reunited*, RADIO FREE ASIA (June 21, 2010), *available at* http://www.rfa.org/english/news/china/portrait-06212010110340.html (last visited Dec. 3, 2014).

185. MCCRACKEN, *supra* note 55, at 31.

186. *See Prosecutor Investigates A TV Show For Defamation Of Atatürk*, BIANET (June 13, 2008, 11:30 AM), *available at* http://www.bianet.org/english/religion/107620-prosecutor-investigates-a-tv-show-for-defamation-of-ataturk (last visited Dec. 3, 2014); Julia Wetherell, *EU Fines Turkey for Blocking Google Sites*, TECHPRESIDENT (Dec. 19, 2012), *available at* http://techpresident.com/news/wegov/23289/eu-fines-turkey-blocking-google-sites (last visited Dec. 3, 2014); Nagehan Alçı, *Journalist to Sue for Defamation After Atatürk Remarks*, TODAY'S ZAMAN (Nov. 11, 2011, 5:30 PM), *available at* http://www.todayszaman.com//news-262347-journalist-to-sue-for-defamation-after-ataturk-remarks.html (last visited Dec. 3, 2014). For a more detailed discussion, see Antoon De Baets, *Defamation Cases Against Historians*, 41 HIST. & THEORY 346, 349 (2002)(particularly note 12).

The likeness of the dead can be well protected by law in Western democracies under privacy law, especially when the proprietary interests of the dead's likeness and name are of concern. In the U.S., the dead's images or likeness could be protected indirectly, as surviving families claim invasions of their own privacy or reputation against disclosure or appropriation. Journalist Allen Favish was denied access to posthumous photographs taken of the late Vincent Foster at the death scene and during the autopsy.[187] Foster was a high-ranking White House lawyer involved in the investigation of Clinton family's scandal of Whitewater Real Estate Venture. He was found to have committed suicide following the official investigation. Favish suspected that the denial to the requested photos of the deceased was part of a cover-up of the murder. The U.S. government refused his request on the ground of protection of the privacy of Foster's family. They explained that disclosure of such photographs would traumatize the family and invade their privacy. The Supreme Court of the U.S. ruled that the privacy interests of the family trump the public's interest in seeing the pictures of his death scene.[188]

But, the dead's privacy and reputation were not without consideration of the Chief Justice. In *Swidler & Berlin v. United States*,[189] Justice William Rehnquist, on behalf of the majority, concluded that to assume a dead person's interest in reputation ends upon his death is unreasonable, which the dissenting Justice Sandra O'Connor also agreed on.[190] In *MacDonald v. Time*, District Judge Sarokin said that such an idea, that a man's defamed reputation dies with him, is to ignore the realities of life and the bleak legacy which he leaves behind.[191]

Many European jurisdictions offer direct protection by statutory law. Appropriation of the dead's likeness as invasion of posthumous privacy is forbidden in Italy. The Italian magazine *Chi* purchased the exclusive right to publish the pictures taken shortly after Princess

187. *See generally* Nat'l Archives & Records Admin. v. Favish, 541 U.S. 157 (2004).

188. *See id.* at 170-72.

189. *See* Swidler & Berlin v. United States, 524 U.S. 399 (1998); *see also* Raymond Iryami, *Give the Dead Their Day in Court: Implying a Private Cause of Action for Defamation of the Dead from Criminal Libel Statues*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1083, 1099 (2006) (discussing the Supreme Court's recognition for decedents' reputation).

190. *See generally Swidler & Berlin*, 524 U.S. at 411 (O'Connor, J. dissenting) (agreeing that normally the attorney-client privilege survives the death of a client).

191. MacDonald v. Time, Inc., 554 F. Supp. 1053, 1055 (D.N.J. 1983) ("Why should a claim for a damaged leg survive one's death, where a claim for a damaged name does not. After death, the leg cannot be healed, but the reputation can.").

Diana's fatal accident and obtained the findings of the autopsy. The Italian court regarded it as a violation of the dead's dignity and found that the disclosure was not justified by the need of free information of the public.[192] Further dissemination of such information may face criminal punishments, such as imprisonment for up to two years.[193] According to Madoff, after the death of Saddam Hussein, even the Italian special authority gave a press release to caution the media to respect the dead's dignity.[194]

Protection of the deceased's last dignity, in particular their death scene pictures, has been recognized by other EU countries. In *Hachette Filipacchi Associes v. France*, the dead's widow and children accused several companies of an infringement of the right to respect of their private life after the companies disclosed a photograph of the murdered Prefect Claude Erignac in Ajaccio for commercial use. The photograph was supplementary to an article and displayed his dead body lying on the ground.[195] The French Court of Cassation concluded that because the photograph clearly indicated the body and face of the murdered, the publication showed disregard for human dignity and therefore the publication was illegal.[196] In replying to the ECtHR, the French Government explicitly expressed that though the publication of that article concerned a matter of public interest, it affected the dignity of a civil servant, which is part of "the hard core" of his rights, as well as the private life of his family.[197]

In the Slovak Republic, courts judged in similar ways to protect the privacy of the dead and their family. For example, in *Weiss vs. R., a. s.*, several photographs of a mother's dead body and others *ante mortem* were published, together with some excerpts of her suicide letter. The deceased was Ms. Marcela Weissová, wife of Slovak politician Mr. Peter Weiss. Her son accused the publisher of violating his own and his late mother's personality rights. The Slovakia judiciary authorities acknowledged that the publication of photographs of the dead body violated Article 15 CC of the Civil Code, which protects posthumous

192. MADOFF, *supra* note 28, at 128.

193. *Id.*

194. *Id.*

195. *See* Hachette Filipacchi Associés v. France, App. No. 71111/01, para. 7-11 (Eur. Ct. H.R. June 14, 2007), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-81066 (last visited Dec. 3, 2014).

196. *Id.* para. 19.

197. *Id.* para. 11 (finding no violation of free speech rights of the applicant company under Article 10 of the Convention).

personality rights and therefore ordered remedies.[198]

Not only is dignity of the dead under legal protection when the dead's likeness is in controversy, but also when the related economic benefits are of much closer concern of the living families. This concerns the economic perspective of the dead's name, likeness, etc. Again, Princess Diana would be bothered if she had the chance to know the fierce legal battles fought under the name of her remembrance, of which millions of dollars were at stake.[199] A similar story happened to Martin Luther King, whose family charged heavily on the use of his likeness, name and the famous "I have a dream" speech.[200]

German law, as Rösler suggested, differentiated more clearly between protection of reputation and privacy as dignity and as property in particular in the 1999 Marlene Dietrich Decision.[201] It is the first time that the German Federal Court rendered damages to posthumous invasion of personality on the ground of commercial exploitation of the decedent's name, voice or image, which was part of marketing strategy about Marlene Dietrich. This involved various products such as bags, t-shirts, watches, calling cards, pins, etc. The Constitutional Court of Germany upheld the decision and affirmed the inclusion of commercial aspects of personality rights under constitutional protection.[202]

E. Biography Writing and Posthumous Disputes

Biography writing matters not only to the living, but also to the dead because this is an important means to recount their life and

198. The Constitutional Court upheld the decision with a monetary compensation for the invasion of the deceased mother's privacy Weiss vs. R., a. s., 7.07.2009 (ÚS), III. ÚS 185/09-24 (Slovak Republic) (the case is briefed to the author by his student research assistant, Mr. Martin Duchac).

199. *See* Matthew Magee, *Court Rules that Newspaper does not have to Identify Commenters*, GUARDIAN (Mar. 1, 2011, 9:54 PM), *available at* http://www.guardian.co.uk/law/2011/mar/01/sue-commenters-libel-daily-mail (last visited Dec. 3, 2014); Heather Timmons, *Diana Charity Halts Grants, Citing Lawsuit*, N.Y. TIMES (July 12, 2003), *available at* http://www.nytimes.com/2003/07/12/world/diana-charity-halts-grants-citing-lawsuit.html (last visited Dec. 3, 2014); Marius Meland, *Princess Diana Fund, Franklin Mint Settle Trademark Dispute*, LAW360 (Nov. 11, 2004, 12:00 AM), *available at* http://www.law360.com/articles/2540/princess-diana-fund-franklin-mint-settle-trademark-dispute (last visited Dec. 3, 2014).

200. Jonathan Turley, *Cashing in on Martin Luther King Jr.*, LOS ANGELES TIMES (Apr. 22, 2009), *available at* http://articles.latimes.com/2009/apr/22/opinion/oe-turley22 (last visited Dec. 3, 2014) (King's family winning landmark case against USA Today and CBS for the illegal use of King's speech without paying them); *see also* MADOFF *supra* note 28, at 9-10.

201. Rösler, *supra* note 77, at 181.

202. *Id.*

achievement. As Craik pointed out, many dead even got more famous after their death through successful biographies.[203] Some people will get their autobiographies ready before death to prevent defamatory statements; others may hire professional writers to put down their stories before death, [204] as Apple's founder Steven Jobs made such an arrangement with the author of his biography.[205] After death, living families may also hire professional writers to complete the story of the deceased for many reasons. Or, biographies of the dead could be written by many without the consent of the dead before death and of their families after death. These two circumstances can both lead to controversies.

The Canadian case *Turgeon v. Michaud* lasted for seven years because of the vague assignment of the author's rights upon writing a biography for a famous Quebec businessman. The dead's family commissioned author Pierre Turgeon to write Desrosier's biography in order to promote business by telling the stories of the founder and how he managed to establish a commercially successful enterprise.[206] The timeline set out in the initial agreement was not respected and the writing was delayed several times. At last the author's manuscript was not to the heirs' satisfaction, who decided not to publish it. Nevertheless, the author sought to publish the draft at another publishing company other than the agreed one. The Quebec Superior Court issued a permanent injunction against Turgeon, halting him from publishing the manuscript. The trial judge claimed that the deceased's heir had the right to refuse to publish the manuscript and the author could not publish any content that is based on the confidential information provided by the deceased's family.[207]

Biographers are likely to disclose private matters that others would have no chance to know. This influences the deceased's' reputations as

203. CRAIK, *supra* note 10, at 182-86 (arguing that biography may extend a dead's reputational network and biographical reputational network ultimately serves as the major locus of the posthumous reputational network).

204. *Id.* at 190 (an example of "pre-posthumous tasks" is Thomas Hardy, who spent years ghostwriting his official biography and then covered it as his wife's memoir).

205. With an agreement that Jobs would not interfere with the contents of his own biography. Nick Bilton, *One on One: Walter Isaacson, Biographer of Steve Jobs*, N.Y. TIMES: BITS BLOG (Nov. 18, 2011, 9:41 AM), *available at* http://bits.blogs.nytimes.com/2011/11/18/one-on-one-walter-isaacson-biographer-of-steve-jobs/?_r=0 (last visited Dec. 3, 2014).

206. Alexandra Steele, *Once Upon a Time, There was a Manuscript*, CETNRE CDP CAPITAL, *available at* http://www.robic.ca/admin/pdf/537/173.14.pdf (last visited Dec. 3, 2014).

207. *Id.*

well as their families' reputations. Francis Russell, an American writer and biographer, was confronted by the heirs of ex-president Harding who sought injunction from Ohio court to exclude the use of love letters of the dead in his book *The Shadow of Blowing Grave* regarding Harding. These love letters were from Mrs. Phillips who had had an affair with Harding for more than fifteen years and was persuaded by Russell to relent. These letters were confiscated by an Ohio Court and they remained under a protective order until 2014.[208] They cover the controversial period regarding Harding's nomination for the Republican presidency in 1920, when it was too late to change the nominee upon knowledge of the affair by the Republican Party, which sought ways to cover the affair.[209] The author protested by leaving the spaces for the citations from the letters merely blank in his published book.[210] Yet during Harding's full term, voters never knew anything about his extramarital affairs, though he suffered multiple posthumous indignities.[211]

The above two cases show the importance of using unpublished materials in biographical writings and the big impacts of legal interferences on historical studies under copyrights.[212] Still, if a biography is not written in favor of the dead, their families may seek damages, injunctions, remedies and an obligatory formal apology to protect themselves and the dead. In China, the children of the deceased ex-prime minister Cheng Yonggui sued historian Wu Shi and won the case with remedies of emotional distress and a formal apology from the author and publisher.[213] Wu described the deceased as "the peasant of Chairman Mao" and listed his previous deeds unknown to the public in

208. Francis Russell, *A Naughty President*, NEW YORK REVIEW OF BOOKS (1982), *available at* http://www.nybooks.com/articles/archives/1982/jun/24/a-naughty-president/ (last visited Dec. 3, 2014).

209. John H. Summers, *What Happened to Sex Scandals? Politics and Peccadilloes, Jefferson to Kennedy*, 87 J. AM. HIST. 825, 836 (2000).

210. The letters are confiscated under the protection of common law copyright interests of the heirs. *See* John Dean, *The Harding Affair: Evidence or Racism Rising*, FINDLAW (Sept. 18, 2009), *available at* http://writ.news.findlaw.com/dean/20090918.html (last visited Dec. 3, 2014) (detailing the story regarding Harding in his interview).

211. Summers, *supra* note 210, at 836.

212. For a general discussion regarding unpublished expressions in biographical writing without consent of the copyright holders in the United Stated, see Bilder, *supra* note 37.

213. Chen Mingliangyu Beijing qingnianbao he Wu Shi QianfanMingyuquan An (陈明亮与北京青年报社、吴思名誉权纠纷案) [Chen Mingliang v. Wu Shi & Beijing Youth Newspaper] (Beijing No. 1 Interm. Ct. Dec. 29, 2003) (China), *available at* http://www.qinquan.info/138v9.html (last visited Dec. 3, 2014).

a biography.[214] Chen's living family would not accept such a negative account of the former politician with a good repute. Even if true, such writing denigrates the reputation of the dead. The adjudicating court ruled that the author used sources, such as private memos, personal interviews, etc., which are not official and un-authoritative.[215] Although the author had been cautious and acted with due care in selecting materials and writing, the Chinese courts still demanded the use of certain sources and materials in favor of the deceased.[216]

Closely related to biographical writing are novels or fictions that are based on real stories of the deceased, but taken as defamatory against the deceased by their families. Such writings and narratives attract disputes from the dead's families or even agitate them because many audiences know clearly whom those characters are in real life. In a famous German case regarding the Klaus Mann's novel *Mephisto-Novel of a Career*, Mann portrayed a character attributed to the well-known, controversial German actor and theatre director Gustaf Gründgens (1899-1963).[217] The heir of Gründgens filed a defamation suit and the German Constitutional Court judged in favor of the dead, finding that the defamation overrided constitutional values.[218] The problem of such artistic works lies in the blurs of facts and imaginations that may mislead the audience to mistake fictions as reality of the past.[219]

No wonder Rosler questioned: "what would happen if such a fusion of fiction and fact took place on a large scale, changing even the perception of history"?[220] This is the rationale behind the Brazilian Civil Code, which requires works of a biographical nature to have consent from their subjects before public release. This obviously

214. *Id.*

215. *Id.*

216. *Id.* In another case, a young Chinese biographer, based on accessible university archives, depicted some notorious acts of a famous scholar, the former president of that university, during China's Culture Revolution. The presiding judge in this case explicitly expressed that memos included in such archives putting down people's self-and-mutual criticisms shall not be used for historical studies like author's work. *Feng Boqun* (冯伯群), *Yinyong Dangan Rechu de Yichang Guansi (引用档案惹出的一场官司)*, 3 DANGAN CHUNQIU (档案春秋) 10–15 (2006).

217. Rösler, *supra* note 114, at 154-55, 174-78.

218. *Id.* at 155.

219. Take the Oscar-winning film Braveheart for example, which has been criticized by many historians of its inaccurate narrative. *See* Elizabeth Ewan, *Braveheart.; Roy Roy*, 4 AM. HIST. REV. 1219, 1219-21 (1995), *available at* http://www.clas.ufl.edu/users/burt/Medieval%20cinema%20recommended/AHR%20Braveheart.pdf (last visited Dec. 3, 2014).

220. Rösler, *supra* note 114, at 156.

influences contents of biographical works so that they "end up being eulogistic to the people they portray."[221] For instance, Ruy Castro was accused by the relatives of the late footballer, World Cup champion Garrincha, of libel for his description of the deceased's penis length.[222] Defamation suits are a big threat to journalists and biographers who are willing to reveal the secrets and realities of the deceased that were once hidden for various reasons.

If biographers are restricted in their writings in using unpublished expressions, then the value of biographical writings – in particular in view of their contribution to history – is shaky on the whole.

F. Religious Honor and Group Identity

With respect to defamation of religion, many will recall the Danish newspaper *Jyllands-Posten* that printed cartoons portraying Muhammad in a less favorable way. The case was defeated by the Danish court,[223] although publishers of the same cartoon were punished in Jordan, Indonesia and Belarus[224] which shows a different tolerance of free speech. The recent example is an Egyptian Christian teacher who was accused of defamation of Mohammed and Islam by her students and their parents.[225] She was eventually removed from her job. No doubt, defamation of the dead prophet and religious leaders is somehow defamation of the accusers' religious identity, and therefore themselves. In jurisdictions where defamation of religion is punished, historians have been silenced and journalists have to conduct self-censorship to

221. Rafael Spuldar, *New Law Set to Ease the Way for Biographies in Brazil*, XINDEX (May 9, 2013), *available at* http://www.indexoncensorship.org/2013/05/new-law-set-to-ease-the-way-for-biographies-in-brazil/ (last visited Dec. 3, 2014).

222. ALEX BELLOS, FUTEBOL: THE BRAZILIAN WAY OF LIFE 105 (Bloombury Publ'g Plc. 2009) (ironically, it was regarded by the adjudicating judge not as degrading, but as a pride of most Brazilians in that country).

223. AFP, *Muslim Cartoon Case Fails to Reach Denmark's Top Court*, CANADA.COM (Oct. 21, 2008), *available at* http://www.canada.com/topics/news/world/story.html?id=c25b9b8a-2906-453f-a671-1a4a137fe61f (last visited Dec. 3, 2014).

224. Meagan McElroy, *Denmark Court Dismissed Lawsuit Against Editors over Muhammad Cartoons*, JURIST (Oct. 26, 2011, 12:00 AM), *available at* http://jurist.org/thisday/2011/10/danish-court-dismissed-lawsuit-against-editors-over-muhammad-cartoons.php (last visited Dec. 3, 2014); *see also* L. Bennett Graham, *Defamation of Religions: The End of Pluralism?*, 23 EMORY INT'L L. REV. 69, 69-73 (2009); *see also* Belnap, *supra* note 49, at 638-42.

225. Pamela Geller, *Sharia in Action: Christian Teacher in Egypt Accused of 'Defaming Islam' Goes on Hunger Strike*, ATLAS SHRUGS (May 13, 2013, 8:43 AM), *available at* http://atlasshrugs2000.typepad.com/atlas_shrugs/2013/05/sharia-in-action-christian-teacher-in-egypt-accused-of-defaming-islam-goes-on-hunger-strike.html (last visited Dec. 3, 2014).

avoid troubles.[226] Such official reaction can even influence publishers from Western democracies who have to take into account negative consequences. For instance, a student editor from University of Illinois and an author from Cambridge University confronted aftereffects of their reproduction of the famous cartoon against Muhammad, implicating potential self-censorship by both university authorities.[227]

We shall not be surprised to observe similar cases even in European democracies that should have been more tolerant to extreme speeches. These cases usually stir up agitation and sentimental distress within religious communities. In the controversial *Giniewski v. France*, the author published an article in a Paris newspaper that was deemed racially defamatory against the Christian community. [228] The author was accused for condemning Christianity's historical anti-Semitism while claiming a direct relation to the horrors at Auschwitz with the core doctrines of Catholic faith, which undermines "the honour and character of Christians and, more specifically, the Catholic community."[229] In the subsequent legal proceedings, the criminal charge was dropped, but the civil complaint was upheld with remedies awarded and a public statement of court ruling ordered.[230]

The case went to the ECtHR for breaching the author's free speech rights. The applicant claimed that his speech was subject to stricter control regarding a sensitive religious matter and the French judicial interpretation of his article was not in accordance with the original texts, whose intention was to contribute to the public debate on the origins of anti-Semitism and the extermination of the Jews.[231] The ECtHR admitted that the interference was prescribed by law, and followed a legitimate aim to protect the reputation of others (the Christian community at stake).[232] The Court realized the fact of the broadened margin of appreciation of its contracting states, due to the "absence of a uniform European conception of the requirements of the protection of

226. *See* Graham, *supra* note 225; *see also* ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, ENDING THE CHILLING EFFECT: WORKING TO REAL CRIMINAL LIBEL AND INSULT LAWS 97 (2004) (in many Eastern Europe and Central Asia countries, journalists are actively convicted and prosecuted by state authorities to encourage self-censorship).

227. IVAN HARE & JAMES WEINSTEIN, EXTREME SPEECH AND DEMOCRACY 312 (Oxford Univ. Press 2010).

228. Giniewski v. France, App. No. 64016/00, para. 14 (E. Ct. H.R. Apr. 31, 2006), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-72216 (last visited Dec. 3, 2014).

229. *Id.* para. 15.

230. *Id.* para. 18-23.

231. *Id.* para. 27-28.

232. *Id.* para. 38-42.

the rights of others in relation to attacks on their religious convictions."[233] It admitted that a proper decision was within its jurisdiction to decide on the pressing social need and proportionality of interference in balancing different interests.[234]

The Court concluded that the defamation accusation is ill grounded on the texts of the article. It held that the author made a contribution to the debate of a particular doctrine, which is open to further discussion by others.[235] The Court could not find attacks on religious beliefs even though it involved a religious doctrine and the gravity of the matter such as the Holocaust, and the author's article is not gratuitously offensive, or insulting, and did not incite disrespect or hatred or cast doubt on clearly established historical facts.[236] Therefore, in the Court's view, the interference was not necessary in a democratic society and the charge of defamation of the Christian community did not confront a pressing social need.[237] Though the criminal charge was acquitted and the civil decision ordered a remedy of merely 1 FRF in damages and publication of a notice of the ruling, the involvement of a criminal offence per se amounted to a deterrent effect and the sanction appeared to be disproportionate in the Court's view.[238]

Though this case did not involve the dead's reputation, it eventually reflects the never-modest reactions from religious groups, including threatening dissents with defamation petitions, either criminal or civil. In this case, Christians are no different from Muslims in defending their beliefs. Not so long ago, Robert Katz wrote in his book *Death in Rome*, which was subsequently turned into a film *Massacre in Rome* (1973), that then deceased Pope Pius XII knew the planned executions of Italians nineteen hours before the event. The killings were in reprisal of the deaths of Germans in Rome due to a partisan attack. The Vatican denied Katz's allegation of the Pope's silence.[239] A niece of the Pope lodged the case in the Italian courts claiming defamation of her uncle's memory. Katz lost his criminal case and was sentenced to fourteen months imprisonment, which was eventually set

233. *Giniewski*, App. No. 64016/00, para. 44.
234. *Id.*
235. *See id.* para. 50.
236. *See id.* para. 51-52.
237. *See id.* para. 53.
238. *Giniewski*, App. No. 64016/00, para.14.
239. *See Robert Katz*, TELEGRAPH, *available at* http://www.telegraph.co.uk/news/obituaries/religion-obituaries/8144130/Robert-Katz.html (last visited Dec. 3, 2014).

aside following an amnesty in 1980.[240]

The Italian judges in charge carried out an investigation of historical event themselves for two years, trying to find out what really happened on March 23rd and 24th of 1943. They travelled around Italy and Germany to interview witnesses.[241] The local court concluded that the "one and only truth" is that Pius XII did not know anything about the planned reprisal, at least no proof could be shown to the court.[242] The Appeal Court quashed the decision of the first instance court and decided not to get into any historical ascertainment of truth. It granted the historian "an almost absolute immunity on the basis of Article 33 of the Italian Constitution."[243] However, the Court of Cassation overturned this ruling and Katz's immunity was abolished. The case was sent back to the Appeal Court of Rome, which ruled against Katz and restated the "truth" established by the local court. According to Resta and Zeno-Zencovich, the final decision is extremely long and more like a historical treatise than a judicial opinion, and the court has somehow established an official, authoritative version of the story to replace Katz's findings.[244]

G. Holocaust Deniers and Revisionists

We must, when appreciating Rosmus-Wenninger's courage and achievements in revealing historical truth,[245] pay attention to a different category of historical studies that are not favoured by many state laws and communities, as well as historians. History revisionists and Holocaust deniers belong to this category in advocating different versions of the dark sides of human history such as war crimes, genocides and atrocities against humanity and concluded with clearly established historical facts.[246] Their expressions have been strictly

240. *See id.*; *see also* WEBER, *supra* note 46 (another version of the story is that the Supreme Court of Italy threw out the case after several appeals ten years later); *see also* Emma Brown, *Robert Katz, 77, Wrote History of WWII Massacre in Italy*, WASH. POST, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/10/21/AR2010102105984.html (last visited Dec. 3, 2014).

241. See Giorgio Resta & Vincenzo Zeno-Zencovich, *Judicial Truth and Historical Truth: The Case of the Ardeatine Quarries Massacre*, 31 L. & HIST. REV. 844, 877 (2013) for a more detailed analysis of the case.

242. *See id.* (the Court's role in finding historical truth would be under critiques of many historians and lawyers); *see also* discussion *infra* Section VI.

243. Resta & Zeno-Zencovich, *supra* note 242, at 877.

244. *See id.* at 878.

245. *See* discussion *infra* Section IV.A for her story.

246. *See* Lehideux & Isorni v. France, App. No. 1045/839, 1997 Y.B. Eur. Conv. on H.R. 55 (Eur. Comm'n on H.R.) (ruling speeches denying Holocaust are not protected by Article 10 of the European Convention of Human Rights).

restricted in most Western democracies whose laws directly treated such expressions as crimes against humanity and human dignity,[247] even in the case that such expressions are presented as academic discourse or an extreme form of freedom of expression. This is in particular the case in countries whose people experienced such tragedies.

When Garaudy challenged the orthodoxies of the Holocaust against Jews and the existence of Hilter's final solution in his book *The Founding Myth of Modern Israel*, he was found guilty of denial of crimes against humanity, racially defamatory statements, and incitement to racial hatred.[248] Before the ECtHR, Garaudy claimed that his views were not revisionist and his book was a political piece of work, instead of historical, questioning Israeli policies. He also complained that his book had been misunderstood and distorted by French Courts.[249] Garaudy submitted to the Court that the 24 *bis* of Act of 29 July 1881 Law, the French Freedom of Press Act, created "a censorship mechanism that wrongfully restricted freedom of expression."[250]

The Court reiterated that justification of a pro-Nazi policy is against the Convention's fundamental values and could not be allowed to enjoy the protection afforded under Article 10.[251] It regarded the author's expressions and ideas in the book not as historical research akin to a quest for the truth, but as trying to rehabilitate the National-Socialist regime and accusing victims of falsifying history. It concluded that "denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incident to hatred of them."[252]

But the latest decision of the Court shows a different tendency on a similar issue: the Armenian genocide, which has been long debated by history scholars all through the world and the official history of Turkey

247. *See* Kenneth Lasson, *Holocaust Denial and the First Amendment The Quest for Truth in a Free Society*, 6 GEO. MASON L. REV 35, 77 (1997).

248. *See* Garaudy v. France, App. No.65831/01 (E. Ct. H.R. June 24, 2003), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829 (last visited Dec. 3, 2014). Exclusion of protection of free speech rights of Holocaust denial and other similar speeches from Article 10 of the Convention, according to some scholars, is not justified and the case law of ECtHR shall be changed. *See, e.g.*, Hannes Cannie & Dirk Voorhoof, *The Abuse Clause and Freedom of Expression in the European Human Rights Convention: An Added Value for Democracy and Human Rights Protection?*, 29 NETHERLANDS Q. HUM. RTS. 54, 83 (2011)("Applying the abuse clause in order to deal with and legitimize the criminalization of the worst kinds of speech is not a desirable project for the future development of democracy in Europe.").

249. *See Garaudy*, App. No.65831/01, para. 17-18.

250. *Id.* para 20.

251. *See id.* para. 22.

252. *Id.* para. 23.

is under constant criticism. In *Perinçek v. Switzerland*, the Court denied the genocide from falling into the legal concept of "genocide" precisely defined by the International court of Justice and the International Criminal Tribunal for Rwanda and thus not convinced by the Swiss court's decision.[253] It regarded the plaintiffs as engaging in speech of a historical, legal and political nature as part of a heated debate.[254]

Many jurisdictions have special memory laws to punish speeches of deniers of the Holocaust, atrocities, war crimes and massacres and related revisionists.[255] In Europe, negationism is punishable in countries such as Germany, France, Austria, Belgium, Spain, Portugal and Switzerland.[256] Regarding revisionism in Europe, Germany and France use different legal terms to cover revisionist views, including approval or justification, and contestation.[257] This includes, in the European context, three verbs – to deny, to justify, and to minimize – repeatedly used to define negationism and revisionism.[258]

Memory law can be used by new democracies to declare a clear-cut departure from the past, although possibly at the cost of free expression, which they should respect and protect more. Consequent to the recent democratization process, Cambodia has recently passed the Law Against Non-recognition of the Crimes Committed during the Democratic Kampuchea Period, which attracted criticism from ARTICLE 19, a NGO defending free speech rights across the world and taking its name from Article 19 of the Universal Declaration of Human Rights. The law's purpose is to punish those who do not recognize, downplay, deny, or dispute the existence of the massive crimes in the

253. *See* Press Release, European Court of Human Rights, Criminal Conviction for Denial that the Atrocities Perpetrated Against the Armenian People in 1915 and Years After Constituted Genocide was Unjustified ((E. Ct. H.R. Dec. 17, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=003-4613832-5581451#{%22itemid%22:[%22003-4613832-5581451%22]} (last visited Dec. 3, 2014)[hereinafter Judgment Perincek v. Switzerland Press Release].

254. *See id.* at 3.

255. Revisionist perspective does not deny the Holocaust but rather aims to challenge the conventional view of responsibility for it; Negationist perspective denies the existence of holocaust, disregards settled historical norms, and distorts the relationship between the Holocaust and historical reality. *See* Emanuela Fronza, *Punishment of Negationism: The Difficult Dialogue Between Law and Memory*, 30 VT. L. REV. 609, 613-14 (2005); *see also* Pascale Bloch, *Response to Professor Fronza's the Punishment of Negationism*, 30 VT. L. REV. 627 (2005).

256. *See* Fronza, *supra* note 256, at 614-17.

257. *See id.* at 618.

258. *Id.* at 619.

Democratic Kampuchea period.[259]

Other jurisdictions, in contrast, are more tolerant and do not punish such expressions as Guraudy's that, according to ECtHR, are certainly against humanities and lead to racial defamation of Jews. In these jurisdictions, free speech rights are more respected and better protected, with the protection extending to extreme expressions.

The Canadian Supreme Court decided so in the famous 1992 Case of *R. v. Zundel*.[260] Ernst Zundel was very determined in voicing doubts over the Holocaust of Jews in his self-published pamphlet called *Did Six Million Really Die?*[261] He was convicted for spreading false news contrary to Section 181 of the Canadian Criminal Code.[262] Regarded as revisionist history, the pamphlet proposed: *inter alia*, the amount of Jewish victims is exaggerated and the Holocaust is a myth made by the Jewish conspiracy.[263] After convicted twice in lengthy legal proceedings, Zundel appealed and the Canadian Supreme Court held that the appeal shall be admitted and Section 181 is unconstitutional.[264] Chief Justice McLachlin, writing on behalf of the Court, said that Section 2(b) of the Canadian Charter of Rights and Freedoms protects all expression of non-violent form, and the content of Zundel's pamphlet is irrelevant in the instant case.[265] Furthermore, "[t]his Court has repeatedly affirmed that all communications which convey or attempt to convey meaning are protected by [Section] 2(b), unless the physical form by which the communication is made (for example, by a violent act) excludes protection."[266]

One may compare *Zundel* with an earlier 1990 case *Keegstra*. The Canadian Supreme Court ruled differently, upholding Keegstra's

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259. *Cambodia: Law Against Non-Recognition of the Crimes Committed During Democratic Kampuchea*, ARTICLE 19 (June 2013), *available at* http://www.article19.org/data/files/medialibrary/37127/13-06-27-cambodia-LA.pdf (last visited Dec. 3 2014).

260. R. v. Zundel, [1992] 2 S.C.R. 731 (Can.).

261. *See id.* at 743.

262. *See id.* at 744.

263. *See id.*

264. *See id.*

265. R. v. Zundel, [1992] 2 S.C.R. 731 (Can.). Zundel was also involved in two other cases regarding Holocaust denial and finally was denounced by the Canadian authority as a threat to national security who denied his application for Canadian citizenship. Deported back to Germany, he was convicted of repeated Holocaust denials and sentenced to five years imprisonment in 2007. Associated Press, *German Activist Ernst Zundel Gets 5 Years for Denying Holocaust*, FOX NEWS (Feb. 16, 2007), *available at* http://www.foxnews.com/story/2007/02/16/german-activist-ernst-zundel-gets-5-years-for-denying-holocaust (last visited Dec. 3, 2014).

266. *Zundel*, 2 S.C.R. at 753.

conviction of hate propaganda and dissemination.[267] In this case, Justice McLachlin, as the dissenting judge, opined in similar lines as in *Zundel* that the alleged speeches conveyed a meaning or a message of non-violent nature.[268] Thus, it is under the protection of Section 2(b), which protects the fundamental rights to free expression and thought.[269] It "protects all content of expression irrespective of the meaning or message sought to be conveyed, no matter how offensive it may be."[270] She reasoned that "Section 319(2) does not constitute a reasonable limit upon free speech" and "lacks the required degree of proportionality."[271]

In the United States, freedom of expression extends even to a much wider scope including hate speeches and Holocaust denial. As Persinger noted, "[o]ne of the principles this country holds dear is the opportunity to express and receive information regardless of how unpopular it may be."[272] This broadened free speech protection covers civil public discourses, including hate speeches and speeches denying Holocaust for various reasons.[273] Lasson noticed that the only jurisprudential remedy against Holocaust denial was by means of contract law.[274] The related case is about a Holocaust survivor who won back his denied award of $50,000 for providing successful evidence for the death of Jews at Auschwitz offered by the Institute for Historical Review.[275]

The American Constitution, said Lidsky, does not allow the State to "punish citizens for holding anti-Semitic beliefs nor prevent them from receiving information likely to foster such beliefs."[276] It is strongly argued that rebuttal of such speeches should be combated in markets of free speech and the State should be out of this terrain, since potential censorship may follow state interference in public discourses

267. R. v. Keegstra, [1990] 3 S.C.R. 697, 795-96 (Can.).

268. *Id.* at 701.

269. *Id.*

270. *Id.*

271. *Id.* at 703, 706.

272. Jason Persinger, *The Harm to Student First Amendment Rights When School Boards Make Curricular Decisions in Response to Political Pressure: A Critique of* Griswold v. Driscoll, 80 U. CIN. L. REV. 291, 312 (2012).

273. *See* Lyrissa Barnett Lidsky, *Where's the Harm?: Free Speech and the Regulation of Lies*, 65 WASH. & LEE L. REV. 1091, 1092 (2008) (arguing "unlike other countries, the United States has never justified the regulation of verifiably false speech on the grounds of that it poses a generalized threat of dignitary harm," such as Holocaust denial speeches).

274. *See* Lasson, *supra* note 248, at 77.

275. *Id.*

276. Lidsky, *supra* note 274, at 1095.

that are critical to a democracy.[277]

For many, the protection of free speech by the Americans probably goes too far sometimes, in particular for those who regard such unpopular, distorted speeches as a means to engrain critical thinking for students and provide bad examples. When Myers sought to remove books of Holocaust-denial nature at Texas A&M University Library, worrying about their influences among students, he was only able to get them removed from the category of Holocaust and Jewish History to a different sub-category called Errors and Inventions. Even worse, he attracted criticisms from fellow scholars across the country, arguing that any suppression of books is wrong, no matter how repugnant their message, since *no fine line can be drawn on the issue*. [278] Even his sympathizers agreed that such books should not be removed so that they could be used to study anti-Semitism.[279]

The popular fear among the Americans of a slippery road to state censorship of free expression bears a heavier weight than their impulse to prevent dignitary harms, mental distress, incitement, and social disorder consequent to such expressions.[280] The First Amendment right of free expression has been worshiped on the sanctuary altar by many Americans as an absolute right. [281]

H. Immortality in the Information Age

The Information Age has fundamentally changed the situations of posthumous reputation and history studies. Online defamation and privacy invasion cases have attracted attentions of legal scholars to debate their impact on defamation law and privacy law all over the world. Due to the information persistence on and easy access to the Internet,[282] on the one hand, the dead's reputation can be kept longer

277. *See id.* at 1095-99 (illustrating the reasons to allow the breathing space for lies); *see also* Lasson, *supra* note 248, at 52-64 (discussing the First Amendment consideration regarding Holocaust denial speeches in U.S. law).

278. *See* Mary Ann Roser, *A&M Professor Stirs Debate over Holocaust Denial Books*, H-NET (Apr. 11, 1996, 11:15 PM), *available at* http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=h-holocaust&month=9604&week=b&msg=MvFTsuPctbrs1hgNxSzTTQ&user=&pw= (last visited Dec. 3, 2014).

279. Lasson, *supra* note 248, at 43.

280. *See id.* at 68 (Lasson argued that "anything which restricts this right (freedom of self-expression) is a step on the road toward tyranny.").

281. *See* Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

282. *See* SIMSON GARFINKEL, DATABASE NATION: THE DEATH OF PRIVACY IN THE 21ST CENTURY (O'Reilly Media 2001) (discussing the threat of the Internet to personal data protection for information persistency); *see also* Jean-Francois Blanchette & Deborah G.

and become known via the Internet, and therefore becomes more connected with history. On the other hand, the popular use of the Internet makes defamation of the dead much easier because everyone has the chance to speak to the whole world on social media and social networks. While the Internet has posed a new threat to the reputations of the deceased, it also provides a new forum for public discussion of the past. The Internet has escalated the conflict between free expression and protection of the dead's reputation and privacy.

Disclosure of the dead's information, even for good purposes, attracts complaints from surviving families. In 2003, Dutch citizen Eiseres, as the only daughter of her Jewish parents and one of the so-called child survivors, sued in Amsterdam for the publication of information of her dead parents and her family. The Foundation of Digital Monument of the Jewish Community in Netherlands (*Stichting Digitaal Monument Joodse Gemeenschap)* was founded in 2000 for the purposes of keeping alive the memory of the dead victims of the Nazi Holocaust and for promoting scientific research and use of educational materials.[283] The plaintiff complained that the online publication of her family's data caused her psychological damage and invaded the privacy of the family.[284] The Amsterdam court judged in favor of the foundation after considering the facts that the deceased victims' information has already been disclosed online and such publication is not in violation of their honor and reputation in reality. It ruled that the publication is not unlawful and does not lead to abuse of right,[285] so that in the instant case "the importance of freedom of expression shall prevail."[286]

In some jurisdictions, the dead's online reputation has been well secured, which leads to censorship of history from state authorities. The Thai government, for instance, blocked the domestic access to the Yale University Press website in 2006 when the latter planned to publish Paul Handley's *The King Never Smiles: A Biography of Thailand's Bhumibol Adulyadej*.[287] The book portrayed a disfavored image of the dead king

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Johnson, *Data Retention and the Panopticon Society: The Social Benefits of Forgetfulness*, 18 INFO. SOC'Y 33 (2002); *see also* Jeffrey Rosen, *The Right to Be Forgotten*, 64 STAN. L. REV. ONLINE 88 (2012), *available at* http://www.stanfordlawreview.org/online/privacy-paradox/right-to-be-forgotten (last visited Dec. 3, 2014).

283. HR 12 november 2003, KB 2003, 1363 m.nt GJ (Eiseres/ Stichting Digitaal Monument Joodse Gemeenschap in Nederland en Gedaagde)(Neth.)[hereinafter Eiseres].

284. *Id.* at 6.1.

285. *Id.* at 7.4.

286. *Id.* (". . . moet het belang van de uitingsvrijheid de doorslag geven.").

287. James Warrick-Alexander, *Thailand Bars Univ. Website*, YALE DAILY NEWS, *available at* http://yaledailynews.com/blog/2006/02/06/_-31649/ (last visited Jan 9, 2015).

in contrast to the popular official image and encountered many obstacles in publication and dissemination from the Thai state authority.[288] In 2011, Joe Gordon, a Thai-born American, was punished with two and a half years' imprisonment for his defaming the royal family after he posted translated sections of the book online on American territory.[289] In such jurisdictions, the Internet has become a new battlefield to suppress criticisms of official history and national honor, of which posthumous defamation is a handy cause of action ready for use.

V. FREE SPEECH AND HISTORY CENSORSHIP

Many may regard the American law's strong protection of free speech, including hate speech and revisionism or negationism, as radical. But from another point of view, such protection draws a clean line to prevent the potential instrumental use of defamation law and privacy law to introduce history censorship by political power. As the protection of posthumous dignitarian personality rights covers the dead's reputation and privacy, we have observed the disproportional restrictions of free expression of journalists or historians by European domestic courts that were overruled by ECtHR.[290]

In this regard, the common law's general rejection of protecting posthumous reputation has wiped out the possibility totally, unless it has a strong connection to the living's legally protected interest. One has to admit that the American approach is the approach to best meet the international standards promulgated by abovementioned international human rights law.

A. International Standards

Article 19 of the Universal Declaration on Human Rights ("UDHR") protects the right to free expression and the rights to seek,

288. Jane Perlez, *A Banned Book Challenges Saintly Image of Thai King*, N.Y. TIMES (Sep. 25, 2006), *available at* http://www.nytimes.com/2006/09/25/world/asia/25thailand.html (last visited Dec. 3, 2014).

289. *Thai Judge Gives American Two Years' Jail for "Insulting Monarchy"*, GUARDIAN (Dec. 7, 2011), *available at* http://www.theguardian.com/world/2011/dec/08/thai-american-jail-insulting-monarchy (last visited Dec. 3, 2014).

290. *See generally* Editions Plon v. France, 2004-IV Eur. Ct. H.R. 39 (2004); Lehideux v. France, 1998-VII Eur. Ct. H.R. (1998); Mizzi v. Malta, Chamber Judgment Eur. Ct. H.R. (2006).

receive and impart information and ideas of all kinds.[291] Article 19 of the International Covenant on Civil and Political Rights ("ICCPR") prescribes in particular the right to freedom of expression and freedom to access to information and ideas, and recognizes relative duties and responsibilities carried with such rights, like to respect others' reputation, etc.[292] Article 20 of ICCPR excludes expressions of "propaganda of war, advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence" from its protection.[293] The rights to freedom of expression under such international treaties are broad enough to include and extend to "almost everything intended to covey meaning", including "information and ideas of all kinds",[294] even speeches regarded as "deeply offensive."[295]

According to these international treaties, expressions of historical research nature shall be protected by domestic law – in the same way as expressions of political discourse,[296] political canvassing,[297] journalism,[298] cultural and artistic expression,[299] teaching,[300] religious discourse,[301] etc.[302] In particular, General Comment No. 34 of the Human Rights Committee pointed out that "[a]ll forms of opinion are protected, including opinions of a political, scientific, *historic*, moral or religious nature. It is incompatible with paragraph 1 to criminalize the holding of an opinion."[303] If such standards can be strictly taken into

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291. Universal Declaration of Human Rights art. 19, G.A. Res 217 (III), U.N. Doc. A/RES/217 (III) (Dec. 10, 1948).

292. International Covenant on Civil and Political Rights art. 19, G.A. Res 2200A (XXI), U.N. Doc. A/Res/2200A(XXI), (Mar. 23, 1976).

293. *Id.* art. 20.

294. *Id.* art. 19.

295. U.N. Human Rights Comm., General Comment No. 34 on Art. 19: Freedoms of Opinion and Expression, Sept. 12, 2011, para. 11, CCPR/C/GC/34, 102nd Sess., (July 2011).

296. *See generally* Essono Mika Miha v. Equatorial Guinea, Communication No. 414/1990, U.N. Doc. CCPR/C/51/D/414/1990 (1994).

297. Concluding Observations on Japan, Human Rights Comm., 94th Sess., Oct. 30, 2008, para. 26, U.N. Doc. CCPR/C/JPN/CO/5, (Oct. 2008).

298. Mavlonov and Sa'di v. Uzbekistan, Human Rights Comm, 95th Sess., March 16-Apr. 9, 2009, para. 8.4, U.N. Doc. CCPR/C/95/D/1334/2004 (March 19, 2009).

299. Hak-Chul Shin v. Republic of Korea, Human Rights Comm., 80th Sess., March 15-Apr. 2, 2004, para. 7.2, U.N. Doc. CCPR//C/80/D/926/2000 (2004).

300. Ross v. Canada, Human Rights Comm., May 1, 1996, para. 11.1,U.N. Doc. CCPR/C/70/D/736/1997 (2000).

301. *Id.* at 11.5.

302. *See generally Cambodia: Joint Submission to the UN Universal Periodic Review*, ARTICLE 19, (June 24, 2013), *available at* http://www.article19.org/resources.php/resource/37121/en/cambodia:-joint-submission-to-the-un-universal-periodic-review (last visited Oct. 13, 2014) (discussion of International standards).

303. U.N. Human Rights Comm., General Comment No. 34 on Art. 19: Freedoms of

account by the contracting states of the ICCPR, they shall have not criminalized Holocaust deniers and revisionists. In practice, most such laws are justified by prevention of racial discrimination, racial incitement, to "national security or of public order (order public), or of public health or morals", as prescribed by Article 19.[304]

The strong tune of these important international laws, of which most western countries are signatories, has been much softened in legal realities even in European democracies. As discussed in the above Section IV (G), European democracies such as France, Spain, Germany and Belgium have adopted memory laws regarding Nazi Holocausts, atrocities and other crimes against humanity. Furthermore, recently the new democracies in Eastern Europe have passed laws condemning the past sins of the communists, including the Ukrainian Famine.[305] Even the European Union proposed a legislative framework for Member States that certain forms of conducts committed for a racist or xenophobic purpose such as, among others, "'publicly condoning, denying or grossly trivializing crimes of genocide, crimes against humanity and war crimes' should be punished with between one and three years' imprisonment."[306]

This attitude can be witnessed in ECtHR judgments. For example, in *Garaudy*, the Court unanimously ruled that speech in justification of a pro-Nazi policy could not be protected under Article 10, since it belongs to the clearly established historical facts and is "against the Convention's underlying values."[307] But similar laws are not without criticisms.[308] Even in France, which has taken to more memory laws than others with respect to Holocaust denial, Armenian genocide, slave trade and French colonialism, the French Constitutional Council announced the Armenian Genocide Law to be unconstitutional in a

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Opinion and Expression, Sept. 12, 2011, para. 9, CCPR/C/GC/34, 102nd Sess., (July 2011) (emphasis added by author).

304. International Covenant on Civil and Political Rights, *supra* note 293, art. 19

305. Josie Appleton, *Freedom for History? The Case Against Memory Laws*, FREE SPEECH DEBATE (April 3, 2013), *available at* http://freespeechdebate.com/en/discuss/freedom-for-history-the-case-against-memory-laws/ (last visited Dec. 3, 2014).

306. Council of the European Union, Council Framework Decision 2008/913/JHA, 2008 O.J. (L328/55) Art. 1(1)(c), Art. 3(2), *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008F0913:EN:NOT (last visited Dec. 3, 2014).

307. Garaudy v. France, HUMAN RIGHTS AND PUB. LAW UPDATE, *available at* http://www.1cor.com/1315/?form_1155.replyids=875 (last visited Dec. 3, 2013).

308. *See* Gerald Tishler, *When Academic Freedom and Freedom of Speech Confront Holocaust Denial and Group Libel: Comparative Perspectives*, 8 B.C. THIRD WORLD L.J. 65 (1988).

2012 decision.[309] The protection of free speech regarding the Armenian genocide has been supported most recently in a ECtHR judgment on December 17th, 2013 which overruled his criminal conviction under Swiss Criminal Code for "racialist discrimination."[310]

B. Historical Truth or Judicial Truth

While expressions regarding clearly established historical facts lead to controversies, it is easy for courts of law to make decisions, since there is no need to decide the truth of alleged expressions such as Holocaust denial and past atrocities. The court's role is to analyze the desired aims, the deployed methods and the content of the expression, and then decide whether or not such expression denies clearly established historical facts.[311] Whether memory laws are really a threat to free speech rights of the public, in particular historians, deserves more analysis when they restrict dissents of clearly established facts. Still, it is important to consider the common law approach that a clear-cut line is the best to protect free speech and to prevent state interference of free expression in posthumous defamation cases from sneaking into history censorship.

However, when controversies involve historical facts that are not clearly established, adjudicating courts will face difficulties, first in checking if such alleged expressions are true, and second, in balancing free speech rights with posthumous reputation protection.

Most courts will refuse to engage themselves in investigating historical facts or truth, because courts are neither composed for such purposes nor suitable for such tasks,[312] when truth is an absolute defense in many jurisdictions.[313] The argument from historians that historical

309. Nicholas Vinocur & Jon Hemming, *French Court Rules Armenian Genocide Law Unconstitutional*, NAT'L POST (Feb, 28, 2012), *available at* http://news.nationalpost.com/2012/02/28/french-court-rules-armenian-genocide-law-unconstitutional/ (last visited Dec. 3, 2014).

310. Judgment Perincek v. Switzerland Press Release, *supra* note 254.

311. Garaudy v. France, App. No.65831/01, para. 2 (E. Ct. H.R. June 24, 2003), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-23829 (last visited Dec. 3, 2014) (highlighting the French government's replies to the ECtHR).

312. The ECtHR in *Chauvy* explicated "it is an integral part of freedom of expression to seek historical truth and it is not the Court's role to arbitrate the underlying historical issues, which are part of a continuing debate between historians that shapes opinion as to the events which took place and their interpretation." Chauvy v. France, App. No. 64915/01, para. 69 (Eur. Ct. H.R. Sept. 29, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861 (last visited Dec. 3, 2014).

313. An exception, for example, is Israeli Defamation Act that does not recognize truthfulness as a defense except a case is of public concern, though in practice "the courts

truth should be settled among historians themselves instead of in court is popularly supported and catches the nerves of judges.[314] Due to the vagueness of truth in historical study, judges are uncomfortable with truth defenses and will try to avoid questing controversial content at stake.[315] And if they cannot consider the truth-value of facts and opinions,[316] judges can only rely on the facts and opinions brought up by parties whose reliability is within their expertise.[317] Judges will decide on other standards that qualify such speeches to be under protection, such as qualified professional methods, fair comment, public interest, balanced opinions, prudence, and good faith.[318]

But some judges do go that far to verify the truthfulness of defamation. In the above-discussed Italian case in 1970s, the Italian court conducted a two-year-long investigation in order to find what had happened, so that the dead Vatican Pop Pius XII was proved innocent of Katz's allegation of moral defects in being a bystander to the Ardeatine Quarries Massacre in Rome.[319] If courts involve themselves in such activities, then "the feasibility and desirability of authoritative judicial resolutions in matters of truth and falsity" is continuously under doubt.[320] The Israeli Supreme Court, in *Sharon v. Benziman*, ruled that given other grounds to decide the case exists; judges shall avoid determining historical truth.[321] The fallout of court-decided historical truth is that any potential mistakes in the future can impair the judiciary authority before the public. However, the Israeli courts have performed such a role in seeking historical truth in past decisions. According to Barak-Erez, the courts' recounts of the past have served as the official history of the Israeli state and its official institutions within which the state organs operate including the judiciary.[322]

If misjudgments were made, they have to be followed in later cases and this puts courts in a passive position when new evidence or new facts may emerge regarding the same historical controversy. The judiciary's independence, very much dependent on the separation of its

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seem to find public concern in the bulk of true publications". *But cf.* Peled, *The Israeli Law of Defamation: A Comparative Perspective and a Sociological Analysis*, 20 TRANSNAT'L L. & CONTEMP. PROBS. 735, 757 (2012).

314. *See* DE BAETS, *supra* note 4, at 86.
315. *Id.*
316. *Id.*
317. *Id.*
318. *See id.* at 87.
319. Resta & Zeno-Zencovich, *supra* note 242, at 877.
320. Peled, *supra* note 79, at 756.
321. *Id.* at 757.
322. Barak-Erez, *supra* note 29, at 100-01.

authority over legal issues from political power, will be diminished. Resta and Zeno-Zencovich observed this in their research concerning the dilemma between historical truth and judicial truth confronted by Italian courts.[323] As in the *Katz* case, when new evidence was released by the CIA and the Vatican Archives, new doubts raised, which proved that courts may not be the appropriate place to settle historical disputes.[324] The two authors in particular noted that when facts and past behaviors were evaluated in a court trial, the judgment made a judicial version of history and it entered the judicial circuit, influencing sequent decisions in a circular and self-referential way.[325] As the authors observed in Italian cases regarding historical controversies, judicial truth "starts to work as an external limit on the freedom of the media to report about an historical event."[326]

C. The Icons of History Censorship

Because it is an integral part of freedom of expression to seek historical truth,[327] a total ban on contesting speeches against official or popular history – including those with well-established historical facts – may lead to censorship of history, even in case of the Holocaust and atrocities. While totalitarian states use censorship to gain legitimacy by forbidding open debate over historical lies, democracies should be confident in open discourses of dark past in order to protect free speech in abstract sense, avoiding any slippery move toward state interference, and protecting the breathing space even for lies.[328] Constitutional courts should have a more active role to play in striking down such laws, as the French Constitutional Council's recent move in quashing the French government's peppy intervention of history, though somehow at the price of mental distress to Armenian people. History is not the stuff of justice, as Wartanian warned, "it belongs to historians who rectify lies, not to politicians."[329] As courts cannot decide on the truthfulness of the

323. Resta & Zeno-Zencovich, *supra* note 242, at 880-86.

324. *Id.* at 878–79.

325. *Id.* at 874–78. In multiple related cases regarding the Ardeatine Quarries Massacre in Rome, Italian courts offered different evaluations of historical facts. *Id.*

326. *Id.* at 874.

327. Chauvy v. France, App. No. 64915/01, para. 69 (Eur. Ct. H.R. Sept. 29, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861 (last visited Dec. 3, 2014).

328. Lidsky, *supra* note 274, at 1095.

329. *See* Raffi Wartanian, *Memory Laws in France and their Implications: Institutionalizing Social Harmony*, HUMANITY IN ACTION, *available at* http://www.humanityinaction.org/knowledgebase/117-memory-laws-in-france-and-their-implications-institutionalizing-social-harmony (last visited Dec. 3, 2014).

presented evidence by different parties, they have to ask for testimony from historians as expert witness.[330]

Courts should act more carefully in defamatory cases that involve historical facts that are not so clearly established but are of public interest. Courts shall leave historical facts for open discussions by others including historians. In such cases, courts also need to balance the dead's dignity, including their privacy and reputation – as well as their family's interests, both dignitary and commercial – with free speech rights of others. Since interference of free speech may be justified by protecting posthumous reputation, which is a legitimate goal in many laws, the focus of courts should be on seeking good balance, *not* investigation of truthfulness of the alleged expressions. But how can we judge the existence of potential chilling effects in court's balancing process or, more generally, in a judicial system? What are the possible criteria to define possible history censorship in court verdicts?

Above all, in my view we may look at how many categories of defense are available to defendants in defamation cases. The more defenses are allowed, and the higher the threshold of restriction of free expression, the less opportunity for censorship of history in court decisions.

As the oldest defense for defamation, truth defense has not been allowed as complete defense in some criminal charges.[331] When truth does not matter in defamation convictions, the purpose of the law is to protect the political authority or social ordering.[332] In criminal procedures, a combination of presumption of innocence and truth defense will obviously offer the charged a strong protection against defamation accusations. In *Colombani & Others v. France*, the ECtHR

330. There are critics against historians' role in court testimony. *See* Richard J. Evans, *History, Memory, and the Law: The Historian as Expert Witness*, 41 HIST. & THEORY 326 (2002) (commenting on Henry Rousso's book, the author argued that historians shall only elucidate the historical context and avoid being involved in judging whether an individual was guilty or otherwise of a crime).

331. *See* Elaine Pearson, *Criminal Defamation Laws in Indonesia Stifle Democracy*, HUM. RTS. WATCH, *available at* http://www.hrw.org/news/2010/06/10/criminal-defamation-laws-indonesia-stifle-democracy (last visited Dec. 3, 2014) (discussing the fact that in Indonesian law, truth is not a defense if an official found your expression to be insulting); Friedman, *supra* note 66, at 54 (noting that the truth only became an absolute defense in more democratic time; and authoritarian governments do not like criticism since truth hurts, so that in many ways the situation would be even worse if such charges were true, as said in the old maxim).

332. Elizabeth Samson, *The Freedom to Speak Truth to Power*, GUARDIAN, *available at* http://www.theguardian.com/commentisfree/libertycentral/2012/apr/20/libel-law-tourism-reform (last visited Dec. 3 2014).

regarded the rejection of the French judiciary of the applicant's use of truth defense as "beyond what is required to protect a person's reputation and right, even if that person was a head of a state or government."[333]

Another important defense widely adopted in most Western democracies is the public figure rule in particular in the U.S., which offers more protection over speeches regarding public figures.[334] The Chinese defamation law has not recognized such a doctrine though some judges have mentioned it in the latest verdicts.[335] This means that Chinese public figures, especially political figures, will enjoy equal protection of law with average people, while holding higher social status offers them more influence on public affairs. In Europe, the public figure doctrine (or rule) has gained more support at least in some ECtHR decisions. As in recent *Joe Luis*, the Court ruled that the limits of acceptable criticism in view of the press "are accordingly wider with regard to a politician acting in his public capacity than in relating to a private individual"; and politicians "must display a greater degree of tolerance."[336] Again, in *Lehideux & Isorni v. France*, the Commission emphasized the importance of historical debate about a public figure and the related different opinions.[337] In *Suarez v. Spain*, it stated that "[e]xceptions to freedom of expression must be interpreted

333. Colombani & Others v. France, App No 51279/99, para. 66 (E. Ct. H.R. Sept. 25, 2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60532 (last visited Dec. 3, 2014).

334. For an explanation of the public figure doctrine in U.S. law; *see* Scott Shackelford, *Fragile Merchandise: A Comparative Analysis of the Privacy Rights for Public Figures*, 49 AM. BUS. L.J. 125-208 (2012); George E. Stevens, *Local and Topical Pervasive Public Figures After Gertz.*, 66 JOURNALISM QUARTERLY 463 (1989); Catherine Hancock, *Origins of the Public Figure Doctrine in First Amendment Defamation Law*, N.Y. INT'L L. REV. 81 (2006); James C. Mitchell, *The Accidental Purist: Reclaiming the Gertz: All Purpose Public Figure Doctrine in the Age of "Celebrity Journalism"*, 22 LOY. L.A. ENT. L. REV. 559 (2002); John J. Watkins, *The Demise of the Public Figure Doctrine*, J. COMMC'N: A PUBL'N NAT'L SOC'Y FOR STUDY COMMC'N 47 (1977).

335. Hou Shoujin yu Zhongguodianying Jituan Gongshi Deng Qinhaimingyuquan An (霍寿金与中国电影集团公司等侵害名誉权案) Huo Shoujin v. China Film Group et al.] (Beijing High Ct. 2007) (China) *available at* http://www.fsou.com/html/text/fnl/1176753/117675388.html (last visited Dec. 3, 2014).

336. *Gutierrez Suarez*, App. No. 16023/07, para. 26 (2010); Case of Jerusalem v. Austria, App. No. 26958/95, para. 38 (Eur. Ct. H.R. May 27, 2001), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59220 (last visited Dec. 3, 2014).

337. *Lehideux*, App. No. 24662/94, para. 45; *see* Von Hannover v. Germany (No.2), App. Nos. 40660/08 and 60641/08, para. 64, 69 (Eur. Ct. H.R. Feb. 7, 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-109029 (last visited Dec. 3, 2014) (explaining wider protection of privacy for public figures' awarded even when no public interest is involved in publication).

restrictively."[338] In the 2013 *Eon v. France*, it emphasised on the wider range of criticism of politicians than ordinary people, since they willingly subject themselves to public and media scrutiny.[339]

In addition, the Assembly Resolution of the Council of Europe on the Right to Privacy prescribes that the right to privacy of public figures is lucrative and often invaded, but they must recognize that the social position they occupy in society automatically entails increased pressure on their privacy.[340] Also, most recently, the Council of Europe adopted a rule similar to public figure doctrine to restrict the extra-protection of public figures in their privacy (family life) and reputation.[341]

The admission of opinions and fair comment for defense are important for free speech protection. After *Milkovich v. Lorain Journal Co.*,[342] the U.S. defamation law has moved away from the long doctrine since *Sullivan*,[343] and a defense similar to opinion privilege has been adopted by the ECtHR when opinions or fair comments are "on a matter of public interest which was underpinned by a sufficient factual basis."[344]

In addition, courts should allow historians and journalists the defenses of professional standards, sufficient prudence, good faith, and participation in academic debates.[345] Once courts are willing to accept

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338. *Gutiérrez Suárez*, App. No. 16023/07, para. 26. Also, note a series of recent cases judged by ECtHR regarding the analysis of term of public figures in its verdicts. *See also* Verlagsgruppe News GmbH & Bobi v. Austria, App. No. 59631/09 (Eur. Ct. H.R. Apr. 3, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115013 (last visited Dec. 3, 2014); OOO 'Vesti' & Ukhov v. Russia, App. No. 21724/03 (Eur. Ct. H.R. Aug. 30, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119969 (last visited Dec. 3, 2014).

339. *ECtHR: Eon v France*, ARTICLE 19 (Aug. 1, 2013), *available at* http://www.article19.org/resources.php/resource/37188/en/ecthr:-eon-v-france (last visited Dec. 3 2014).

340. EUR. PARL. ASS., *Res. 1165 – Right to privacy*, 24th Sess., at para. 6 (1998), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta98/eres1165.htm (last visited Nov. 17, 2014).

341. EUR. PARL. ASS., *Res. 1577 – Towards decriminalization of defamation*, 34th Sess., at para. 6, 17.6 (2007), *available at* http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta07/eres1577.htm (last visited Nov. 17, 2014) (describing resolutions regarding defamation and privacy laws).

342. *See* Milkovich v. Lorain Journal Co., 497 U.S. 1, 21 (1990) (ruling the First Amendment does not require a separate "opinion" privilege limiting the application of state defamation laws).

343. *See generally* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

344. Jucha & Żak v. Poland, App. No. 19127/06, para. 45 (Eur. Ct. H.R. Jan. 23, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113919 (last visited Dec. 3, 2014).

345. *See* DE BAETS, *supra* note 4, at 87.

such defenses, even if the alleged narratives or accounts of historical events bear some falsity, judges in general will rule in favor of free speech. For instance, French historian Jean-Luc Einaudi was found guilty, but with no remedy awarded because his research is of a "serious, relevant and comprehensive" nature according to the court.[346]

In contrast, rejection of justifiable defenses in courts is a clear sign of potential censorship in posthumous defamation cases. As De Baets pointed out in his study, historians were found as defamers on the following grounds: "they did not interview eyewitnesses, overestimated the value of certain texts or acts of the complainant, did not consult original sources but literature only, or attached [more] importance to a single source."[347] De Baets' observations of the posthumous defamation cases find a parallel pattern in Chinese cases. In many cases, Chinese judges upheld defamation petitions because the authors did not use authoritative sources,[348] did not verify the sources used with the deceased's family before publication,[349] did not verify the sources such as oral history and published individual memoirs,[350] or did not work with due care in some cases,[351] etc. Also, there was no distinction between opinions and facts in historians' alleged texts made by Chinese courts.[352] It proved that the more defenses that are accepted by courts, the more that professional methods are respected, and the less that censorship will occur in court decisions.

Secondly, courts may restrict free expression on obviously weird grounds in some cases, when procedural requirements prevent other ways of protecting the deceased's reputation. In *Mizzi v. Malta*, the controversial text that was accused of being defamatory was a simple sentence "Dr. Boffa wanted to build there," which was read by the deceased's son as "attribut[ing] false and despicable intentions to his father,"[353] and by the Maltase Court of Appeals as "it implied that Dr.

346. Ariane Chemin, *Long History of a Forgotten Massacre*, LE POINT INT'L (Nov. 5, 2011), *available at* http://www.lepointinternational.com/it/cultura/europa/765-long-history-of-a-forgotten-massacre.html (last visited Dec. 3, 2014). Due to the brave historians' works on the subject, the killings of Algerians in France in 1961 were recognized by the French government and a plaque was put on the bridge where the event happened to commemorate the dead. *Id.*

347. DE BAETS, *supra* note 4, at 87.

348. *See* Bo Zhao, *Posthumous Reputation and Posthumous Privacy in China: The Dead, the Law, and the Social Transition*, 39 BROOK. J. INT'L L. 269, 323 (2014).

349. *See id.* at 347.

350. *See id.* at 341.

351. *See id.* at 347.

352. *See id.* at 347-48.

353. Mizzi v. Malta, App. No. 17320/10, para. 8 (Eur. Ct. H.R. Feb. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec.

Boffa had taken advantage of his position as head of the civil administration," a reading supported by the Constitutional Court.[354] It was denied by the ECtHR since such a reading "made it very difficult, if not impossible, for the applicant to provide direct corroboration of it."[355] In the Spanish *Gutiérrez Suarez*, the Spanish Supreme Court, was unable to declare defamation on solid grounds, pointed to the headline of the alleged article instead of body content, as violating the honor of the then deceased Moroccan King.[356] The ECtHR rejected this decision that headlines, whose aim is to call the attention of readers, must be read in combination with body context; and that "journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation."[357] Both interpretations of such texts were strange even to ordinary readers.

Lastly, censorship of free speech in posthumous defamation cases may generally be found in the disproportionality of court verdicts. This is seen either in improper protections given to posthumous reputation or privacy, while obviously it is not in great danger; or in the legal measures restricting free speech, such as injunctions, and remedies and damages awarded to plaintiffs, which are unusual, exceeding necessity.

While posthumous reputation is recognized as legitimate, it is a delicate issue for courts to balance the deceased's interests and their families' with the free speech of others, in particular when public interest is involved. As a fundamental value to democracy, free speech rights shall have certain priority, unless exceptional occasions are at stake.

Take *Szenes* for example, where Justice Cheshin even claimed the equal legal status of reputation to free speech in democracy and the Jewish community in particular, including reputation of the dead.[358] It defined that among others, the realization of collective identity of the state, its national history, and its own social goals form part of public interest.[359] The Israeli Supreme Court pointed out that the petition was filed under the public law to protect public interest, such as protecting the dignity and good name of the dead, protecting historical truth and

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3, 2014).

354. *Id.* para. 12, 15.

355. *Id.* para. 35.

356. The Constitutional Court of Spain upheld the decision. *Gutiérrez Suárez*, App. No. 16023/07, para. 10 ("It stated that the headlines of the information led the average reader to believe that the Moroccan royal family had been an accomplice to illegal trafficking in hashish.").

357. *Id.* para. 36.

358. *Szenes*, 53(3) PD 817 at para. 9, 12.

359. *Id.* para. 17.

honoring national values, as well as the rights of defendants. The court judged that regarding the circumstances that can justify curtailing freedom of expression, expressions that are offensive to other's feelings are not a strong ground, because "if every such offense was to justify infringement, surely these freedoms and indeed democracy itself would be emptied of meaning."[360]

The court admitted that a democracy should be sensitive to such feelings, but "[a] democratic society is based on the recognition that the feelings of some will inevitably be offended by their fellows' exercise of their respective freedoms."[361]The court stated explicitly that in explaining the protection of heroes and collective memory, law in a democracy does not preserve the image of its heroes by repressing freedom of expression, and that truth shall reject falsehood in the free market of ideas.[362] In conclusion, the court rejected protection of the dead's name under public law, but ruled that the requested remedy could only be sought in private law, where the balance could be made differently.[363]

In the above reasoning, we observe a *clear* but *high* threshold of "a compelling or urgent need" to justify the restriction of free speech.[364] This can be regarded as a standard to gauge potential censorship in relevant court decisions. At this point, the ECtHR carries out its balancing processes in a similar way when facing appeals from largely-diversified social-cultural backgrounds, by interpreting the adjective "necessary" in Article 10 (2) as implying the existence of a pressing social need."[365] On the whole, the Court balanced different interests in a much-fixed pattern, in particular when it takes into account the margin of appreciation of Contracting States, so that it will not interfere with domestic affairs.[366] The Court usually checks if state interference with free speech has a legitimate aim prescribed by law, if such restriction is necessary to a democracy, and if it is in accordance with the

360. *Id.* para. 20.

361. *Id.* para. 22.

362. *Id.* para. 27-28.

363. *Szenes*, 53(3) PD 817 at para. 28.

364. In Justice Mazza's words, "a concrete and imminent danger of uprooting the public order." *Id.* para. 28. (quoting HCJ 2888/97 Novik v. Channel Two Television & Radio PD 51(5)193, 202 (Isr.)).

365. *See* Chauvy v. France, App. No. 64915/01 (Eur. Ct. H.R. Sept. 29, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861 (last visited Dec. 3, 2014); *see* Éditions Plon v. France, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

366. *See Chauvy*, App. No. 64915/01; *see Éditions Plon*, App. No. 58148/00.

proportionality standard, not exceeding necessity.[367]

In *Chauvy*, the Court noted that it must consider the public interest in being informed of the circumstances of the previous French Resistance leader, and the need to protect the reputation of Mr. and Mrs. Aubrac in the impugned betrayal of the book.[368] Furthermore, the Court prescribed that it "must verify whether the state authorities struck a fair balance when protecting two values guaranteed by the Convention", namely the right of expression and the right of others to reputation.[369] As pointed out already, the Court did not judge the legitimacy in protecting posthumous reputation or honor by contracting states, since this is a matter within margin of apperception.[370] It merely executed its supervisory role to verify the proper use of legal measures in limiting free speech, and the proportionality of the interference contingent on the nature and severity of the penalties imposed. [371]

In *Plon*, the Court pointed out the circumstance of time distance as an important element in striking a good balance.[372] The Court found the book ban in violation of Article 10 in that the more time elapsed after the President's death, the more the public interest in debating the President's two terms of presidency prevailed over his interest to medical confidentiality, in particular when the duty of confidentiality was breached and there was already dissemination in traditional media and the Internet.[373] Another important ruling from the ECtHR is that posthumous reputation is a much weaker interest in balancing different values under its protection.[374]

The discussion of the proportionality standard brings us to available measures used by courts to restrict free speech in posthumous defamation cases. Usually this could be monetary damages awarded to plaintiffs or defamation victims, and injunctions (prohibitory or

367. *See Chauvy*, App. No. 64915/01; *see Éditions Plon*, App. No. 58148/00.

368. *Chauvy*, App. No. 64915/01, para. 69.

369. *Id.* para. 70.

370. Mizzi v. Malta, App. No. 17320/10 (Eur. Ct. H.R. Feb. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 4, 2014).

371. *Chauvy*, 2004-VI Eur. Ct. H.R. at para. 78 ("Assessing the proportionality of the interference, the nature and severity of the penalties imposed.").

372. *See* Éditions Plon v. France, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014).

373. *Id.* para. 53.

374. Mizzi v. Malta, App. No. 17320/10, para. 39 (Eur. Ct. H.R. Feb. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 3, 2014) (ruling that "in this respect, although the possibility of bringing such an action existed in the Maltese legal system . . . it is of the view that this element should have been considered by the domestic courts when assessing the proportionality of the interference.").

mandatory). Since defamation of the dead should generally cause less harm than defamation of the living, damages awarded accordingly should be comparatively lower. As seen in *Mizzi v. Malta*, the awarded damages were a symbolic amount of 700 euros.[375] Interim injunctions are more acceptable for prevention of potential harm when the real circumstances are unclear. [376] If a book has a small defamatory part about a deceased historical figure and can be corrected by deletion or change of text, banning the whole book after publication is obviously an indication of potential censorship by state.[377]

In many occasions, an obligatory publication of apology or court verdict will be ordered to restore the deceased's reputation. Though this might be an insult to authors, its real impact is doubtful in social reality. Bans and publication of apologies on widely circulated media or on the Internet could bring even more public attention because of the famous Streisand effect.[378] In the history of censorship, many times banning books did not stop circulations; instead the bans even brought more readers to banned authors.

D. A Threat from Law or to Law?

A last point to make is that whether a law implements history censorship – or censorship of expressions regarding the past of the dead – has to be defined more carefully, *not* denoted in a few cases regarding posthumous defamation and privacy-invasion. It has to be found in a series of similar cases in which judges have constantly restricted free speech rights with respect to historical expressions, by upholding defamation convictions, awarding large damages, and imposing unnecessary injunctions. It has to be demonstrated that the pursued legal aims are not just and prescribed by law. It has to be demonstrated that free expression has been given less weight than they should have been, if following the proportionality standard endorsed by the ECtHR.[379] However, if a jurisdiction always decides in favor of

375. *See id.* para. 39. Also, an award of eighty-eight Euros in damages is more or less symbolic in the famous *Flux v. Moldova*. *See also* Flux v. Moldova (No. 6) App. No. 22824/04 (Eur. Ct. H.R. Oct. 29, 2008), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-88063 (last visited Dec. 3, 2014).

376. For instance, European Court of Human Rights accepted interim injunctions in general. *Editions Plon*, 2004-IV Eur. Ct. H.R. at para. 35, 48.

377. As pointed out by the ECtHR in *Plon*. *See id.*

378. *See* Mario Cacciottolo, *The Streisand Effect: When Censorship Backfires*, BBC (last updated June 15, 2012, 11:19 PM), *available at* http://www.bbc.co.uk/news/uk-18458567 (last visited Dec. 3, 2014).

379. *See* discussion *supra* Section V(C).

posthumous defamation regarding deceased political figures with impact in history, while it awards no such protection to the ordinary deceased, we may observe possible censorship of history conducted in a legal system.

While historians and free speech rights advocators criticize censorship of history via legal protection of the dead's reputation and privacy, proponents of posthumous dignitary rights may argue that the presumed chilling effects are not only imaginary, but also practically not true. For example, for Hannes Rösler, the idea that a posthumous personality right could deter valuable historical research is not well justified.[380] First of all, Rösler argued, since truth is the commonly acceptable defense of libel charges, it will motivate historians to publish more accurate, factually-based statements.[381] A second reason, he argued, is that adoption of the narrow dignitary personality right could encourage free speech instead of chilling it.[382] If one knows that his lifetime achievement and reputation in the public memory can be protected, he would participate more actively in public discourse and disclose more personal information.[383] A third reason is that due to the failure of the marketplace of ideas, there is public interest to protect reputation against defamatory statements, in particular those against the deceased and defenseless minorities.[384] Other arguments include the lack of societal interest in false communication, potential exceptional protection only for severely infringements, and proportional restriction via balanced decisions.[385]

Rösler's arguments cannot be denied in abstract. In reality, however, counter examples can be found in some ECtHR cases regarding posthumous defamation and privacy invasion. For many contracting states, protection of the dead's dignity and personality nevertheless ended up in decisions that were overturned by the Court for free speech protection.[386] The threat from the deceased's families with a defamation suit, whether criminal or civil, causes authors to self-censor before publication. The legal recognition of posthumous dignity

380. Rösler, *supra* note 77, at 190.

381. *Id.* at 190.

382. *Id.* at 188.

383. *Id.* at 188-89.

384. *Id.* at 189.

385. Rösler, *supra* note 77, at 188-91.

386. *See* Éditions Plon v. France, App. No. 58148/00 (Eur. Ct. H.R. Aug. 18, 2004), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61760 (last visited Dec. 3, 2014); Mizzi v. Malta, App. No. 17320/10 (Eur. Ct. H.R. Feb. 22, 2012), *available at* hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107530 (last visited Dec. 3, 2014); Gutierrez Suarez v. Spain, App. No. 16023/07 (Eur. Ct. H.R. 2012).

(including reputation, privacy, honor, etc.) per se provides a legal avenue to incorporate potential state censorship. This lies in the use of law to police the bounds of certain speeches, in particular speeches regarding Holocaust denial, which shall draw our caution. When state authority can regard all Holocaust or genocide denial or similar speeches illegal, it may exclude other speeches from protection of free speech as well, if not monitored closely by the public. Thus "a government that can tell us what not to say can also tell us what we must say",[387] which is detrimental to democracy holding free speech as the most fundamental value. In a more general sense, the law's protection of the dead's dignitary interests and the related interest of the living may cause a threat or chilling effect on free speech for democracy.

With respect to law's instrumental use within this context, the threat is not only from law, but *to law itself*. According to Douglas, "certain features that define law as a formal discourse" concerning harm, culpability, proof and jurisdiction, have "distort[ed] . . . the very history record that law has been asked to [protect]."[388] Even worse is that when law serves the end to protect certain kinds of information and suppress others, especially when involving historical facts that are too long to be investigated, law reaches its limit, as seen in the controversies around truth commissions in many post-war countries. With impossible missions, the real threat is to law itself, not only to historical research. Law cannot risk its independence, authority, and trust from the public to impose threat on free expression that is crucial to a democracy.

VI. LAW, POLITICS AND CULTURE

Law is vulnerable before politics. The Russian authority's passive attitude to the rehabilitation of Katyn tragedy victims showcases that a political state can have difficulties confronting its dark past.[389] The unexpected termination of the official investigation of the tragedy in the 1990s especially reveals the law's weakness in handling sensitive, political events. When history has a significant role to play in politics,

387. Smith, *supra* note 101, at 137.

388. Lawrence R. Douglas, *Policing the Past: Holocaust Denial and the Law, in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATION 67, 68 (Robert C. Post ed., 1998).

389. *See* OOO 'Vesti' & Ukhov v. Russia, App. No. 21724/03 (Eur. Ct. H.R. Aug. 30, 2013), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-119969 (last visited Dec. 3, 2014).

censorship of history becomes feasible and law might be a victim of political suppression of those who talk frankly about the past. Law is also a product of a particular culture. While in Germany and other continental law countries the dead's dignity and honor is significant and protected as fundamental values by law, common law countries offer almost no protection of such posthumous interests. This section tries to interpret, following the above case analysis, the political and cultural rationales underpinning potential history censorship within different conceptual and cultural embeddings.

A. Politics and Law

Authoritarian regimes and dictatorial states have the most and strongest motives to censor history. The primary reason is to gain legitimacy and support of the public by use (misuse or abuse) of history of which censorship and control of the past is a necessity. Dictators know well the power of history and lie to distort the reputation of many deceased opponents. For example, Stalin removed Leon Trotsky out of books to dehumanize him because the true record of Trotsky denied Stalin as the true heir of Lenin, showing no crucial role in the Bolsheviks' victory.[390] The extreme use of history for legitimacy is the distortion of the North Korean War by North Korean dictators who described the West as the invader, diminished external military aids, and advocated "a total victory" on its own.[391] The past is usually cast as miserable and dark by a new political regime, so that a new community can be promoted and cherished for development and achievement.

Second, the deceased can be forged either as a moral model for others to follow, or as negative examples punished for political purposes. But, such distortion or fabrication of posthumous reputation can cause serious distrust of the regime in eventual disclosure of facts. The famous Chinese moral model Lei Feng set up by communist propaganda recently has been under serious scrutiny by a new generation of historians.[392] In contrast, many landlords who are

390. MACMILLAN, *supra* note 4, at 25.

391. A similar story happens to USSR's support in North Korean's version of the War. Sarah Buckley, *North Korea's 'Creative' History*, BBC NEWS ONLINE (July 25, 2003, 14:30 GMT), *available at* http://news.bbc.co.uk/2/hi/asia-pacific/3096265.stm (last visited Dec. 3, 2014); *Korean Independence: A History Re-Written by North Korea*, NEW FOCUS INT'L (Aug. 15, 2013), *available at* http://newfocusintl.com/independence-day-in-north-korea-changing-with-the-times/ (last visited Nov. 13, 2014).

392. The defamer of the dead hero was detained by Beijing police recently in China's new wave to crackdown online social media which threats official authority in various fields. *Questioning of Lei Feng's Frugality Leads to Detention*, WALL ST. J. (Aug. 21,

regarded as notorious and blood-sucking and who died during China's numerous political movements, have been later found out to be merely fabrications for political ends by the Chinese Communist Party.[393]

Even dictators themselves who have been worshipped by the populace are products of such powerful propaganda machines. Secrets and sins deliberately covered from being known would shock the public later. Mao's real characteristics nowadays gradually emerge before the public because of the disclosure of his brutal political decisions and policies from two sources: the declassification of some archives of former the Soviet Union regarding China,[394] and the recently published stories of Mao's private life by the individuals who worked for or around him.[395]

When public figures' reputations are so closely affiliated with the official history of a state, to protect their reputations is to protect the official history. Turkey's special law directly protects the honor and dignity of the dead Ataturk.[396] The Egyptian penal code criminalized and allowed detention for insulting the president before the Arab Spring.[397] In these countries, law has been openly used for suppression of speeches concerning the late public figures as direct censorship of history per se.

"As social norms change, laws that touch on reputation and privacy change along with them."[398] The shift in Stalin's reputation in Russia after his death reflects the influences of political change on social morals and ethos in Russian community. With the fall of communism in particular, the Russian authority to some extent allowed the

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2013, 8:00 PM), *available at* http://blogs.wsj.com/chinarealtime/2013/08/21/four-detained-for-questioning-lei-fengs-frugality/ (last visited Dec. 3, 2014).

393. For example, Liu Wencai was a fabricated figure of the communist propaganda machine, which is totally against his real personality, to incite political hatred between classes during the Culture Revolution. Gao Wenqian & Regina Hackett, *Revisiting the Past: Insights from the Art of the Cultural Revolution,* HUMAN RTS. IN CHINA (Oct. 21, 2009), *available at* http://www.hrichina.org/content/3824 (last visited Dec. 3, 2014).

394. *See* ALEXANDER V. PANTSOV & STEVEN I. LEVINE, MAO: THE REAL STORY (Simon & Schuster reprint ed. 2013).

395. Mao's personal doctor, for instance, wrote a book portraying a different private life from the official version, which can lower the great leader's honor. *See* LI ZHI-SUI, THE PRIVATE LIFE OF CHAIRMAN MAO (Random House 1996).

396. *Law Concerning Crimes Committed against Ataturk No. 5816*, U.S. FOUNDATION, INC (2014), *available at* http://www.usefoundation.org/view/878 (last visited Dec. 3, 2014); *see* MELZER, *supra* note 56, at 40.

397. MELZER, *supra* note 56, at 188.

398. FRIEDMAN, *supra* note 66, at 5.

discussion of Stalin's cruel ruling by historians and witnesses.[399] Attitudes to Stalin are polarized between supporters and dissents, and between the Russian state authority and many EU countries that often compare him with Hitler. Recently top Russian leaders reclassified the related archives and portrayed him as an effective crisis manager.[400] The earlier popular, liberal trend among Russian politicians after the collapse of communism seems to have been replaced with a strong sentiment of national pride and honor. This may somehow explain the Russian authority's reluctance to rehabilitate the deceased Polish victims of the Katyn tragedy, although Russia itself has a rehabilitation law to restore the reputations of those who died under communist repression.

However, there is no turning back in Eastern European countries that have joined the EU and willingly embraced Western political ideology after the collapse of communism. Many countries in Eastern Europe passed rehabilitation laws, investigated previous politically charged suppressions, and convicted political criminals. Posthumous reputations that were tarnished under previous communist regimes got the chance to be restored and remedied. For instance, relatives of the deceased Latvian peasants, who died in hands of paramilitary combatants led by communist partisans and supported by the Russian during the WWII, accused the surviving partisan of war crimes for killing innocent civilians.[401] Similar cases emerged especially after the collapse of the Berlin Wall, involving re-evaluation of communist resistant activities during WWII against Nazi occupation. In France, the *Chauvy* case involves the defamation of surviving communist resistant forces with suspicion of their potential betrayal.[402] In Italy, public debate on the values of the communist resistance was dramatically reopened and the sudden increase in civil actions concerning violations of personality rights was an immediate byproduct of the changed political climate and of a new phase of public confrontation with the

399. Anne Garrels, *Libel Case Sparks New Focus on Stalin's Reputation*, NPR (Sept. 8, 2009, 3:18 PM), *available at* http://www.npr.org/templates/story/story.php?storyId=112642329 (last visited Dec. 3, 2014).

400. *Id.*

401. *See* Kononov v. Latvia, App. No. 36376/04 (Eur. Ct. H.R. May 17, 2010), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669 (last visited Dec. 3, 2014).

402. *See* Chauvy v. France, App. No. 64915/01 (Eur. Ct. H.R. Sept. 29, 2004), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61861 (last visited Dec. 3, 2014).

past.[403]

Political change can cause re-evaluation of the past and reputations of the deceased in new democracies such as Spain, Peru, Chile, Argentina, etc. These countries went through political transition from dictatorship or totalitarian states to democracy. In these countries, it is possible to investigate political leaders' past sins and hidden secrets of militaries in previous oppression. Therefore, many people's reputations including the deceased could be altered in the context of political transition. Posthumous reputation can be protected by laws strongly supported by politicians who survived collapsed regimes or by their families and supporters who still stay in power. Further complicating the situation, amnesty laws may block the way to seek historical truth. To prevent opening old historical wounds, which may detain the restoration of democracy, the Spanish community reached compromise and passed the 1977 Amnesty Law after Franco's death.[404] Though the treatment of the legacy of Franco's long dictatorship is still controversial, defamation of Franco cannot yet be tolerated by the deceased's proponents.[405]

In a sense, we may take Spanish Amnesty Law as a form of forced silencing or censorship of history. The 1977 Law is incompatible with international human rights law that overrides the imprescriptibility principle in criminal law. In addition, the Spanish Law to Historical Memory also brings the legal principles of irretroactivity and predictability into question. Both principles are critical to establishment of rule of law in new democracies.[406] If such fundamental legal doctrines or principles can be ignored, even for higher values like justice and human dignity, the authority of law and its independence from political power would be under threat of political whims and sensations, which escalate easily during political change.

More importantly, Spain's Amnesty Law is the pact of different social forces that compromised their interests to have a better future. The law is of the nature of a social contract that should bear binding force over generations. A breach under political pressure can

403. In Italy there are cases against the communist resistant force concerning the Ardeatine Quarries Massacre. *See* Resta & Zeno-Zencovich, *supra* note 242, at 861–64.

404. Kadribasic, *supra* note 108, at 132.

405. It seemed that both supporters and the opponents have not been satisfied with the ways that the memory and legacy of Franco has been handled so far. Guy Hedgecoe, *Spanish Left Cold Over 'Franco in a fridge,'* DW (Aug. 19, 2013), *available at* http://www.dw.de/spanish-left-cold-over-franco-in-a-fridge/a-17029255 (last visited Dec. 3, 2014).

406. For a general discussion of internal principles of law see FULLER, *supra* note 8.

deconstruct mutual trust within the Spanish community. The idea that promise must be kept is essential for the existence and dignity of all human communities in the long run. This compromise or mutual trust should not be broken to meet short-term political needs. Otherwise, law is merely an instrument under the manipulation of politicians or the masses.[407]

Recently, Spanish law made a significant move in *Garzon* in which law stayed away from political whim,[408] indicating that Spain now has a firm democracy and rule of law. In similar political context, the Israeli Supreme Court judged *Szenes* in favor of free speech, instead of being motivated by the political consideration to promote Israeli identity for state construction.[409] In this case, national identity represented by the deceased heroine is of political importance to collective memory and collective identity, but the defamatory threat is not high enough to require more protection than free speech. The decision would have been different before in the formative stage of the Israeli State, when the Israeli law had played a significant role in state-construction and identity establishment. As Bilsky noticed, this transformation period lasted until the 1990s since the Zionist revolution, and many of the constitutional moments involved transformation trials of a more political nature.[410]

In mature democracies, law is more independent from political power and is strong enough to rebut the political need of history censorship. Free speech rights are regarded as fundamental to a well-functioning democracy and are well protected by its constitution. Furthermore, political states draw legitimacy from ballots, not from history. Another notable reason that we see less censorship of history in democracies is that in democracies, citizens are treated equally as mature fellows, capable of making rational decisions themselves with free access to information. A political state is *not* assumed to be in the position to tell people what and what not to believe; which is contrary to authoritarian states, where there is a paternalist approach to think on behalf of subordinates. In addition, we have to note that democratic communities are more tolerant due to multiculturalist nature,

407. For a discussion of the independence of law and rule of law in Modern state from politics see PHILIPPE NONET & PHILIP SELZNICK, LAW & SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978).

408. *See* Roht-Arriaza, *supra* note 176.

409. *See generally* HCJ 6126/94 Szenes v. Broadcasting Authority 53(3) PD 817 [1999] (Isr.).

410. LEORA BILSKY, LAW, MEANING & VIOLENCE: TRANSFORMATIVE JUSTICE ISRAELI IDENTITY ON TRIAL 7-10 (Univ. of Michigan Press 2004).

recognizing and treating different cultures rather equally.[411]

These are the reasons why most countries that have decriminalized defamation are mature Western democracies. However, this is not to say that rule of law and democracy, both respecting free speech as a fundamental value, can eradicate potential history censorship even in Western democracies. But, the non-protection of the dead's reputation and dignity in common law countries can block history censorship as justified by protection of the dead as a whole. Though the deceased's living family may sue to protect their own interest affiliated with the deceased, it offers no big chance to control information regarding the dead in a more systematic way.

Protection of the dead's dignitary interest by some continental law countries, in contrast, leaves a legal avenue open for state interference with history, even if such cases have to be waged by private parties. The disproportional interference of free speech rights, discussed above with respect to *Plon, Mizzi, Lehideux, Kurzac, Gutiérrez Suárez,* etc., denotes possible history censorship, even by European democracies via the protection of posthumous interests. Such cases, however, verify the importance of a transnational court in securing free speech rights and preventing state censorship of history. The critical role for the ECtHR is to make decisions from *a neutral position,* away from the compelling pressures of domestic politics, national identities, and cultural traditions. The contribution of the Court, therefore, lies in its juridical authority to bring difficult cases beyond the political and cultural limitations of domestic laws to meet higher standards.

We have to understand that protection of the dead's dignity is a well-justified end, since in many cultures the dead and their dignity are important, and law has to protect the related interests both of the living and the deceased. Law is a product of culture, and the values and morals of a particular culture should be respected in pursuit of human rights. The next section explains the reasons why reputations of the dead are important in some cultures, but not in others, as well as the resulting influence on law.

B. Law and Culture

The living law, Friedman said, "has its messages and functions . . . and one purpose is to protect the people who matter in society", and such a protection "prevents society itself from severe structural

411. CHARLES TAYLOR ET AL., MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 27 (Amy Gutmann ed., 6th ed. 1994).

damage."[412] Whether reputation and dignity of the dead deserve legal protection depends on a particular culture that defines social functions of reputation in that community. Reputation in general, according to Post, can be analyzed from the perspectives of honor, intangible property and dignity.[413] Reputation, as personal, intangible property, corresponds more to a community of individualist nature that comprehends reputation as individual achievements on the free market. In contrast, both the understandings of reputation as honor and as dignity reside in communities of a more collective nature, though in different ways.[414]

The European continental laws represented by German law and French law have been established on a similar base of a communitarian or collective nature, stressing the value of human honor and dignity in more hierarchal communities.[415] Reputation as honor has deep roots in the two communities through their aristocratic traditions and has been leveled up from privileged, minority social groups, to the concept of mutual respects among all community members.[416] Actually, this kind of honor in reputation represents individuals' social status in a community that cannot be achieved by individual "effort and labor, [but as] a right to it by virtue of the status with which society endows his social role".[417] And "the loss of honor is a loss of status and personal identity; the value of a good name 'ought to be more precious' than life."[418]

This emphasis on honor has been reflected in insult laws and memory laws that are popular in Europe, providing special protection for reputation of special groups, although as in Germany, it is "a kind of living fossil."[419] The emphasis on human dignity and honor in

412. FRIEDMAN, supra note 66, at 12.

413. Post, *supra* note 12, at 693 (discussion of the concept of reputation as honor, personal property and dignity, which in the author's view co-exist in reputation but to different extents).

414. *Id.* (though Post talked about common law countries, his analysis can be applied to other communities equally).

415. Whitman, *supra* note 64, at 1284-85 (arguing that "the European culture of honor and dignity reaches very deep into everyday social life, covering what to us seem astoundingly trivial matters of civility" and describing "the dignitary cultures of civility that reign in both France and Germany today and traces the sources of those cultures to old traditions of social hierarchy."); *see also* Peled, *supra* note 79, at 779–82 (arguing the communitarian tradition in German defamation law).

416. Whitman, *supra* note 64, at 1384-90 ("a commitment to the broad distribution of honor or dignity throughout society.").

417. Post, *supra* note 12, at 700.

418. *Id.* at 703.

419. Whitman, *supra* note 64, at 1314.

European jurisdictions can be witnessed both in Article One of the European Union Charter of Fundamental rights, and in the constitutions of many European countries.[420] Protection of human dignity has been recognized by the ECtHR in past judgments,[421] and the Court regards human dignity as supporting other Convention rights.[422] Following McCruden, "[h]uman dignity has also been incorporated judicially as a general principle of European Community law, deriving from the constitutional traditions common to Member States."[423]

Since honor and dignity refer to social status of individuals, protection of the dead's reputation is more comprehensible against such legal-social backgrounds. The dead still need to be respected because of dignity as past human beings, and because their social status previous to death shall be cherished. As the German Constitutional Court pointed out long ago in *Mephisto*, "the human dignity of the deceased was of overriding constitutional value" and "it would be incompatible with the constitutional command of the inviolability of human dignity, if individuals could be freely disparaged after death."[424] In the decision, as Brugger commented elsewhere, an apparent communitarian concept could be found in German constitutional law.[425]

A similar treatment can be found in the Israeli Basic Law: Human Dignity and Liberty in 1992. According to the Supreme Court of Israel, the right of human dignity includes not only honor, but also reputation, privacy and property, among others;[426] and both the right to reputation and the freedom of speech are derived from the mother right of human

420. Rösler, *supra* note 77, at 170; *see also* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 216-17 (2008) (explaining Rao's accounts of constitutional commitment to human dignity in Germany, France, South Africa, and Canada, as well as in international laws).

421. First mentioned in Tyrer v United Kingdom by the Court, involving corporal punishment, as against Article 3 protecting a person's dignity and physical integrity. *See* Tyrer v United Kingdom, App. No. 5856/72, para. 33 (E. Ct. H.R. Apr. 25, 1978), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57587 (last visited Dec. 3, 2014).

422. Pretty v. United Kingdom, App. No. 2346/02, para. 65 (E. Ct. H.R. July 29, 2002), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60448 (last visited Dec. 3, 2014) (ruling "the very essence of the Convention is respect for human dignity and human freedom); *see also* Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 683-84 (2008) (discussing the ECtHR's protection of human dignity).

423. McCrudden, *supra* note 423, at 683.

424. Rösler, *supra* note 77, at 177-78.

425. *See* Winfried Brugger, *Communitarianism as the Social and Legal Theory Behind the German Constitution*, 2 INT'L J. CONST. L. 431, 433 (2004).

426. Peled, *supra* note 79, at 743-44.

dignity.[427] In analyzing the jurisprudential foundations of Israeli defamation law, Peled noticed the moral influences of Jewish Law that "attaches significant weight to the right of reputation and treats defamation with great severity", and whose protection of the dead has been absorbed by Israeli defamation law.[428]

Peled found that the Jewish majority, as the dominating force in shaping the country's culture and politics before late 1970s, "was characterized . . . by communitarianism, collectivism and internal solidarity."[429] He concluded that communitarianism and solidarity parallel with each other with an ideology that values honor greatly and limits freedom and liberty "*in the name of moral commitment to society*", and demands individuals' compromise.[430] However after the late 1970s, Peled noticed the Israeli law gradually witnessed a decline in such collective and communitarian tendencies for a variety of reasons.[431]

We have to distinguish the two concepts of reputation which both originated from such collective communities: reputation as honor and reputation as dignity, which in Post's view refer to different things.[432] Reputation as honor concerns unequal social status in honor communities with a deferential, hierarchical nature,[433] while reputation as dignity refers to equal social status of community members and equal participation in communal issues.[434] According to Whitman, European communities represented by France and Germany have leveled up the protection of honor (reputation) of higher social classes to other social classes after the Second World War, so that dignity and honor belong to *each member* of a community.[435] In contrast, many societies protect the dead's reputation more for the dead's honor and their related social status. The stress is to secure social order and a hierarchical structure.

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427. *Id.* at 748. It is worth of mentioning the plausible distinctions between posthumous dignity and human dignity made by Antoon De Baets. *See* Antoon De Baets, *A Successful Utopia: The Doctrine of Human Dignity*, 7 HISTOREIN 71, 80–82 (2007).

428. Peled, *supra* note 79, at 773.

429. *Id.* at 782-83 (pointing out three sources of the communitarianism before 1980s: Jewish tradition, Jewish immigrants from European societies and Arab societies which contained communitarian features, and the Zionist ideology with strong collectivist and communitarian themes).

430. *Id.* at 783.

431. *Id.* at 787.

432. Post, *supra* note 12, at 715.

433. *See* BOWMAN, *supra* note 12 (discussing honor cultures and communities both in the East and the West).

434. Post, *supra* note 12 at 715.

435. Whitman, *supra* note 64, at 1323, 1384 (In Whitman's terms: "an equal honor for all" or "a minimum of honor for all.").

Their laws have not yet shifted to the stage of protecting dignity of each human being of equal status, including equally protecting dignity of the deceased regardless of previous social status.

This doctrine is well explained in honor societies in which female victims of rape crimes are dishonored even within their own families. In communities where honor killings are popular, a woman's reputation or honor belongs to her husband or her father, who regard her tragedy as a big dishonor or disrespect of their incapacity to control or protect her.[436] As David Pryce-Jones commented, honor acts as a kind of social glue in a shame society and the acquisition of honor brings high status to the individual and the avoidance of shame is a guarantee of low status.[437] For John Davis, the essential character of honor is a system of stratification, describing distribution of wealth, prescribing appropriate behavior of people of various social positions, entailing the acceptance of subordination and super-ordination.[438] Reputation as honor concerns simply not only the individuals whose reputation is under direct consideration, but also their families and relatives. Such an approach influences social rules or civility norms in Post's terms.[439]

In addition, attention shall be paid to the connection between honor society and collective identity. At this point, honor of a state or a particular racial group is collectively owned and appreciated, not allowed to be degraded by others. The escalating negative attitudes of many Russian authorities toward the Kytan tragedy, and the complaints from the Polish families of the deceased victims can be explained by changed political-cultural circumstances. Though Russia has been more democratized in past years, the new regime still needs a new national identity of self-pride and self-appreciation for unity. The over-disclosure of past massive murders of other peoples, as in the Katyn tragedy, though commanded by a few communist leaders, is still a big shame to the new identity.[440] From this perspective, it is easy to

436. KWAME ANTHONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN 18 (W. W. Norton & Co. 2010).

437. David Pryce-Jones, *Shame and Honor, Terribly Twisted*, NAT'L REV., (Apr. 21, 2003) (citing Bowman, *supra* note 12, at 27).

438. Post, *supra* note 12, at 700 (citing JOHN DAVIS, PEOPLE OF THE MEDITERRANEAN: AN ESSAY IN COMPARATIVE SOCIAL ANTHROPOLOGY 98 (1977)).

439. *Id.* at 710 (". . .when rules of deference and demeanor are embodied in speech, and hence are subject to the law of defamation, I shall call them rules of civility.").

440. *See* Anne Garrels, *Libel Case Sparks New Focus On Stalin's Reputation*, NPR (Sept. 8, 2009, 3:18 PM), *available at* http://www.npr.org/templates/story/story.php?storyId=112642329 (last visited Dec. 3, 2014); Andrew Osborn, *Josef Stalin's Grandson Loses Legal Attempt at Rehabilitating Soviet Dictator's Reputation*, TELEGRAPH (Oct. 13, 2009, 8:29 PM), *available at*

understand why a Russian historian was arrested when he invested the fate of German soldiers imprisoned by Russian Security Services,[441] as just part of a "'[p]utinite campaign against freedom of historical research and expression.'"[442]

In sharp contrast, communities of an individualist nature take reputation as personal, achieved by personal efforts and labor. It can be lost and regained on free market as *personal, intangible* property. An individual can reconstruct his or her own reputation and therefore, reputation is different from personal identity.[443] It is against this cultural concept that the deceased have no legal protection of reputation after death and their relatives and heirs cannot sue on their behalf to benefit from other's good reputation.[444] The American approach to reputation is a typical individualist one hatched in an individualist culture.[445] The individualist approach can collapse or wear out the collective nature of honor in reputation, given that free market and democracy become the dominating aurae. Market economy will re-calculate the value of personal reputation as products of personal efforts and available for market exchange, while democracy requires equal respect of individuals in participating public issues regardless of their social status.

This explains the shift of reputation concept in many societies. Since the late 1970s, for instance, Israeli society has witnessed the decline of communitarianism, collectivism and solidarity and a concurrent rise of individualism, at least among those people whose influence on the character of the State of Israel is the greatest.[446] Among other factors, that the economic growth especially during the 1990s increased living standards – together with the process of the Americanization – has strengthened individualism in Israeli community. This has helped maintain a liberal majority in the Supreme Court to attribute greater weight to freedom of speech and to embrace a liberal

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http://www.telegraph.co.uk/news/worldnews/europe/russia/6319755/Josef-Stalins-grandson-loses-legal-attempt-at-rehabilitating-Soviet-dictators-reputation.html (last visited Dec. 3, 2014).

441. Lydia Harding, *Russian Historian Arrested in Clampdown on Stalin Era*, GUARDIAN (Oct. 15, 2009, 1:38PM), *available at* http://www.guardian.co.uk/world/2009/oct/15/russia-gulag-historian-arrested (last visited Dec. 3, 2014).

442. *Id.*

443. Post, *supra* note 12, at 700.

444. Iryami, *supra* note 19, at 1088.

445. *See* Bellah, *supra* note 35, at 743 ("Arguing that 'America is a culture that focuses on the individual, a culture in which 'individualism' is a central value.").

446. Peled, *supra* note 79, at 787.

interpretation of the constitutional protection of dignity.[447]

In China, we observe a similar tendency. The rise of "a free market" and capitalism has helped with prioritizing individual interests in daily life after the 1980s, albeit collectivism is still the official ideology. Nowadays more people are likely to gauge other's achievement (reputation) by economic achievements, and individualism becomes the dominant morals than collectivism.[448] Reputation is not only understood as honor denoting personal social status among the Chinese, but more as the appreciation of personal economic achievements and human dignity.[449] Moreover, the ordinary Chinese have gradually recognized the economic interest in reputation and privacy of the dead.[450] Therefore, even the ordinary Chinese start to resort to law for protection.[451] The growth of individualism enriches the understandings of reputation in China. And it motivates the Chinese to speak out what they think about the past communist rulings and the late political figures, which have caused many troubles.[452]

It is in the communitarian culture that individuals are requested to compromise their free expression right to protect the collective identity or reputation, or human dignity for public interest. Laws of such communities accordingly provide protection of posthumous reputation, when reputation is more taken as either personal honor or individual dignity.[453] While the emphasis on both concepts could be accepted by

447. *Id.* at 789–90.

448. *See* Liza G. Steele & Scott M. Lynch, *The Pursuit of Happiness in China: Individualism, Collectivism, and Subjective Well-Being During China's Economic and Social Transformation*, SOC. INDICATORS RES. 442–51 (arguing that after decades' market economy in China, Chinese people are increasingly prioritizing individualist factors in assessments of their own happiness and life satisfaction, suggesting that Chinese society becomes increasingly individualistic in social realities).

449. No wonder, the introduction of rule of law and the popularity of the idea of human rights among the public play a role in promoting the idea of equality and dignity of individuals. *See id.*

450. Many posthumous privacy cases are about the illegal appropriation of the dead's likeness and the unconsented use of their names for commercial purposes. *See* Zhao, *supra* note 349, at 298.

451. *See* Benjamin L. Liebman, *Innovation Through Intimidation: An Empirical Account of Defamation Litigation in China*, 47 HARV. INT'L L. J. 34, 103 (2006) (arguing that the "increased use of defamation litigation by powerful parties in recent years may also be encouraging more ordinary individuals to assert their rights" and "Permitting such cases to be used to entrench local interests may be a necessary corollary or prerequisite to the effective use of litigation by ordinary people.").

452. *See* Zhao, *supra* note 349, at 338.

453. At this point, I won't discuss Muslim communities, for which the collective identity is of fundamental importance, in particular regarding the dead prophets and religious leaders. *See id.*

members of a society, it might be used as a good justification to limit free speech of others. Eventually, this becomes a matter of balancing different social interests by courts of law, which might lead to potential chilling effects and history censorship.

It is better to conclude the discussion of the relationship between culture difference, posthumous reputation protection, and legal interference by quoting an observation of Rösler that "the conceptual and cultural embedding is decisive."[454]

VII. CONCLUSION: DEAD BUT NOT FAR AWAY

This article has discussed the relationship between legal protection of posthumous reputation and history censorship, explaining the interplays of law, politics and culture that contribute to the complexity of many posthumous defamation cases in different communities. On the whole, the crux of the issue is how we shall treat the dead and their posthumous interests, and how much compromise a community is willing to make to protect the deceased? As discussed above, different approaches can be interpreted by the characteristics of politics and culture of a particular community.

Totalitarian and dictatorial states protect the dead's reputation, in particular the reputation of political leaders, on the ground of their social status, collective memory, and political legitimacy. Reputation and honor of the dead therefore are important values to be protected by their laws and free speech is usually compromised. It is also likely in religious communities that strictly forbid defamation of religious leaders and prophets. But, this is not to say that in Western democracies there exists no history censorship or censorship of speech regarding the past, or no official history or narrative is officially protected. We have observed that in many circumstances speeches regarding dead leaders and kings have been limited to different extents and some of which were overturned by the ECtHR as violating the right to free speech. This shows that free speech concerning the past may be restricted sporadically for various reasons in Western democracies.

Other reasons include the protection of national honor or dignity by preventing insults of state leaders, or protecting national identity. However, the tendency in mature democracies is that there is no systematic censorship of history, and that with the abolition of criminal defamation, insult law and blasphemy law, there will be less violation of

454. Rösler, *supra* note 77, at 186.

free speech rights of historians and journalists. Of course, the best practice in this regard is from common law jurisdictions, whose strong rejection of the protection of the dead's reputation and privacy has erased the potential to abuse defamation law and privacy law for history censorship.

This, however, does not mean that the strong tradition in some European countries to respect and protect the dead's dignity shall not be appreciated such as in German law and Maltese law. The point is that there is a big danger to violate the proportionality principle when balancing the posthumous protection with free speech right. Protection of the right to free speech may yield under accumulating exigent public needs and political whims, as seen in memory laws in Europe, opening the door for future state censorship. The safest way is to walk far away from the slippery water bank with a clear-cut line by resembling the common law approach.[455] Even when protection of the dead's reputation and dignity are regarded as highly important to a community, courts of law shall make judgments in favor of free speech rights, unless there exists real, compelling social needs, or the offense is grave and serious enough to endanger the fundamental value of a society affiliated with posthumous reputation and privacy.

To prevent potential history censorship under this avenue, judges have to pay more attention to the following two issues: First, law is the last means, but not the best to resolve history's controversies. Judges are not well-equipped professional historians who can dig deep into the dusts of history. Actually, historians themselves run into difficulties too often in seeking historical truth (or facts). Though courts may dance with politicians to achieve certain critical, political ends, such as helping with the formation of Israeli state and Zionist identity, it should be crystal clear that they must avoid such a political role and protect the independence of law, so that law's authority and independency will not melt down before prevailing political whims and public outcry. Otherwise, what comes with the postponed suspicion of judicial truth (or historical truth) offered in court is eventual distrust of the judiciary. Therefore, second, when courts have to settle posthumous defamation disputes regarding sensitive history, their discretion should be strictly

455. A reason why the author is against the recent proposal to protect the dead's reputation by some law reform commissions in western democracies. *See, e.g., Report On The Civil Law Of Defamation*, LAW REFORM COMM'N (1991), *available at* http://www.lawreform.ie/_fileupload/Reports/rDefamation.htm (last visited Dec. 3, 2014); *Death of a Good Name - Defamation and the Deceased: A Consultation Paper*, SCOTTISH GOV'T, *available at* http://www.scotland.gov.uk/Publications/2011/01/11092246/0 (last visited Dec. 3, 2014).

limited to decide whether the accused authors have sufficient evidence to support controversial statements, and whether they have conducted research according to acceptable academic manners.

A NUCLEAR KELLOGG-BRIAND PACT: PROPOSING A TREATY FOR THE RENUNCIATION OF NUCLEAR WAR AS AN INSTRUMENT OF NATIONAL POLICY

David A. Koplow†

Si vis pacem, para bellum ("If you want peace, prepare for war")
– Roman adage

Si vis pacem, para pacem ("If you want peace, prepare for peace")
– Inscription on the ceremonial pen used to sign the Kellogg-Briand Pact

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INTRODUCTION

The Kellogg-Briand Pact has gotten a bum rap. That bold 1928 agreement, formally known as the General Treaty for the Renunciation of War as an Instrument of National Policy,[1] represented the height of post-World War I idealism. Under it, the leading powers of the day, with the United States in the vanguard, condemned recourse to war and pledged themselves to resort only to pacific means for the resolution of all their future disputes.

Unfortunately, the treaty has been widely derided for a generation as foolhardy in the extreme. Critics have portrayed Kellogg-Briand as the ultimate illustration of legal and diplomatic hubris, in pretending that something meaningful could be accomplished by purporting to "outlaw" a phenomenon as pervasive as international combat. We can't simply legislate this scourge away, proclaim the realists; idealistically waving a piece of solemnly signed parchment did not prevent World War II, and it would be similarly ineffectual against any modern outbreak of hostilities, too.

Such harsh assessments have some merit; Kellogg-Briand can seem quixotic when viewed with the hindsight of nearly a century of

1. *See generally* General Treaty for Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 (entered into force Jul. 24, 1929) [hereinafter Kellogg-Briand Pact].

unrelenting, increasingly bloody, often widespread, war. But this article argues that Kellogg-Briand was, in truth, a great success – it marked a crucial turning point in the intellectual history of warfare, if not a watershed in its actual conduct. In earlier years – into World War I – war was widely regarded as something inevitable, an ineluctable phenomenon of the human condition. War was an expensive and nasty business, to be sure; it was uncomfortable and possibly fatal, but it was inherent in life, part of the "settled order of things," much as a harsh, cold winter might be. Neither circumstance was, as a practical matter, avoidable; neither needed a "justification"; certainly neither was subject to close or effective regulation by law.

In the inter-war period, however, attitudes around the world about war were transformed. Populations and their leaders came to see warfare as something extraordinary, something subject to human volition. Especially (but not only) in the democracies, a new appreciation grew that war could, and should, be controlled and regulated; that states should not resort to war easily and for transient reasons. Most dramatically, the leading statesmen of the era proclaimed that going to war required a certain type of justification – in particular, it must have an acceptable legal rationale.

The Kellogg-Briand Pact – originally proposed modestly as a bilateral France-United States accord, but quickly expanded to embrace dozens of key states all around the world – played a central role in that transformation. This short instrument – still in force today, although largely superseded by the Charter of the United Nations[2] – captured the *zeitgeist* and substantially deepened and broadened its pervasive influence. Kellogg-Briand is a political, social, and legal inflection point – it catalyzed a lasting change in the way people and states think, talk, and act about war.

This article further argues that the time has come to extend that success to an additional realm, to adapt Kellogg-Briand to twenty-first century conditions and needs, by proposing a "nuclear version" of the monumental accord. Under that structure, the states of the world would unite to renounce nuclear war in particular; to declare that they will not resort to, or threaten, that apocalypse; to insist that they will always find alternative mechanisms for resolving international disputes; and – exceeding the accomplishments of Kellogg-Briand – to undertake specific steps, unilaterally and in concert, to reduce the likelihood of any outbreak of nuclear hostilities. The article proceeds as follows:

2. *See generally* Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153 [hereinafter U.N. Charter].

After this introduction, Section I provides an in-depth analysis of the text of the Kellogg-Briand accord, dissecting its provisions and noting both what it includes and what its drafters intentionally or unconsciously omitted. The drafting architecture of the document reflects its era; it is not styled as modern treaties on such critical topics would be today, but there are lessons nonetheless.

Section II then provides more background about the evolution of the treaty, noting its kindred antecedents and numerous other contemporaneous instruments pursuing similar objectives. It also describes several subsequent lawmaking tools, including a chain of like-minded "confidence-building" accords that reaches into the modern era, and critically assesses their impact. This part of the discussion concludes by summarizing the key features of Kellogg-Briand, highlighting a number of aspects that resonate into contemporary arms control efforts.

Next, Section III turns to nuclear weapons, nuclear proliferation and the specter of nuclear war. It focuses, in particular, on the potential military, legal, and political "usability" of nuclear weapons, and on a series of "negative security assurances" and "no first use" pledges, through which the states that possess nuclear weapons have undertaken (more or less) to refrain from using or threatening to use nuclear weapons against states that have foregone their own possible nuclear aspirations. It suggests that the world already has, to some extent, promulgated something akin to a partial "nuclear version" of Kellogg-Briand, but without the deliberative process and the comprehensive, negotiated text that would make it most meaningful.

Section IV then presents the heart of the matter: a proposed new treaty to renounce nuclear war as an instrument of national policy. The draft text includes numerous footnotes that explain the provisions, highlight the drafter's options, and cite precedents. The accompanying discussion elaborates multifarious suggested steps to "operationalize" the outlawry of nuclear war – features of a type that were notably absent from Kellogg-Briand – and to insinuate the commitments into the practices and plans of the nuclear weapons-possessing countries.

Finally, Section V offers some concluding observations. Overall, the thesis of the article is that states should now commit, with renewed vigor, to the imperative of avoiding nuclear war, and they should undertake immediate, legally binding steps to reduce the likelihood of that civilization-threatening catastrophe. These measures would complement the "Getting to Zero" campaign for global nuclear disarmament, but could and should be undertaken independently and promptly, even if the ultimate objective remains elusive. In short, a new

approach to nuclear weapons – inspired by the 1928 cognitive shift established in Kellogg-Briand – should now be reflected in international law, moving the world in a safer, more secure direction.

I. PARSING THE TEXT OF THE KELLOGG-BRIAND PACT

Kellogg-Briand does not look like a modern arms control treaty. The official text of the instrument is largely "procedural," in identifying the participating states and their respective representatives.[3] The document includes four preambular paragraphs;[4] only two "operational" articles;[5] and a third "boilerplate" article describing the procedures for ratification, accession, and entry into force.[6] The two operational

3. Kellogg-Briand Pact, *supra* note 1, at introduction (the treaty records the names of the plenipotentiaries who negotiated the instrument on behalf of the nine participating sovereigns: Germany, the United States, Belgium, France, Great Britain [with separate recognition of Canada, Australia, New Zealand, South Africa, Ireland and India], Italy, Japan, Poland, and Czechoslovakia).

4. The preamble describes the parties as

> "*[d]eeply sensible* of their solemn duty to promote the welfare of mankind; *Persuaded* that the time has come when a frank renunciation of war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated; *Convinced* that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process, and that any signatory Power which shall hereafter seek to promote its national interests by resort to war a should be denied the benefits furnished by this Treaty; and *Hopeful* that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force bring their peoples within the scope of its beneficent provisions, thus uniting the civilized nations of the world in a common renunciation of war as an instrument of their national policy."

Id. at preamble (italics added).

5. Article I provides: "The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another." Article II provides: "The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means." *Id.* arts. I-II.

6. Article III provides:

> "The present Treaty shall be ratified by the High Contracting Parties named in the Preamble in accordance with their respective constitutional requirements, and shall take effect as between them as soon as all their several instruments of ratification shall have been deposited at Washington. This Treaty shall, when it has come into effect as prescribed in the preceding paragraph, remain open as long as may be

articles, each consisting of just a single sentence, combine for only seventy-eight words.[7] There are but five active verbs.

In contrast, arms control treaties today are behemoths,[8] incorporating expansive provisions that specify the obligations with precision, often accompanied by reams of exquisitely crafted legal definitions.[9] Modern negotiators elaborate the exact scope of the undertakings and provide detailed timetables for the mandated actions.[10] They frequently create new international organizations to oversee and implement the agreement, and they specify all the institutional

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necessary for adherence by all the other Powers of the world. Every instrument evidencing the adherence of a Power shall be deposited at Washington and the Treaty shall immediately upon such deposit become effective as between the Power thus adhering and the other Powers parties hereto. It shall be the duty of the Government of the United States to furnish each Government named in the Preamble and every Government subsequently adhering to this Treaty with a certified copy of the Treaty and of every instrument of ratification or adherence. It shall also be the duty of the Government of the United States telegraphically to notify such Governments immediately upon the deposit with it of each instrument of ratification or adherence."

Id. art. III.

7. James T. Shotwell, one of the leading advocates for the outlawry movement culminating in the Kellogg-Briand Pact, commented that "[s]eldom had so important an event so little text behind it or so direct and simple a history." JAMES T. SHOTWELL, WAR AS AN INSTRUMENT OF NATIONAL POLICY AND ITS RENUNCIATION IN THE PACT OF PARIS 189 (Harcourt Brace & Co. 1929).

8. Consider, for comparison, three major modern arms control agreements, the 1991 START I nuclear weapons treaty between the United States and the Soviet Union (Treaty on the Reduction and Limitation of Strategic Offensive Arms, U.S.-U.S.S.R., Jul. 31, 1991, S. TREATY DOC. NO. 102-20) [hereinafter START I]; the multilateral 1993 Chemical Weapons Convention (Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, S. TREATY DOC. NO. 103-219, 1974 U.N.T.S. 317) [hereinafter CWC]); and the multilateral 1996 Comprehensive Nuclear-Test-Ban Treaty, Sept. 10, 1996, 35 I.L.M. 1439 (not in force) [hereinafter CTBT]. START I includes nineteen articles, as well as six attached protocols, an annex of thirty-eight "agreed statements," and several other related instruments; the CWC includes twenty-four articles, three annexes, and other documents; and the CTBT includes seventeen articles, two annexes, a protocol and other items. *But see* Strategic Offensive Reductions Treaty, U.S.-Russ., May 24, 2002, 944 U.N.T.S. 3 (demonstrating a very brief U.S.-Russia arms control treaty that incorporated provisions of START I).

9. *See, e.g.*, START I, *supra* note 8, at Annex on Terms and Their Definitions (defining 124 terms); CWC, *supra* note 8, art. II (defining fourteen terms).

10. *See, e.g.*, START I, *supra* note 8, art. II (requiring parties to reduce nuclear weapons in three stages, with benchmarks at three, five, and seven years); CWC, *supra* note 8, at Annex on Implementation and Verification, Part IV(A)C.17 (specifying the timetable for destruction of chemical weapons, with interim deadlines at two, five, seven, and ten years).

arrangements.[11] Importantly, weapons-related treaties nowadays demonstrate fastidious attention to provisions for "verification" of parties' compliance with the commitments, and drafters stay at the bargaining table until they have hammered out minute details about data reporting, confirmatory inspections, and mechanisms for resolution of disputes.[12] Unsurprisingly, these modern arms control agreements are prolix: the 1991 START I Agreement, for example, is 257 pages long; the 1993 Chemical Weapons Convention ("CWC") runs to ninety-seven pages; and the 1996 Comprehensive Test Ban Treaty ("CTBT") is sixty-one pages.[13]

The gestation period for these documents reflects their length and overall state of development. The Kellogg-Briand pact was crafted in about eight months, via a series of exchanges of diplomatic notes;[14] it entered into force eleven months after signature.[15] In contrast, the United States and the Soviet Union brokered START I over a period of nine years;[16] the negotiation of the CWC required only a slightly less extended process;[17] and the CTBT talks consumed about two and one half years.[18] After signature, the hiatus before entry into force for START I was three and one half years;[19] for the CWC, more than four

11. *See, e.g.*, START I, *supra* note 8, art. XV (establishing a Joint Compliance and Inspection Commission); CWC, *supra* note 8, art. VIII (establishing the Organization for the Prohibition of Chemical Weapons); CTBT, *supra* note 8, art. II (establishing the Comprehensive Nuclear-Test-Ban Treaty Organization).

12. *See, e.g.*, START I, *supra* note 8, art. XI; CWC, *supra* note 8, at Annex on Implementation and Verification; CTBT, *supra* note 8, art. IV.

13. Page lengths are taken from THOMAS GRAHAM, JR. & DAMIEN J. LAVERA, CORNERSTONES OF SECURITY: ARMS CONTROL TREATIES IN THE NUCLEAR ERA (2003) (START I is found on pages 889-1145; CWC is found on pages 1170-1266; and CTBT is found on pages 1380-1440). Published in this format, the Kellogg-Briand Pact would be less than one page.

14. HANS WEHBERG, THE OUTLAWRY OF WAR: A SERIES OF LECTURES DELIVERED BEFORE THE ACADEMY OF INTERNATIONAL LAW AT THE HAGUE AND IN THE INSTITUT UNIVERSITAIRE DE HAUTES ÉTUDES INTERNATIONALES AT GENEVA 72-74, 78 (Edwin H. Zeydel trans., 1931).

15. The Kellogg-Briand Pact was signed on August 27, 1928 and entered into force on July 24, 1929. *Kellogg-Briand Pact 1928*, YALE UNIV. AVALON PROJECT, *available at* http://www.yale.edu/lawweb/avalon/imt/kbpact.htm (last visited Dec. 18, 2014)[hereinafter YALE UNIV. AVALON PROJECT].

16. GRAHAM, JR. & LAVERA, *supra* note 13, at 884-85 (START negotiations began in July 1982; the treaty was signed on July 31, 1991).

17. *Id.* at 1168-70 (CWC negotiations began in earnest in 1984; the treaty was signed on January 13, 1993).

18. *Id.* at 1377-79 (CTBT negotiations opened in early 1994; the treaty was signed on September 24, 1996).

19. *Id.* at 885-87 (START I was signed on July 31, 1991 and entered into force on

years;[20] and the CTBT is still not in force, despite having been opened for signature on September 24, 1996.[21]

Kellogg-Briand thus manifests the benefits and disadvantages of brevity. In it, the parties (acting "in the names of their respective peoples"[22]) "condemn recourse to war for the solution of international controversies, and [reciprocally] renounce it as an instrument of national policy."[23] They further agree that all disputes or conflicts among themselves, of whatever nature or origin, shall be resolved exclusively via "pacific means."[24]

And that's essentially it. The treaty does not define "war" or explain exactly what it means to condemn or renounce it; it does not enlighten the reader regarding the notion of rejecting war specifically "as an instrument of national policy."[25] Importantly (as elaborated

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December 5, 1994).

20. *Id.* at 1170 (CWC was signed on January 13, 1993 and entered into force on April 29, 1997).

21. *Id.* at 1379 (date of signature of CTBT).

22. Kellogg-Briand Pact, *supra* note 1, art. I; *see* Edward A. Harriman, *The Effect of the Kellogg-Briand Treaty*, 9 B.U. L. REV. 239, 240 (1929) (noting that this is a novel phrase in treaties; it has no legal effect, but symbolically suggests a change in the general theory of statehood, with governments now acting as agents of their people).

23. Kellogg-Briand Pact, *supra* note 1, art. I; *see* WEHBERG, *supra* note 14, at 82-83 (arguing that this language in the Kellogg-Briand Pact amounts to "outlawing" war; the phrase "'outlawry of war' is hardly more than a catch-word repeated by everyone," but the vocabulary of condemnation and renunciation expresses more clearly what is desired); SHOTWELL, *supra* note 7, at 103, 07 (discussing the American origins of the concept of "outlawry," and its modification by Briand).

24. Kellogg-Briand Pact, *supra* note 1, art. II.

25. WEHBERG, *supra* note 14, at 76, 85, 98-99 (noting that this phrase could be interpreted to permit a war undertaken for a purpose other than "national policy," such as a means of "international policy," to assert a "religious" dogma or a philosophy of life, or to crush the communist Soviet Union); *see* Harriman, *supra* note 22, at 246 (arguing that war "as an instrument of national policy" includes all wars undertaken in pursuance of national claims or in promotion of national interests, other than wars of self-defense); DIPLOMATIC NOTE FROM THE SOVIET GOVERNMENT CONTAINING ITS ADHESION TO THE PEACE PACT, AUGUST 31, 1928, *reprinted in* J.W. WHEELER-BENNETT, INFORMATION ON THE RENUNCIATION OF WAR 1927-1928, at 181, 184 (1928) (official comments of Soviet Union, objecting to the "national policy" phrase in the Kellogg-Briand Pact and asserting that all wars should be forbidden, including those undertaken for the purpose of oppression of national liberation movements); DAVID HUNTER MILLER, THE PEACE PACT OF PARIS: A STUDY OF THE BRIAND-KELLOGG TREATY 38-42 (1928) (contrasting the early French focus on renouncing wars of aggression with the U.S. focus on war as an instrument of policy); ROBERT H. FERRELL, PEACE IN THEIR TIME: THE ORIGINS OF THE KELLOGG-BRIAND PACT 66 (1968) (suggesting that the phrase "as an instrument of national policy" might have originated as a derivative from the famous dictum of Karl von Clausewitz that war is an instrument of policy, a continuation of politics by other means); SHOTWELL, *supra* note 7, at 209-19 (emphasizing that the structure of Kellogg-Briand amounts to "defining war without

below) the negotiators fully appreciated that "defensive" war – waged in opposition to an enemy's aggression – would remain legitimate, yet they never alluded to that distinction in the text, and nowhere attempted to explicate the crucial offensive/defensive bifurcation. Kellogg-Briand has no provisions for verification or enforcement of compliance; there is no institutional mechanism to monitor parties' performance or inflict coordinated sanctions on violators. Moreover, the treaty did nothing to mitigate the vast and growing war-making capabilities of its parties – it has no arms limitation or reduction provisions. Nor did it specify or suggest what is included in the obligatory "pacific means" or create any new dispute-resolution institutions or avenues.

The treaty does specify some of the legal procedural provisions that are now common in modern agreements – it requires ratification by the original signatories and allows other states to join subsequently as well, and it entrusts to the United States the specified duties of a depositary[26] – but it is bereft of any provisions for duration, withdrawal, or amendment.

Kellogg-Briand was ratified by its original fifteen parties and by thirty-two others by July 24, 1929, when it entered into force; eight more joined shortly thereafter.[27] Today, the treaty has seventy parties, including representatives from every continent except Antarctica.[28]

The most significant sleight-of-hand in crafting Kellogg-Briand was the juxtaposition of the seemingly "absolute" rhetoric (apparently renouncing all war without exception or limitation) together with a *sub silentio* preservation of a right to respond with force against a neighbor's unprovoked aggression, and even a recognition of the obligations, imposed by other balance-of-power agreements of the age, to come to the aid, by military means if necessary, of an allied state that had been victimized by an enemy's unwarranted use of military force.[29]

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a definition.").

26. Kellogg-Briand Pact, *supra* note 1, art. III.

27. YALE UNIV. AVALON PROJECT, *supra* note 15.

28. *Treaties in Force 2013*, U.S. DEP'T ST. at 467, *available at* http://www.state.gov/documents/organization/218912.pdf (last visited Dec. 18, 2014) (listing treaties in force for the United States on January 1, 2013).

29. *See* WEHBERG, *supra* note 14, at 34-36, 73-77, 85 (treaty negotiators agreed that defensive war would be permitted, without reflecting that consensus in the text of the document); Diplomatic note from Mr. Kellogg to M. Claudel, February 27, 1928, *reprinted in* WHEELER-BENNETT, *supra* note 25, at 85*; General Pact for the Renunciation of War: Hearings before the Committee on Foreign Relations*, 70th Cong. 2 (Dec. 7 and 11, 1928) (statement of Frank B. Kellogg, Secretary of State), *available at* http://avalon.law.yale.edu/20th_century/kbhear.asp (last visited Dec. 18, 2014) [hereinafter *Hearings*] (affirming that a party to the Locarno Treaty could lawfully come to the aid of a

In addition, the participants understood that other important "escape hatches" persisted – the United Kingdom made clear that it would continue to fulfill what it regarded as special obligations regarding its vast overseas empire,[30] and the United States retained Monroe Doctrine rights that might seem inconsistent with complete outlawry of war.[31] But the text nowhere addresses these ineffable complexities.[32]

II. THE ANTECEDENTS AND SEQUELAE OF KELLOGG-BRIAND

How did the world get to the 1928 treaty? The social history of the convention was, of course, grounded in the trauma of World War I – the supposed "war to end all wars" that did not quite work out that way. Three factors, in particular, stand out. First, the epochal horror and absurdity of that senseless blood-letting – the planet stumbling into a conflagration that seemingly no one wanted and no one benefitted from – propelled a consciousness that future pyrrhic conflicts: a) must be avoided and b) could be avoided.[33] Warfare had become so devastating,

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treaty partner who had been attacked; the Kellogg-Briand Pact would not inhibit that act of cooperative self-defense, but would also not require the United States to join it); *see also* Vilho Harle, *The Implementation of Peace Ideas: The Case of Outlawry of War*, 10 HIST. EUR. IDEAS 677, 684 (1989) (arguing that because the Kellogg-Briand Pact permitted defensive war, "it was a total failure" for the idea of outlawry.)

30. *See* SHOTWELL, *supra* note 7, at 200-08 (discussing the "British Monroe Doctrine"); WEHBERG, *supra* note 14, at 77, 86; WHEELER-BENNETT, *supra* note 25, at 36-40; Diplomatic Note Reply of the British Government, May 19, 1928, *reprinted in* WHEELER-BENNETT, *supra* note 25, at 115; *Hearings*, *supra* note 29, at 4 (Kellogg describing the British position on defending interests throughout the empire); FERRELL, *supra* note 25, at 180.

31. WEHBERG, *supra* note 14, at 85 ("There is also no doubt that America does not look upon disputes concerning the Monroe Doctrine as matters of purely national policy."); *see* Harriman, *supra* note 22, at 249 (noting that the report of the Senate Foreign Relations Committee interpreting the Kellogg-Briand Pact asserted that the Monroe Doctrine is part of the U.S. system of national defense); *see Hearings*, *supra* note 29, at 10-11; Congressional Record vol. 70-a, 70th Cong. 2, Jan. 15, 1929, p. 1730 (quoting report of Senate Foreign Relations Committee).

32. *Hearings*, *supra* note 29, at 6 (colloquy between Senator Reed and Secretary Kellogg regarding the reliance upon diplomatic notes to alter the plain meaning of the treaty); Henry Cabot Lodge, *The Kellogg-Briand Peace Pact: A Contemporary Criticism*, TEACHINGAMERICANHISTORY.ORG 2 (Dec. 1928), *available at* http://teachingamericanhistory.org/library/document/the-kellogg-briand-peace-pact-a-contemporary-criticism-1928-29/ (last visited Dec. 18, 2014) (criticizing the use of diplomatic notes, sent prior to conclusion of the treaty, as expressions of reservations to the text).

33. J.M. WINTER, THE EXPERIENCE OF WORLD WAR I, at 202-21 (Oxford Univ. Press 1989) (1988); SAMUEL HYNES, A WAR IMAGINED, 269-352 (1990); Jennifer Llewellyn, Jim Southey & Steve Thompson, *The Human Cost of World War I*, ALPHA HISTORY, *available at* http://alphahistory.com/worldwar1/human-cost/ (last visited Dec. 18, 2014) (estimating at

so expensive in blood and treasure, that it could no longer be sustained; the habit or tradition of armed combat simply had to be abandoned.[34] Populations could exert control, or at least influence, over their sovereign decision-making, and could unite to banish too-easy recourse to international violence.[35]

Second was a growing appreciation for the efficacy of international law – a new belief that legal tools, institutions, and procedures could play a leading role in the world's escape from warfare. The 1919 Covenant of the League of Nations[36] provides the most vivid illustration

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least twelve million deaths and twenty million serious injuries from World War I, as well as a significant social psychological sense of loss); John Simkin, *Financial Cost of the First World War*, SPARTACUS EDUC. (Sept. 1997), *available at* http://spartacus-educational.com/FWWcosts.htm (last visited Dec. 18, 2014) (calculating a total of over $185 billion costs of World War I to the combatant states). *But see* MICHAEL HOWARD, THE INVENTION OF PEACE: REFLECTIONS ON WAR AND INTERNATIONAL ORDER 55-59 (2000) (arguing that World War I was not "accidental"; many people welcomed it with enthusiasm).

34. SHOTWELL, *supra* note 7, at 36 (asserting that war "is no longer a safe instrument for statesmanship . . . it is too dangerous to employ."); Akira Iriye, *The Globalizing of America*, 3 CAMBRIDGE HIST. AM. FOREIGN REL. 103 (1993) (describing the peace movement of the 1920s as a global "hegemonic ideology"); Jacob Heilbrunn, *The Case for Normal Angell*, NAT'L INT. (Sept. – Oct. 2013).

35. SHOTWELL, *supra* note 7, at 14-15 (discussing the "recognized principle of international law" in the eighteenth and nineteenth centuries that a sovereign state "is entirely free to strike at any adversary or to work its will by force and to accept no curb upon its power save only such as it may agree to in the exercise of its very sovereignty."); Hersch Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 36 (1946) (explaining that prior to the Kellogg-Briand Pact, a central idea of international law was that a state had the right to resort to war not only to defend its legal rights, but to destroy the legal rights of others; according to Machiavelli, any war which is necessary is just); Robert H. Jackson, *The Legal Basis of Our Defense Course: We Are Creating Important Precedents* (March. 27, 1941), *available at* http://www.ibiblio.org/pha/policy/1941/1941-03-27a.html (last visited Dec. 18, 2014) (arguing that under the traditional view, there is no law to keep the peace, so all wars are legal; this view was swept away in the twentieth century); FERRELL, *supra* note 25, at 14 (observing that "The 'intrusion' of public opinion into foreign policy nonetheless was a notable fact of the period after the 1918 Armistice, which professional diplomats had to reckon with whether they liked it or not."); John Norton Moore, *Strengthening World Order: Reversing the Slide to Anarchy*, 4 AM. U. J. INT'L L. & POL'Y 1, 9 (1989) (saying that Kellogg-Briand "reflected a fundamental shift in the history of conflict management that may have been the single most important intellectual leap in history."); Barry Kellman, *Of Guns and Grotius*, 7 J. NAT'L SECURITY L. & POL'Y 465 (2014) (surveying evolving trends in legal history regarding international warfare); WEHBERG, *supra* note 14, at 32 (suggesting that education of American and global public opinion became a moral force strongly promoting the Kellogg-Briand Pact); *see also* WEHBERG, *supra* note 14, at 2-5 (discussing the ancient "just war" tradition, which maintained that a just war had to have a just cause).

36. *See generally* Treaty of Versailles Part I, June 28, 1919, 2 Bevans 235, 13 A.J.I.L. Supp. 151 [hereinafter League of Nations Covenant]; *see also* James Barros, *The League of Nations and Disarmament*, *in* 2 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 605

of this conviction. That instrument not only established the first permanent global security institutions (a Council of leading states, supported by a more inclusive Assembly and a permanent Secretariat),[37] it specified that any war or threat of war would be an emergency of concern to all states;[38] that mandatory dispute resolution procedures would apply to all discord that might lead to a rupture of the peace;[39] and that a three-month "cooling off period" would have to intervene before an aggrieved state could resort to war.[40] These sinews of legal process, it was hoped, could abate any rush to war, providing additional opportunities for diplomacy to intervene, and could deter aggression by assembling a staunch front of nations united in opposition.[41]

Another critical manifestation of the newfound affinity for law was the burgeoning "outlawry" movement in the United States and elsewhere.[42] Faith grew that a public declaration that war was now illegitimate could make a difference – that the labels and concepts of law were impactful. The hypotheses that war should be officially condemned as "illegal," and that such a designation mattered, were hot topics in public international discourse, and various drafts of an outlawry instrument were eagerly circulated and vigorously debated.[43]

(Richard Dean Burns ed., 1993).

37. League of Nations Covenant, *supra* note 36, arts. 2, 4.

38. *Id.* art. 11.

39. *Id.* arts. 12, 13, 15.

40. *Id.* art. 12.

41. Moore, *supra* note 35, at 7 (noting that under the Covenant of the League of Nations, "the lawfulness of resort to war was primarily defined in procedural terms.").

42. WEHBERG, *supra* note 14, at 5-9 (describing peace and outlawry movements just before and after World War I); *id.* at 17-20 (discussing the origins of the American outlawry movement); FERRELL, *supra* note 25, at 31-37; Sandi E. Cooper & Lawrence S. Wittner, *Transnational Peace Movements and Arms Control*, *in* 1 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 491 (Richard Dean Burns ed., 1993); Harle, *supra* note 29, at 678 (asserting that "[t]he movement for the complete outlawry of war originated in the United States.").

43. WEHBERG, *supra* note 14, at 7-8 (describing early draft treaties); *id.* at 64-67 (discussing prominent proposed outlawry treaty drafted by American professors); FERRELL, *supra* note 25, at 86-87 (describing catalytic drafting role of American professors James T. Shotwell and Joseph P. Chamberlain); SHOTWELL, *supra* note 7, at 53-70, 271-78 (presenting influential early draft outlawry treaty); *see also* Aristide Briand, Speech at the Signing of the Kellogg-Briand Pact (Aug. 27, 1928) (official translation), *reprinted in* WHEELER-BENNETT, *supra* note 25, at 171, 174 (emphasizing that war, which had previously been a "divine right" and an "attribute of sovereignty" was now being deprived of its legitimacy; emphasizing that solemn international legal process constituted "a direct blow to the institution of war, even to its very vitals."); Frank B. Kellogg, *Address to the Council on Foreign Relations, New York* (Mar. 15, 1928), *available at* http://www.foreignaffairs.com/articles/68889/frank-b-kellogg-secretary-of-state/the-war-prevention-policy-of-the-united-states [hereinafter *Kellogg Address to the Council on Foreign Relations*] (noting that treaties alone cannot "afford a certain guarantee against

Third, it is noteworthy that the contemplated legal and political undertakings were to be public and multilateral. Reflecting the first of President Woodrow Wilson's celebrated 1918 "Fourteen Points" ("Open covenants of peace, openly arrived at"[44]), this notion rejected backroom transactions and private balance-of-power bargaining between selected state partners. Self-serving "special deals" between particular sovereigns were suspect – this was one of the leading reasons why the United States insisted upon expanding the original French proposal for a bilateral treaty into the global Kellogg-Briand accord.[45]

A. Three Types of Anti-War Treaties.

The first decades of the twentieth century therefore proved a fertile period for the progressive development of international law in opposition to war. Three noteworthy streams of international agreements emerged (with some documents contributing to more than one objective), and each resonates into the modern era: dispute resolution, disarmament, and outlawry.

First, the era witnessed a vivid flowering of alternative dispute-resolution mechanisms and fora. For example, the Permanent Court of Arbitration – "the first global mechanism for the settlement of disputes between states"[46] – was established in 1900, pursuant to the First Hague Peace Conference. A companion institution, the Permanent Court of International Justice – the first "world court" – was created as part of

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those conflicts between nations," but asserting that legal implements help the world make great strides toward pacific adjustments of international disputes); Joseph Preston Baratta, *The Kellogg-Briand Pact and the Outlawry of War*, *in* 2 ENCYCLOPEDIA ARMS CONTROL & DISARMAMENT 695, 699 (Richard Dean Burns ed., 1993) (noting that supporters likened the outlawry of war to the abolition of dueling, which had once been commonplace, but eventually lost its "aura of honor" and was finally "put down as an odious abuse.").

44. Woodrow Wilson, President of the United States, *Address to the Joint Session of Congress: Fourteen Points* (Jan. 8, 1918), *available at* http://avalon.law.yale.edu/20th_century/wilson14.asp (last visited Jan. 9, 2015) [hereinafter *President Woodrow Wilson, Fourteen Points*]. Point I states "[o]pen covenants of peace, openly arrived at, after which there shall be no private international understandings of any kind but diplomacy shall proceed always frankly and in public view" and the first paragraph of the presentation introducing the fourteen points asserts that the day of "secret covenants entered into in the interest of particular governments" is gone by. *Id.*

45. WEHBERG, *supra* note 14, at 72-73; WHEELER-BENNETT, *supra* note 25, at 20-26.

46. *Permanent Court of Arbitration: History*, PERMANENT CT. ARBITRATION, *available at* http://www.pca-cpa.org/showpage.asp?pag_id=1044 (last visited Dec. 18, 2014); *The Court: History*, INT'L CT. JUST., *available at* http://www.icj-cij.org/court/index.php?p1=1&p2=1 (last visited Dec. 18, 2014) (tracing the history of international arbitration to the 1794 Jay Treaty between the United States and Great Britain; observing that the name "permanent court" does not accurately describe the arbitration institution).

the Covenant of the League of Nations, becoming operational in 1922.[47] International arbitration of all types and formats was greatly in fashion in this period, with a series of multilateral and bilateral engagements committing countries to pursue exclusively non-violent reconciliation.[48] For the United States, a flurry of "Bryan treaties" (named for Secretary of State William Jennings Bryan, who fostered the negotiations, beginning in 1913) ultimately grew to forty-eight international agreements binding the parties to conciliation processes and to refrain from resorting to hostilities while talks were pending.[49]

Second, regarding disarmament, Wilson's fourth "Point," as elaborated in Article 8 of the Covenant of the League of Nations, recognized that "the maintenance of peace requires the reduction of national armaments to the lowest point consistent with national safety."[50] The most prominent successes in this sector were the 1921-22 Washington Naval Conference and the 1925 Geneva Protocol.[51] The Washington Conference generated a fistful of interlocking treaties limiting the naval assets of the United States, Great Britain, Japan, and other key players, principally by establishing a 5:5:3 ratio for the tonnage that the three chief protagonists could deploy.[52] This

47. *The Court: History*, INT'L CT. JUST., *available at* http://www.icj-cij.org/court/index.php?p1=1&p2=1 (last visited Dec. 18, 2014); League of Nations Covenant, *supra* note 36, art. 14; Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031; T.S. 993.

48. WEHBERG, *supra* note 14, at 14 (discussing several treaties concluded in the 1920s among European states containing provisions for mandatory arbitration to resolve disputes); Manley O. Hudson, *The Inter-American Treaties of Pacific Settlement*, FOREIGN AFF. (Oct. 1936) (describing arbitration and conciliation treaties establishing a system of pacific settlement for the Americas); David J. Hill, *The Second Peace Conference at The Hague*, 1 AM. J. INT'L L. 671, 681-84 (1907) (listing arbitration treaties).

49. *Bryan Treaties*, *in* WEST'S ENCYCLOPEDIA OF AMERICAN LAW, (2nd ed. 2005) (also noting that few disputes were actually submitted to these arbitral procedures); Harold Josephson, *Outlawing War: Internationalism and the Pact of Paris*, 3 DIPLOMATIC HIST. 377, 383 (Oct. 1979) (reporting that President Hoover negotiated twenty-five arbitration treaties and seventeen conciliation treaties); *see* Hudson, *supra* note 48; *Kellogg Address to the Council on Foreign Relations*, *supra* note 43 (discussing eighteen Bryan treaties then in force, as well as two multilateral conciliation treaties with Central and South American states).

50. *President Woodrow Wilson, Fourteen Points*, *supra* note 44, at point IV; League of Nations Covenant, *supra* note 36, art. 8.

51. *See* Iriye, *supra* note 34, at 78 (concluding that the 1920s was the only recent decade in which actual arms reductions took place; "there was in the world less armament in 1929 than in 1919.").

52. Treaty for the Limitation of Armament, Feb. 6, 1922, 25 T.S. 201 (also referred to as the Five Power Treaty/Agreement); *The Washington Naval Conference, 1921-1922*, U.S. DEP'T ST., *available at* http://history.state.gov/milestones/1921-1936/naval-conference (last visited Jan. 9, 2015); *1921-1922 Washington Naval Conference*, GLOBAL SECURITY,

instrument led to the scrapping of several capital ships by each country and the cancellation of plans for what would otherwise have become an expensive and destabilizing arms race in battleship construction.[53] The Geneva Protocol,[54] responding to the particularly loathsome use of chemical weapons in the trenches of World War I,[55] created a prohibition on "asphyxiating, poisonous or other gases, and of bacteriological methods of warfare."[56] It attracted widespread adherence and remained for half a century the world's strongest legal bulwark against those insidious forms of combat.[57]

Finally, the particular concept of outlawing or renouncing war was expressed in several treaties, resolutions, and other commitments. Noteworthy in this regard were the 1925 Locarno treaties,[58] the most important of which (the "Rhineland Pact"[59]) incorporated reciprocal promises by Germany and Belgium, and by Germany and France, "that they will in no case attack or invade each other or resort to war against

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available at http://www.globalsecurity.org/military/world/naval-arms-control-1921.htm (last visited Jan. 9, 2015); Thomas H. Buckley, *The Washington Naval Limitation System 1921-1939*, *in* 3 ENCYCLOPEDIA OF ARMS CONTROL AND DISARMAMENT 369 (Richard Dean Burns ed., 1993). In addition to the Five Power Treaty, separate overlapping agreements were concluded as the Four Party Treaty, the Nine Power Treaty, and others. Under the Five Power agreement, the United States and Great Britain were each allowed to deploy capital ships totaling 525,000 tons displacement; Japan was allowed 315,000 tons, and Italy and France 175,000 tons each. Additionally, battleships and aircraft carriers were limited in size.

53. Iriye, *supra* note 34, at 75-78 (reporting that these agreements would result in the United States destroying thirty of its forty-eight large ships (in being or under construction), Britain would reduce its navy from forty-five to twenty warships, and Japan would destroy seventeen of its twenty-seven warships).

54. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 [hereinafter Geneva Protocol].

55. *See generally* L.F. HABER, THE POISONOUS CLOUD: CHEMICAL WARFARE IN THE FIRST WORLD WAR (1986); ROBERT HARRIS & JEREMY PAXMAN, A HIGHER FORM OF KILLING: THE SECRET HISTORY OF CHEMICAL AND BIOLOGICAL WARFARE (1982); JONATHAN B. TUCKER, WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL-QAEDA (2006); *see also* GRAHAM, JR. & LAVERA, *supra* note 13, at 7-8.

56. Geneva Protocol, *supra* note 54.

57. *See* GRAHAM, JR. & LAVERA, *supra* note 13, at 7-10. The Geneva Protocol was eventually supplemented by the 1972 Biological Weapons Convention (Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction), April 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163, T.I.A.S. No. 8062 and the CWC, *supra* note 8.

58. WEHBERG, *supra* note 14, at 32-40 (emphasizing the Locarno treaties as a major accomplishment); FERRELL, *supra* note 25, at 48-49 (discussing the hopeful "spirit of Locarno" generated by those treaties).

59. Treaty of Mutual Guarantee Between Germany, Belgium, France, Great Britain, and Italy, Oct. 16, 1925, 54 L.N.T.S. 305.

each other,"[60] with Great Britain and Italy acting as guarantors of the peace.[61] In the Western Hemisphere, the Fifth International Conference of American States, meeting in Santiago, Chile in May 1923, adopted a Treaty to Avoid or Prevent Conflicts,[62] and the sixth such conference, in Havana in February 1928, passed two resolutions similarly expressing the participants' unqualified condemnation and prohibition of war in their mutual relations.[63]

B. The Evolution of the Kellogg-Briand Pact.

The peripatetic French Foreign Minister, Aristide Briand (who had shared the Nobel Peace Prize in 1926 for his work on the Locarno treaties[64]), attempted to build on that European success by proposing a cognate U.S.-France peace bond.[65] His interlocutor in the Coolidge Administration, Secretary of State Frank B. Kellogg,[66] welcomed the initiative, but insisted upon multilateralizing it, to embrace all the key international players of the era.[67] A draft treaty quickly took shape, via a series of diplomatic notes – Kellogg preferred correspondence to face-to-face meetings, fearing that a formal conference would inevitably engage legions of lawyers, who would jeopardize the enterprise by burdening it with unnecessary details and complexity.[68]

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60. *The Locarno Pact*, AVALON PROJECT art. 2. (2008), *available at* http://avalon.law.yale.edu/20th_century/locarno_001.asp (last visited Dec. 18, 2014). These commitments would not apply in the case of legitimate defense against an unprovoked act of aggression. *See id.*

61. *Id.* arts. 1, 5. In case of a flagrant violation of article 2, the other parties to the treaty agree to come to the aid of the victim. *Id.* art. 4 (3).

62. Treaty to Avoid or Prevent Conflicts between the American States, May 3, 1923, 33 L.N.T.S 25.

63. WHEELER-BENNETT, *supra* note 25, at 25; WEHBERG, *supra* note 14, at 68-72; *Kellogg Address to the Council on Foreign Relations*, *supra* note 43.

64. *See Aristide Briand - Biographical*, NOBELPRIZE.ORG, *available at* http://www.nobelprize.org/nobel_prizes/peace/laureates/1926/briand-bio.html (last visited Dec. 18, 2014); FERRELL, *supra* note 25, at 62-65.

65. *See* WEHBERG, *supra* note 14, at 64, 72-73; WHEELER-BENNETT, *supra* note 25, at 19; SHOTWELL, *supra* note 7, at 41-52, 71-77; FERRELL, *supra* note 25, at 68-83; MILLER, *supra* note 25, at 7-12.

66. *See Biographies of the Secretaries of State: Frank Billings Kellogg*, U.S. DEP'T ST., *available at* http://history.state.gov/departmenthistory/people/kellogg-frank-billings (last visited Dec. 18, 2014); *see* FERRELL, *supra* note 25, at 79-83.

67. *See* WEHBERG, *supra* note 14 at 73-74; WHEELER-BENNETT, *supra* note 25, at 21-23.

68. *See Hearings*, *supra* note 29, at 4 (Kellogg explaining that a multilateral meeting of lawyers "would be the end of any treaty"); SHOTWELL, *supra* note 7, at 128-44 (describing the early Franco-American negotiations); MILLER, *supra* note 25, at 20-37, 154-83 (French and U.S. diplomatic notes); WHEELER-BENNETT, *supra* note 25; YALE UNIV.

When the draft treaty was ready for prime time, Kellogg circulated it to two tiers of countries: first, those fifteen who would be stylized as original High Contracting Parties, whose ratification would be required for entry into force;[69] and second, a miscellaneous wider array, who would be invited to affiliate immediately or at any subsequent time.[70] Remarkably, all the solicited first wave of countries joined on with alacrity; few if any modifications in the original text of the document were proposed.[71] The imperative for speed was pronounced, prompted by agitation from national publics, who were well aware of the contents and progress of the negotiations, and impatient that the articulation of a basic outlawry agreement was taking so long.[72] In fact, when the Soviet Union was invited to participate, among its complaints was the apprehension that the Kellogg-Briand ratification process might be unacceptably prolonged. Therefore, the Soviet Foreign Minister, Maxim Litvinov, negotiated a companion instrument, joined by Estonia, Latvia, Poland, and Romania, as well as the U.S.S.R., which accomplished an immediate effectuation, on substantially identical terms. This Litvinov Protocol entered into force on March 16, 1929, four months before Kellogg-Briand.[73]

AVALON PROJECT, *supra* note 15 (collection of diplomatic notes leading to Kellogg-Briand Pact).

69. The original participants were selected to reach the major powers and additional states that had been engaged in conflicts with them, while not including so many states that prompt conclusion and entry into force of the treaty would be delayed. *See* WEHBERG, *supra* note 14, at 78-80; WHEELER-BENNETT, *supra* note 25, at 43; SHOTWELL, *supra* note 7, at 145-58, 172-76; MILLER, *supra* note 25, at 80-111.

70. *See* WEHBERG, *supra* note 14, at 78-79.

71. *See* WHEELER-BENNETT, *supra* note 25, at 28-51; WEHBERG, *supra* note 14, at 79; FERRELL, *supra* note 25, at 138-43, 192-200; SHOTWELL, *supra* note 7, at 192-93 (describing British reaction). Russia asserted numerous complaints about the text of the agreement (its failure to prohibit all war, its lack of disarmament commitments), but agreed to join. SHOTWELL, *supra* note 7, at 78-79; *see* Diplomatic Note from the Soviet Government Containing its Adhesion to the Peace Pact, *supra* note 25. Many additional states signaled their willingness to join soon; only Argentina and Brazil remained aloof. WEHBERG, *supra* note 14, at 80.

72. *See* WHEELER-BENNETT, *supra* note 25, at 52 (noting public criticism of perceived dilatory policy of United Kingdom government dealing with Kellogg-Briand); SHOTWELL, *supra* note 7, at vii, 83-92 (highlighting the growing power of public opinion); FERRELL, *supra* note 25, at 177, 183-85.

73. *See* Protocol for the Immediate Entry into Force of the Treaty of Paris arts. I-II, Feb. 9, 1929, 89 L.N.T.S. 370. The Kellogg-Briand Pact is attached as an annex to the Litvinov Protocol; the effect of the Protocol is to bring Kellogg-Briand into force as soon as individual states ratify the Protocol, without waiting for all the original parties to the Pact to ratify it. *Id.* arts. I, II. The Litvinov Protocol was later extended to include Turkey, Persia and Lithuania. *See* WHEELER-BENNETT, *supra* note 25, at 54-58; WEHBERG, *supra* note 14, at 79.

Subsequent lawmaking and interpretation[74] regarding all three themes of alternative dispute resolution, disarmament, and outlawry, continued unabated for another decade, before being punctured by the rise of Nazi and associated totalitarianism. Noteworthy accomplishments included the 1928 General Act for Pacific Settlement of International Disputes,[75] the 1933 Argentine Anti-war Treaty of Non-Aggression and Conciliation among the United States and Latin American partners,[76] and others.[77]

C. The Post-World War II Legacy.

After World War II, including in the depths of the cold war, reminders of the spirit of Kellogg-Briand can be discerned in a variety of "confidence-building" measures (sometimes expanded into transparency-, confidence-, and security-building measures). Noteworthy in the roster of such accords would be bilateral U.S.-U.S.S.R. instruments, such as the 1963 agreement to establish the "hotline" and its 1971 and 1984 upgrades;[78] the 1971 Agreement on

74. In September 1934, the International Law Association, meeting in Budapest, offered a weighty commentary of interpretation and reinforcement of the Kellogg-Briand Pact, emphasizing the stringency of its prohibitions. *See generally International Law Association, Briand-Kellogg Pact of Paris, Budapest Articles of Interpretation*, 20 TRANSACTIONS GROTIUS SOC'Y 205, 205-06 (1934); *see also* Josephson, *supra* note 49, at 381-82; Hersch Lauterpacht, *The Pact of Paris and the Budapest Articles of Interpretation*, 20 TRANSACTIONS GROTIUS SOC'Y 178 (1934).

75. *See generally* General Act for Pacific Settlement of International Disputes, Sept. 26, 1928, 71 L.N.T.S. 101 (replaced by 1949 revision).

76. *See generally* Anti-war Treaty of Non-aggression and Conciliation, Oct. 10, 1933, U.S.T.S 906, 163 L.N.T.S. 394 (also known as the Saavedra Lamas Treaty, terminated and replaced in 1948); *see also* Hudson, *supra* note 48.

77. *See* Philip C. Jessup, *Rights and Duties of States in Case of Aggression*, 33 AM. J. INT'L L. SUPP. 819, 824-25 (1939) [hereinafter Harvard Research] (concluding that of seventy-one states in the world, sixty-nine had accepted obligations to refrain from resort to armed force under some circumstances); *id.* at 848-52 (collecting treaties that deal with aggression); *id.* at 872 (concluding that "practically every State of the world, except perhaps Lichtenstein, Yemen, and one or two others of like magnitude, are parties to either the Covenant of the League, the Pact of Paris or the Argentine Anti-War Pact.").

78. *See generally* Memorandum of Understanding Between the United States of America and the Union of Soviet Socialist Republics Regarding the Establishment of a Direct Communications Link, U.S.- U.S.S.R., June 20, 1963, 472 U.N.T.S. 163; Agreement Between the United States of America and the Union of Soviet Socialist Republics on Measures to Improve the U.S.A.-U.S.S.R. Direct Communications Link, September 30, 1971, 806 U.N.T.S. 402; Agreement Between the United States of America and the Union of Soviet Socialist Republics to Expand the U.S.-U.S.S.R. Direct Communications Link, July 17, 1984, *available at* http://www.state.gov/t/isn/4786.htm (last visited Dec. 18, 2014). This sequence of agreements created, and sequentially upgraded, mechanisms for quick and reliable communications between the superpowers, to reduce the dangers of accidents or

Measures to Reduce the Risk of Outbreak of Nuclear War;[79] the 1972 Incidents at Sea Agreement;[80] the 1973 Prevention of Nuclear War Agreement;[81] the 1987 Agreement on the Establishment of Risk Reduction Centers;[82] and the 1988 Ballistic Missile Launch Notification Agreement.[83] Among multilateral instruments, the 1986 Stockholm Document on Confidence- and Security-Building Measures and Disarmament in Europe[84] and the associated Vienna Documents of 1990 and thereafter[85] stand out.

These agreements, for the most part, do not require countries to

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miscalculations that might cascade into nuclear war. *See* sources cited *supra*.

79. *See generally* Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War, U.S.- U.S.S.R., Sept. 30, 1971, 807 U.N.T.S. 57. This instrument included reciprocal pledges to maintain and improve organizational and technical arrangements to prevent the accidental or unauthorized use of nuclear weapons, and to notify each other in case of related incidents. *See id.*

80. *See generally* Agreement Between the Government of the United States of America and the Government of the Union of Soviet Socialist Republics on the Prevention of Incidents on and over the High Seas, U.S.-U.S.S.R., May 25, 1972, 852 U.N.T.S. 152. This treaty addresses the problem of near-collisions between the states' ships and aircraft, by adopting safety measures and signals and by avoiding provocative maneuvers. *See id.*

81. *See generally* Agreement on the Prevention of Nuclear War, U.S.- U.S.S.R, June 22, 1973, 917 U.N.T.S. 86. In this agreement, the two countries stated their objective "to remove the danger of nuclear war and the use of nuclear weapons." *Id.* art. I. The two countries also agreed, "that each Party will refrain from the threat or use of force against the other Party." *Id.* art. II.

82. *See generally* Agreement on the Establishment of Nuclear Risk Reduction Centers, U.S.-U.S.S.R, Sept, 15, 1987, 1530 U.N.T.S 387. The Risk Reduction Centers supplement the hotline agreements, which are reserved for use by heads of the two governments, by providing a secure, reliable and routine mechanism for communication of non-crisis information, including the frequent notifications that must be exchanged pursuant to nuclear arms control agreements. *See id.*

83. *See generally* Agreement Between The United States of America and The Union of Soviet Socialist Republics on Notifications of Launches of Intercontinental Ballistic Missiles and Submarine-Launched Ballistic Missiles, U.S.-U.S.S.R, May 31, 1988, 27 I.L.M. 1200. Under this agreement, the parties provide twenty-four hours advance notice of the planned date, launch site and impact area of any launch of an intercontinental ballistic missile or submarine-launched ballistic missile. *See id.*

84. *See generally* Document of the Stockholm Conference on Confidence- and Security-Building Measures and Disarmament in Europe Convened in Accordance with the Relevant Provisions of the Concluding Document of the Madrid Meeting of the Conference on Security and Cooperation in Europe, Sept. 19, 1986, 26 I.L.M. 190. The Stockholm Document contains a variety of measures such as notification of upcoming military exercises, invitation of observers to monitor those exercises, and aerial and on-site inspections. *See id.*

85. *Vienna Document 1999 of the Negotiations on Confidence- and Security-Building Measures*, COM (1999) 1/99 final (Nov. 16, 1999). The Vienna Document called for increased transparency of military assets and activities, annual exchanges of information, and improved consultation procedures. *See id.*

limit or reduce their armed forces or armaments; they do not directly restrict participants' military deployments or operations. They do, however, enhance regional and global stability and security by committing the parties to a modicum of prudential self-restraint, mutual respect, and concern for how their ambiguous actions might be perceived by the other side; by reducing accidents, miscommunications, and misunderstandings that could cascade into calamity; and by instituting practices, exchanges, and transparency that can help reassure nervous countries that their neighbors and erstwhile foes are not secretly preparing an armed attack.[86]

Kellogg-Briand was the pathbreaker for these agreements, and reflected a remarkable degree of social consensus, inside the United States and around the world. The U.S. Senate, for example, provided its advice and consent to the treaty on January 16, 1929 by a resounding vote of 85-1.[87] The pact drew vigorous support from even the "Irreconcilables," such as Idaho Republican Senator William E. Borah, who had zealously opposed the Treaty of Versailles and U.S. participation in the League of Nations, but who considered legal abolition of warfare to be propitious.[88] Kellogg was awarded the Nobel

86. Confidence-building measures of various sorts are employed in a wide variety of contexts, to promote peace and stability, even without directly reducing arms. *See, e.g.*, *U.S. Dep't of St., Rep. of the U.S. Pursuant to Actions 5, 20, 21 of the 2010 Nuclear Non-Proliferation Treaty Review Conference Final Doc.*, U.S. DEP'T. ST. 12-14 (2014), *available at* http://www.state.gov/documents/organization/225580.pdf (last visited Dec. 18, 2014) [hereinafter *Actions Report*] (summarizing transparency and confidence-building measures adopted by the United States and others in response to demands from non-nuclear countries); *U.S. Rep. to the Org. of American States on the Application of Confidence and Security Building Measures for 2009 and 2010, AG/RES.2447*, U.S. DEP'T. ST. (2011), *available at* http://www.state.gov/p/wha/rls/187741.htm (last visited Dec. 18, 2014); *Rep. of the U.N. Group of Governmental Experts on Transparency and Confidence-Building Measures in Outer Space Activities, A/68/189*, UNITED NATIONS (2013), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/68/189 (last visited Dec. 11, 2014); Daryl Kimball, *Open Skies Treaty at a Glance,* ARMS CONTROL ASS'N (Oct. 2012), *available at* http://www.armscontrol.org/factsheets/openskies (last visited Dec. 18, 2014).

87. Congressional Record vol. 70-a, 70th Cong. 2, Jan. 15, 1929, p. 1731 (Senate vote on Kellogg-Briand); *see* FERRELL, *supra* note 25, at 252 (noting that John G. Blaine (Republican from Wisconsin) was the lone dissenter); Josephson, *supra* note 49, at 378-79 (explaining that Kellogg-Briand united diverse political constituencies; it promoted the interests of multiple factions); Herbert Hoover, U.S. President, Remarks Upon Proclaiming the Treaty for the Renunciation of War (Kellogg-Briand Pact) (July 24, 1929) (characterizing the treaty as "a proposal to the conscience and idealism of civilized nations. It suggested a new step in international law, rich with meaning, pregnant with new ideas in the conduct of world relations."); Baratta, *supra* note 43, at 703 (noting that the Kellogg-Briand Pact was displayed in post offices across the United States, "creating the impression that a historic event was afoot.").

88. JOHN CHALMERS VINSON, WILLIAM E. BORAH AND THE OUTLAWRY OF WAR 59-70,

Peace Prize for his leadership of the treaty process, and was later appointed to the Permanent Court of International Justice ("PCIJ").[89] The NGO community – perhaps best represented by Andrew Carnegie's Endowment for International Peace, which had sponsored sequential high-visibility iterations of an anti-war treaty – was never stronger.[90]

President Calvin Coolidge enthused, as the Kellogg-Briand negotiations neared conclusion:

> Had an agreement of this kind been in existence in 1914, there is every reason to suppose that it would have saved the situation and delivered the world from all the misery which was inflicted by the great war . . . . It holds a greater hope for peaceful relations than was ever before given to the world. If those who are involved in it, having started it will finish it, its provisions will prove one of the greatest blessings ever bestowed upon humanity.[91]

Barely a decade later, however, World War II – a different kind of war, with different causes and stakes – dealt a lasting blow to the whole concept of outlawry, and to Kellogg-Briand in particular.[92] The treaty continued to be frequently cited,[93] and the spirit animating the peace

122-32, 149-75 (Univ. of Ga., 1st ed. 1957); *William E. Borah*, ENCYCLOPEDIA BRITANNICA (2014), *available at* http://www.britannica.com/EBchecked/topic/73799/William-E-Borah (last visited Dec. 18, 2014); WEHBERG, *supra* note 14, at 18, 133 (reprinting one of Borah's Senate resolutions in support of outlawry); *see also* FERRELL, *supra* note 25, at 33.

89. *See Biographies of the Secretaries of State: Frank Billings Kellogg*, *supra* note 66.

90. Carnegie founded the Endowment for International Peace in 1910, to "hasten the abolition of war, the foulest blot upon our civilization." *Carnegie at 100: A Century of Impact*, CARNEGIE ENDOWMENT INT'L PEACE (2014), *available at* http://carnegieendowment.org/about/?fa=centennial (last visited Dec. 18, 2014). Experts affiliated with the Carnegie Endowment provided much of the public intellectual support for the concept of outlawry of war and drafted alternative versions of a treaty. *See* Josephson, *supra* note 49, at 379 (discussing contributions of James T. Shotwell and Joseph P. Chamberlain); *see* WHEELER-BENNETT, *supra* note 25, at 19; *see* FERRELL, *supra* note 25, at 21-23.

91. FERRELL, *supra* note 25, at 208 (Calvin Coolidge spoke about the Kellogg treaty in Wassau, Wisconsin on August 15, 1928).

92. *See* Josephson, *supra* note 49, at 387-88 (as World War II approached, most internationalists abandoned support for Kellogg-Briand, concluding that armed force was required to protect international peace and security against the dictators); Iriye, *supra* note 34, at 131-48 (the rise of totalitarianism threatened democracies in ways that institutions such as Kellogg-Briand could not address).

93. *See* Josephson, *supra* note 49, at 383 (U.S. Secretary of State Henry L. Stimson "invoked the Kellogg-Briand pact in the Sino-Russian conflict in Manchuria in 1929 and then again in the Sino-Japanese conflict during the early 1930s."); *id.* at 386 (President Franklin D. Roosevelt and his Secretary of State Cordell Hull invoked the pact on numerous occasions in the late 1930s); Jackson, *supra* note 35, at 7 (calling the Kellogg-Briand Pact a cornerstone of U.S. foreign policy and stating that the United States had invoked it repeatedly); Baratta, *supra* note 43, at 696; Richard N. Current, *Consequences of the Kellogg Pact*, *in* ISSUES AND CONFLICTS: STUDIES IN TWENTIETH CENTURY AMERICAN

movement never fully retreated, but it was never again the centerpiece of international attention and diplomacy. After World War II, the conceit of Kellogg-Briand provided essential intellectual and legal underpinnings for the Nuremburg and Tokyo war crimes tribunals, substantiating the doctrine of prosecuting aggressors for "crimes against the peace."[94]

In its ninth decade, however, the legacy of the Kellogg-Briand pact is often portrayed as one of abject failure and misguided idealism – the treaty is the poster child for those who would deride the whole concept of marshaling legal instruments to help constrain pernicious national behaviors. Of course we can't meaningfully outlaw war, skeptics laugh – aspirational legal instruments are a weak reed against the tenacity of determined evil-doers. Only armed might, backed by eternal vigilance, counts for much in modern international confrontations; unverifiable and unenforceable declarations are not worth the parchment they're written on, and serve only to lull the soft-hearted into a false sense of security.[95] Even those inclined to be sympathetic with the ambitions of the Kellogg-Briand enterprise tend to conclude, sadly, that it was

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DIPLOMACY 210, 212-15 (George L. Anderson ed., 1959).

94. Josephson, *supra* note 49, at 388 (allied prosecutors at Nuremburg emphasized the crime of conspiring to wage aggressive war in violation of Kellogg-Briand); Baratta, *supra* note 43, at 696-97; Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 54, (1947); Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, 25 FOREIGN AFF. 179, 183-84 (Jan. 1947).

95. *See, e.g.*, Richard Perle, *Yes, Nukes: The Global Zero Utopia*, WORLD AFFS. J. (Mar./Apr. 2011), *available at* http://www.worldaffairsjournal.org/article/yes-nukes-global-zero-utopia (last visited Dec. 18, 2014) (describing "the illusion created by Kellogg-Briand" as one of the factors precipitating World War II; asserting that utopianism does not make the world more idealistic and may bring about the very evils the advocates are attempting to eliminate; and comparing the current effort to abolish nuclear weapons to Kellogg-Briand); Charles Krauthammer, *The Age of Obama: Anno Domini 2*, HERITAGE FOUND. (Feb. 1, 2010), *available at* http://www.heritage.org/research/lecture/the-age-of-obama-anno-domini-2 (last visited Dec. 18, 2014) (describing Kellogg-Briand as "an absurdity" and a "useless treaty"); Andrei Shoumikhin & Baker Spring, *Strategic Nuclear Arms Control for the Protect and Defend Strategy*, HERITAGE FOUND. (May 4, 2009), *available at* http://www.heritage.org/research/reports/2009/05/strategic-nuclear-arms-control-for-the-protect-and-defend-strategy (last visited Dec. 18, 2014) (criticizing Kellogg-Briand as "ambitious and ultimately unachievable," "utopian grandeur," flawed in confusing ends with means, and giving the United States an "unfounded faith" that impeded effective response to Japanese aggression; also comparing modern arms control initiatives to Kellogg-Briand); Josephson, *supra* note 49, at 377 (noting the views of historians, journalists and commentators who deride Kellogg-Briand as naïve, feeble, a worthless piece of paper, or a diplomatic charade); Matthew J. Morgan, *A New Kellogg-Briand Mentality? The Anti-Personnel Landmine Ban*, 13 SMALL WARS & INSURGENCIES 97, 98 (2002) (commenting about Kellogg-Briand that "The futility of this endeavor cannot be exaggerated" and criticizing the effort to ban land mines as reminiscent of it).

largely a benighted, utopian failure.[96]

D. Principal Attributes of Kellogg-Briand.

In concluding this section, the article attempts to extract some of the key features of Kellogg-Briand that may be relevant for twenty-first century conditions – especially nuclear conditions. These highlights might not rise to the level of "lessons learned" – and the article certainly does not contend that Kellogg-Briand was a flawless success – but there are at least "suggestions" from the heady 1928 experiences about traits that a nuclear version of the treaty might try to replicate (or to avoid).

1. Kellogg-Briand is Legally Binding.

The aspirations of the drafters were lofty and their rhetoric was bold, and they chose to express their ambitions in the form of a written, legally binding treaty, rather than a hortatory "agreement in principle," a joint statement of intentions, or a series of grand policy speeches.[97] Legally binding tools are not necessarily more important or more enduring, nor are they automatically more likely to be complied with, but this choice is not merely one of style.[98] The formalities of law – both international law and the domestic legal processes that individual states must follow in order to affiliate – signify a special depth of commitment and seriousness of purpose.[99]

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96. *See* FRANKLIN D. ROOSEVELT, OUR FOREIGN POLICY: A DEMOCRATIC VIEW 573, 585 (1928) (emphasizing that "war cannot be outlawed by resolution alone"); Josephson, *supra* note 49, at 385 (noting that prior to his election as president, Roosevelt considered Kellogg-Briand to be harmless but unrealistic); Baratta, *supra* note 43, at 698.

97. Under Article 2 of the Vienna Convention on the Law of Treaties, a treaty is "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Here, the critical factor is that Kellogg-Briand is "governed by international law." Vienna Convention on the Law of Treaties art. II, May 23, 1969, 1155 U.N.T.S 331 (U.S. not a party).

98. Harriman, *supra* note 22, at 239, 252 (arguing that the legal effect of Kellogg-Briand is not as important or interesting as its political effect, but is noteworthy nonetheless); *see* Emily Cumberland, *The End of Treaties? An Online Agora,* AJIL UNBOUND (Apr. 28, 2014), *available at* http://www.asil.org/blogs/end-treaties-online-agora (last visited Dec. 18, 2014) (discussing the possible decline in formal treaties as a mechanism of cooperation in international law); *see also Treaty Survival*, GEORGE WASH. UNIV. (Apr. 9, 2014), *available at* http://www.law.gwu.edu/News/2013-2014events/Pages/TreatySurvival.aspx (last visited Dec. 18, 2014) (panel discussion of continued effectiveness of treaties in modern era).

99. *See Circular 175 Procedure*, U.S. DEP'T ST. (2014), *available at* http://www.state.gov/s/l/treaty/c175/ (last visited Dec. 18, 2014) (noting that in U.S. practice, the Department of State oversees the "Circular 175 process," which determines whether a particular international agreement will be structured as a legally binding

Moreover, Kellogg-Briand was not just any treaty, but an aggressively multilateral one, attracting the participation of virtually all the critical global players, and it was a fully public enterprise, in which civil society populations looked eagerly over the shoulders of the drafters.[100] The treaty both drew strength from, and reciprocally helped reinforce, the world-wide, populist anti-war zeal.

2. Kellogg-Briand is, in Effect, a "No First Use" Commitment.

Despite sometimes being advertised as a comprehensive, full-scope non-war undertaking, the true upshot of Kellogg-Briand is limited in this important – and realistic – way. Although the text of the document is not explicit, the parties were completely clear among themselves that the function was to outlaw aggressive or offensive war; each state necessarily retained the inherent right to defend itself and its allies.[101]

At the same time, the document utterly failed to define the core distinction between (prohibited) offensive war and (permitted) defensive engagement, or to offer any line-drawing assistance in resolving what could frequently be problematic and intensely contested international fact patterns.[102] Kellogg refused to attempt any negotiations toward a definition of the term "aggression"[103] – an effort that would inevitably lead the diplomats down a hopeless rabbit hole[104]

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instrument, and if so, whether it will be handled for domestic purposes as a treaty or an executive agreement).

100. *See* WHEELER-BENNETT, *supra* note 25, at 21-24 (noting rapid public and media responses to the evolving negotiation of the Kellogg-Briand Pact).

101. *See* WHEELER-BENNETT, *supra* note 25, at 107 (reprinting Frank B. Kellogg, Speech to American International Law Association, Washington, D.C., April 29, 1928) ("There is nothing in the American draft of an anti-war treaty which restricts or impairs in any way the right of self-[defense].").

102. *See* WEHBERG, *supra* note 14, at 46-51 (describing the 1925 conflict between Greece and Bulgaria that raised difficult issues in defining the distinction between offensive and defensive war); *id.* at 100-08 (discussing defensive war, war undertaken to sanction a country, and war to punish aggression); *id.* at 81 (concluding that despite definitional problems, the Kellogg-Briand Pact succeeded in reversing the burden of proof about the legitimacy of a use of military force); *see also* WHEELER-BENNETT, *supra* note 25, at 59 (noting that the Kellogg-Briand Pact permits the use of force "in the case of Great Britain, in [defense] of certain places or strategic points which are vital to the safety of the Empire.").

103. WEHBERG, *supra* note 14, at 72-76; WHEELER-BENNETT, *supra* note 25, at 24-25; *Kellogg Address to the Council on Foreign Relations*, *supra* note 43, at 90; *Hearings*, *supra* note 29, at 8 (Kellogg testifying that "nobody on earth, probably, could write an article defining 'self-defense' or 'aggressor' that some country could not get around"); *see* Matthew Lippman, *The History, Development and Decline of Crimes Against Peace*, 36 GEO. WASH. INT'L L. REV. 957, 986-90 (2004).

104. *See* Harvard Research, *supra* note 77; *see also* Report of the Working Group on the Crime of Aggression, *infra* note 120 (regarding the difficulty of negotiating text

– and the Americans insisted that the treaty would not contain any commitments (as in the Treaty of Versailles[105] and the Locarno Pact[106]) to come to the aid automatically of a state that found itself victimized by another.[107]

3. Kellogg-Briand Does Not Address Disarmament, and Contains no Implementation Mechanisms or Diplomatic Infrastructure.

Many of Kellogg-Briand's proponents earnestly advocated disarmament, of course, seeing weapons programs as exorbitantly expensive, wasteful and provocative; they wanted to rein in the "merchants of death."[108] But Kellogg-Briand is a specialized, single-purpose instrument, content with the solo function of condemning recourse to war; the arms reductions would be addressed separately, in a different series of instruments.[109]

In the same vein, it must be noted that Kellogg-Briand is also bereft of specifications about the intended concrete meaning of a general "renunciation" of war; it contains no subsidiary obligations pursuant to which states would give operational content to the abstract commitment. After joining the agreement, parties were not required to

concerning the definition of the crime of aggression for the International Criminal Court).

105. Under the League of Nations Covenant in Part I of the Treaty of Versailles, *supra* note 36, Article 11 states that any war or threat of war is "declared to be a matter of concern to the whole League [of Nations]," and Article 16 declares any state that resorts to unwarranted war "shall ipso facto be deemed to have committed an act of war against all other Members of the League." League of Nations Covenant, *supra* note 36, arts. 11, 16; *see* WEHBERG, *supra* note 14, at 11, 22 (noting American resistance to the obligation imposed upon members of the League of Nations to use force in response to aggression against another member); *Hearings*, *supra* note 29, at 3-4 (colloquy between senators and Secretary Kellogg regarding contrasting types of obligations in the Kellogg-Briand Pact and other treaties of military alliance).

106. *See* WEHBERG, *supra* note 14, at 32-40 (analyzing parties' commitments to use military power to enforce the Locarno commitments); WHEELER-BENNETT, *supra* note 25, at 32-33 (noting American suspicion of other treaties under which European states committed to use military force to assist each other against aggression).

107. *See* Iriye, *supra* note 34, at 63, 69, 80 (noting varying opinions in the United States regarding committing to participation in international affairs, especially regarding the use of force); *see also* Lodge, *supra* note 32, at 3-5 (questioning the value of the Kellogg-Briand Pact, if it does not really constitute a pledge of military support); Josephson, *supra* note 49, at 380 (some saw Kellogg-Briand as a door that would open the United States to the League of Nations and the world court); *see also* Current, *supra* note 93, at 221-23.

108. WEHBERG, *supra* note 14, at 97 ("The great importance of a radical disarmament for the idea of the outlawry of war can hardly be overemphasized.").

109. The Soviet Union strongly complained that Kellogg-Briand should do more to reduce arms; Foreign Minister Litvinov emphasized this as a priority. *See* Diplomatic Note from the Soviet Government Containing Its Adhesion to the Peace Pact, *reprinted in* WHEELER-BENNETT, *supra* note 25, at 181-87.

undertake any particular follow-up steps to substantiate their act of outlawry. The treaty does not indicate any possible day-to-day measures that would assist in making international armed conflict less likely or more avoidable, or create any "firebreaks" that could impede adverse developments. Nor does the treaty establish any fresh diplomatic infrastructure – no new organization or international institutions are elicited.[110]

4. Kellogg-Briand Reinforces the Parties' Commitment to Peaceful Dispute Resolution.

The one partial exception to the observation made in the immediately preceding paragraph is the treaty's insistence that any future disputes or conflicts shall be resolved exclusively via "pacific" means.[111] Again, Kellogg-Briand does not itself establish or enlarge any international mechanisms for this purpose, but multiple companion instruments had proliferated an array of judicial, arbitration, conciliation and related services. These alternatives were intended to provide practical, readily available surrogates for armed force in the resolution of disputes (although, in practice, these opportunities were only rarely exploited).[112]

5. Kellogg-Briand is Reciprocal.

The treaty extends its protection only to states that join the club – parties renounce war only "in their relations with one another."[113] This, of course, is a pregnant political choice, and the drafters expressed their hope that all states would "join in this humane endeavor,"[114] but it would certainly have been possible to condemn all war, including war

110. Harriman, *supra* note 22, at 240 (arguing that Kellogg-Briand's condemnation of war "is, of course, merely an expression of opinion and does not call for any action by the parties.").

111. Kellogg-Briand Pact, *supra* note 1, art. II; *see also* Harriman, *supra* note 22, at 243-46 (arguing that in this context, "'pacific' does not mean "amicable"; the treaty would allow all measures of redress that fall short of war, including retorsion, reprisal, embargo, etc.).

112. In this connection, note especially article 12 of Part I of the Treaty of Versailles, which requires that any serious international dispute be submitted either to arbitration or to the Council of the League of Nations, and that parties not resort to war until three months after the award by the arbitrators or the report by the Council. League of Nations Covenant, *supra* note 36, art. 12; *see also* SHOTWELL, *supra* note 7, at 255 (identifying four formal institutional alternative mechanisms for resolving international disputes); Current, *supra* note 93, at 216-18.

113. Kellogg-Briand Pact, *supra* note 1, at preamble para 3, art. I.

114. *Id.* at preamble para 4.

launched against states that had not yet, for whatever reason, signed and ratified the document.[115]

6. Kellogg-Briand is Permanent.

Unlike many treaties, Kellogg-Briand has no fixed duration; it has avoided sunset (and even any amendment) to the present day.[116] Moreover, the document has no "withdrawal" clause, of the sort that has become commonplace in more recent arms control treaties.[117] The Charter of the United Nations has, for most practical purposes, come to supersede Kellogg-Briand,[118] and the 1928 restraints would be suspended (or inapplicable) if a party were attacked by another state, so there is a type of "escape hatch," but it has never been formally or overtly exercised.

7. Kellogg-Briand is Not About Criminal Law.

Despite invoking the rhetoric of "outlawry," the treaty is not concerned with imposing criminal sanctions on countries or individuals. Today, the crime of aggression might be prosecuted in an international tribunal, such as a successor to forums established at Nuremburg and Tokyo, or more recent variations,[119] or perhaps, in the future, the International Criminal Court.[120] Likewise, pursuant to "universality"

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115. *See* Harriman, *supra* note 22 at 247 (concluding that under Kellogg-Briand, an aggressive war of conquest against a non-party is permitted).

116. *See* MILLER, *supra* note 25, at 146 (highlighting as "perhaps the most striking feature" of Kellogg-Briand the fact that the treaty is permanent; saying that "the significance of such perpetuity is almost impossible of overstatement.").

117. *See, e.g.*, START I, *supra* note 8, art. XVII.3; CWC, *supra* note 8, art. XVI.2; CTBT, *supra* note 8, art. IX.2 (each establishing a party's right to withdraw from the treaty if it determines that extraordinary events related to the subject of the treaty have jeopardized its supreme national interests).

118. Under the Charter, a country may use military force in self-defense or pursuant to authorization from the Security Council. U.N. Charter, *supra* note 2, arts. 2.4, 42, 51. In the event of a conflict between the Charter and any other treaty, the obligations of the Charter prevail. *Id.* art. 103. *See also* Robert J. Delahunty, *Paper Charter: Self-Defense and the Failure of the United Nations Collective Security System*, 56 CATH. U. L. REV. 871, 888-89 (2007).

119. *See* DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS (Princeton Univ. Press 2012) (discussing various international and mixed war crimes tribunals); *UN Tribunals Crucial for Delivering Justice for Rwanda, Former Yugoslavia, Security Council Told*, UN NEWS CENTRE (June 5, 2014), *available at* http://www.un.org/apps/news/story.asp?NewsID=47968#.U5DMGoUl3bk (last visited Dec. 18, 2014) (assessing the impact of ad hoc war crimes tribunals established by the U.N. Security Council for Rwanda and the former Yugoslavia).

120. The International Criminal Court, established pursuant to the Rome Statute of the International Criminal Court exists to prosecute individuals for "the most serious crimes of

jurisdiction, perhaps any state could prosecute an individual guilty of the most serious crimes against the peace.[121] But those eventualities were not in prospect in 1928.[122]

8. Fundamentally, Kellogg-Briand Represents a Psychological Shift.

That is, the radical spirit behind the treaty is to effect a change (or to reflect a change that was already occurring in the 1920s) in the way people (military and civilian leaders, kings and elected officials, and their general populations) thought about war. The objective was to de-emphasize war as a normal mode of operation of the international community; to no longer understand war as something that "just happens"; to characterize war as extraordinary and aberrational, and as a phenomenon that requires a justification, including a basis in international law. The proponents wanted to see war, and preparations for war, differently – it would not be something that countries would possess an untrammeled right incessantly to prepare for, threaten, and conduct; instead, it would be something perpetually to be avoided, to be circumnavigated via alternative, better processes.

The entire field of modern *jus ad bellum*, regulating the circumstances under which a state may now lawfully initiate international hostilities, thus owes its genesis (or at least its renaissance from an earlier "just war" tradition) to this paradigm shift. Of course, the treaty was far from perfect, and alterations in international law cannot by themselves fully extirpate war from the human experience – any more than a massive, armed combat can truly "end all wars" – but new patterns of thought can make an important difference.[123]

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concern to the international community as a whole" including genocide, crimes against humanity, war crimes and aggression. UN Doc. A/CONF. 183/9, 2187 U.N.T.S. 90, 37 I.L.M. 1002 (1998) (entered into force July 1, 2002). However, the court's jurisdiction over the crime of aggression has not yet been activated. Report of the Working Group on the Crime of Aggression, RC/11, 11-E-011110 45, Annex III, Dec. 22, 2010, *available at* http://www.icc-cpi.int/iccdocs/asp_docs/RC2010/RC-11-Annex.III-ENG.pdf (last visited Dec. 18, 2014).

121. *See* AM. LAW INST., RESTATEMENT (THIRD) OF THE FOREIGN REL. LAW OF THE U.S. § 404 (1987) (discussing the small category of offenses "recognized by the community of nations as of universal concern," enabling any state to assert jurisdiction; the crime of aggression is not listed, but might be considered of equivalent status).

122. *See* WEHBERG, *supra* note 14, at 20, 107 (discussing the possibility of criminal prosecution of states or individuals for violations of Kellogg-Briand); *see also* sources cited *supra* note 94 (noting the role that Kellogg-Briand played in underpinning the post-World War II criminal trials of Nazi and Japanese aggressors).

123. *See* WEHBERG, *supra* note 14, at 82 (emphasizing the "moral value" of the treaty); Josephson, *supra* note 49, at 384 (U.S. Secretary of State Henry L. Stimson believed that if global public opinion desired to make Kellogg-Briand effective, it could become

III. NUCLEAR WEAPONS, PROLIFERATION, AND WAR

The devastating power of nuclear weapons, the precarious dangers of nuclear proliferation, and the catastrophic effects of nuclear war are now so well-appreciated that little elaboration here is required.[124] In response to these extraordinary hazards, the world community has undertaken a series of multilateral, bilateral, and unilateral arms control initiatives – but no one can pretend that this present conglomeration is adequate to meet the appalling threats.[125]

A. The Current Threat.

Nuclear weapons pose the greatest danger in the world today; indeed, the greatest danger humanity has ever confronted. A single nuclear weapon (the standard model of which is now many times more powerful than the devices that obliterated Hiroshima and Nagasaki in 1945) could annihilate a city. Even a relatively "small," limited nuclear

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irresistible); Harriman, *supra* note 22 at 241-42 (prior to Kellogg-Briand, every state had an absolute right under international law to make war; that has changed); Harvard Research, *supra* note 77, at 857 (noting that in the 1890s, it was not possible to say that state's decision to go to war could be illegal – it was either permitted by international law or simply unregulated by it); *see* Moore, *supra* note 35, at 9; Quincy Wright, *The Outlawry of War and the Law of War*, 47 AM. J. INT'L L. 365, 369 (1953) (arguing that the moral, social, and psychological change effected by the Kellogg-Briand Pact would require generations, not merely decades, to succeed); HOWARD, *supra* note 33, at 9 (discussing St. Augustine's concept of 'just war"); Christopher M. Petras, *The Use of Force in Response to Cyber-Attack on Commercial Space Systems-Reexamining "Self-Defense" in Outer Space in Light of the Convergence of U.S. Military and Commercial Space Activities*, 67 J. AIR L. & COM. 1213 (2007); Leo Van den hole, *Anticipatory Self-Defence Under International Law*, 19 AM. U. INT'L L. REV. 69 (2003).

124. *See Nuclear Weapons Effects Technology, Militarily Critical Technologies List: Sec. VI, Nuclear Weapons Effects Technology*, FED'N OF AM. SCIENTISTS, *available at* http://www.fas.org/irp/threat/mctl98-2/p2sec06.pdf (last visited Dec. 18, 2014); *The Effects of Nuclear War*, U.S. OFFICE TECHN. ASSESSMENT (May 1979), *available at* http://www.fas.org/nuke/intro/nuke/7906/index.html (last visited Dec. 18, 2014); U.S. DEP'T DEF. & ENERGY RESEARCH & DEV. ADMIN, THE EFFECTS OF NUCLEAR WEAPONS (Samuel Glasstone & Philip J. Dolan eds., 1977), *available at* http://www.fourmilab.ch /etexts/www/effects/ (last visited Dec. 18, 2014)[hereinafter THE EFFECTS OF NUCLEAR WEAPONS]; *Scientific Aspects of Nuclear Explosion Phenomena*, TRINITY ATOMIC WEBSITE, *available at* http://www.abomb1.org/nukeffct/enw77b3.html#foot_7 (last visited Dec. 18, 2014); *Nuclear Detonations: Contemplating Catastrophe: Development and Disarmament Roundtable*, BULL. ATOMIC SCIENTISTS (2013), *available at* http://thebulletin.org/nuclear-detonations-contemplating-catastrophe (last visited Dec. 18, 2014).

125. *See generally* STEVEN PIFER & MICHAEL E. O'HANLON, THE OPPORTUNITY: NEXT STEPS IN REDUCING NUCLEAR ARMS (2012); OLIVER MEIER & CHRISTOPHER DAASE, ARMS CONTROL IN THE 21ST CENTURY: BETWEEN COERCION AND COOPERATION (2013); WARD WILSON, FIVE MYTHS ABOUT NUCLEAR WEAPONS (2013); GRAHAM, JR.& LAVERA, *supra* note 13.

war would inflict devastation of historic proportions on a country (or several). A massive nuclear exchange would jeopardize the planet's civilization and quite possibly eradicate all human life on earth. For the United States, nuclear weapons pose an existential threat – they are the only mechanism that could inflict sudden, massive, inescapable societal destruction.[126]

Nine countries are known to possess nuclear weapons: China, France, India, Israel, North Korea, Pakistan, Russia, the United Kingdom, and the United States. Many more states hold the potential to join that club; they have the intellectual, industrial, and managerial capability, as well as access to the necessary raw materials. Proliferation of nuclear weapons to additional countries (and, *a fortiori*, to terrorist organizations) could be calamitous, further destabilizing international political relations and empowering localized disputes to mushroom to global dimensions.[127]

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126. *See Strategy for Countering Weapons of Mass Destruction*, U.S. DEP'T DEF. (June 2014), *available at* http://www.defense.gov/pubs/DoD_Strategy_for_Countering_Weapons_of_Mass_Destruction_dated_June_2014.pdf (last visited Dec. 18, 2014); *see Nuclear Posture Review Report*, U.S. DEP'T DEF. 3 (April 2010), *available at* http://www.defense.gov/npr/docs/2010%20Nuclear%20Posture%20Review%20Report.pdf (last visited Dec. 18, 2014) [hereinafter *2010 Nuclear Posture Review Report*] (discussing threat of nuclear proliferation and terrorism); PAUL BRACKEN, THE SECOND NUCLEAR AGE: STRATEGY, DANGER AND THE NEW POWER POLITICS (Henry Holt & Co. LLC 2012); MICHELLE BENTLEY, WEAPONS OF MASS DESTRUCTION AND US FOREIGN POLICY: THE STRATEGIC USE OF A CONCEPT (2014); MARK A. HARWELL, NUCLEAR WINTER: THE HUMAN AND ENVIRONMENTAL CONSEQUENCES OF NUCLEAR WAR (1984); Alan Robock & Owen Brian Toon, *Self-Assured Destruction: The Climate Impacts of Nuclear War*, 68 BULL. ATOMIC SCIENTISTS 66 (2012); Michael J. Mills et al., *Multidecadal Global Cooling and Unprecedented Ozone Loss Following a Regional Nuclear Conflict*, AGU PUBLICATIONS (Apr. 1, 2014), *available at* http://climate.envsci.rutgers.edu/pdf/MillsNWeft224.pdf (last visited Dec. 18, 2014).

127. *See Strategy for Countering Weapons of Mass Destruction*, *supra* note 126; *see Nuclear Weapons: Who Has What at a Glance*, ARMS CONTROL ASS'N (last updated June 23, 2014), *available at* http://www.armscontrol.org/factsheets/Nuclearweaponswho haswhat (last visited Dec. 18, 2014) (estimating the nuclear weapons stockpiles of nine countries: China 240; France fewer than 300; Russia 1512 deployed strategic warheads, plus 3000 others; United Kingdom 225; United States 4804; India up to 100; Israel 75-200; Pakistan 90-110; North Korea 4-8); *Status of World Nuclear Forces*, FED'N AMER. SCIENTISTS (last updated Apr. 30, 2014), *available at* http://fas.org/issues/nuclear-weapons/status-world-nuclear-forces/ (last visited Dec. 18, 2014) (providing slightly different numerical estimates); Hans M. Kristensen & Robert S. Norris, *US Nuclear Forces, 2014*, 70 BULL. ATOMIC SCIENTISTS 85 (2014); *Press Release, Stockholm Int'l Peace Research Inst., Nuclear Forces Reduced Whole Modernizations Continue, Says SIPRI*, SIPRI (June 16, 2014), *available at* http://www.sipri.org/media/pressreleases/2014/nuclear_May_2014 (last visited Dec. 18, 2014); *Worldwide Threat Assessment of the US Intelligence Community: Hearing before the S. Armed Services Comm.*, 113th Cong. (2014) (statement of John R. Clapper, Dir. of National Intelligence),

Blocking the further spread of nuclear weapons has always been a top global priority, but it is a strenuous challenge. Nuclear weapons technology is now decades old; the very nature of technology is to propagate, and the basic secrets of bomb-building are now well-dispersed. The "trick" to avoiding further proliferation, therefore, must lie in politics, not in denial or force. As Jonathan Schell observed:

The world's safety ultimately depends not on the number of nations that want to build nuclear weapons but cannot, but on the number that can but do not. If the spread of nuclear weapons is to be prevented over the long run, it cannot come through restrictions on nations' capacity. Instead, it must come by influencing their will.[128]

Unfortunately, the world at the moment seems a bit "stuck" in its efforts to influence the most relevant nations' respective willingness to reduce the dangers of nuclear possession and proliferation. The global stockpile of nuclear weapons has, blessedly, been greatly reduced: by the leading estimate, the world has produced some 125,000 nuclear weapons (ninety-seven percent manufactured by the United States and the Soviet Union/Russia) since 1945; today, approximately 10,000 remain in active military stockpiles, with thousands more awaiting dismantlement.[129] But the reductions process seems to have fallen into hiatus: there are no major nuclear arms control negotiations under way or in prospect, and several participants are currently ramping up and modernizing, rather than winnowing, their strategic forces.[130]

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available at http://www.dni.gov/files/documents/2014%20WWTA%20SFR_SASC_11_Feb.pdf (last visited Dec. 18, 2014) (providing the U.S. intelligence community's judgment that proliferation of weapons of mass destruction constitutes a major threat to the security of the United States and its allies); Edward A. Friedman & Roger K. Lewis, *A Scenario for Jihadist Nuclear Revenge*, FED'N AMER. SCIENTISTS (2014), *available at* http://fas.org/pir-pubs/scenario-jihadist-nuclear-revenge/ (last visited Dec. 18, 2014); Matthew Bunn et al., The U.S.-Russia Joint Threat Assessment of Nuclear Terrorism, BELFER CENTER FOR SCI. & INT'L AFF. (2011), *available at* http://belfercenter.ksg.harvard.edu/files/Joint-Threat-Assessment%20ENG%2027%20May%202011.pdf (last visited Dec. 18, 2014). *But see* Kenneth N. Waltz, *Why Iran Should Get the Bomb Nuclear: Balancing Would Mean Stability*, 19 FOREIGN AFF. 2 (2012) (arguing that proliferation is inevitable and can be stabilizing).

128. Jonathan Schell, *The Folly of Arms Control*, 79 FOREIGN AFF. 22, 28 (2000); *see also* R. Scott Kemp, *The Nonproliferation Emperor has no Clothes: The Gas Centrifuge, Supply-Side Controls and the Future of Nuclear Proliferation*, 38 INT'L SECURITY 39, 39 (Spring 2014) (arguing that export controls and economic sanctions are insufficient to prevent a country from developing or acquiring the capability to develop nuclear weapons; political and cultural factors must play the leading roles).

129. Hans M. Kristensen & Robert S. Norris, *Global Nuclear Weapons Inventories, 1945-2013*, 69 BULL. ATOMIC SCIENTISTS 75, 75 (2013), *available at* http://bos.sagepub.com/content/69/5/75.full.pdf+html (last visited Dec. 18, 2014) [hereinafter *Inventories*].

130. *See id.* (reporting that Russia is undertaking a major transformation of its nuclear

The concept of complete nuclear disarmament has only episodically been on the front burner of international politics.[131] This iconoclastic notion experienced an abrupt resurgence with the publication, beginning in January 2007, of a series of vigorous advocacy columns in the *Wall Street Journal* penned by four of the most prominent senior U.S. statesmen, George P. Shultz, William J. Perry, Henry A. Kissinger, and Sam Nunn.[132] The momentum for "getting to zero" suddenly intensified, with a torrent of supportive opinion pieces, analytical conferences, books and articles; diverse countries and NGOs vigorously took up the cause.[133] President Obama

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posture and deploying fewer, but newer, weapons; China is likely to double its force of intercontinental ballistic missile warheads in the next fifteen years; and India and Pakistan are in an arms race to deploy new weapons types); *see also* Kristensen & Norris, *supra* note 127, at 88-92; Hans M. Kristensen, *Nuclear Weapons Modernization: A Threat to the NPT?*, 44 ARMS CONTROL TODAY 8 (May 2014), *available at* http://www.armscontrol.org/act/2014_05/Nuclear-Weapons-Modernization-A-Threat-to-the-NPT (last visited Jan. 9, 2015); *see* Ray Acheson, *Modernization of Nuclear Weapons: Aspiring to "Indefinite Retention"?*, 68 BULL. ATOMIC SCIENTISTS 88, 88 (2012); *The NPT Action Plan Monitoring Report*, REACHING CRITICAL WILL 31-40 (2014), *available at* http://www.reachingcriticalwill.org/images/documents/Publications/2010-Action-Plan/NPT_Action_Plan_2014.pdf (last visited Dec. 18, 2014) [hereinafter REACHING CRITICAL WILL] (assessing status of world nuclear forces); *see generally Assuring Destruction Forever: Nuclear Weapon Modernization Around the World*, REACHING CRITICAL WILL (Ray Acheson ed., 2012), *available at* http://www.reachingcriticalwill.org/images/documents/Publications/modernization/assuring-destruction-forever.pdf (last visited Dec. 18, 2014) [hereinafter *Assuring Destruction*].

131. At their summit meeting in Reykjavik, Iceland October 11-12, 1986, President Ronald Reagan and Soviet Union General Secretary Mikhail Gorbachev came astonishingly close to an agreement to abolish all their nuclear weapons; at the last minute, such a breathtaking accord dissolved, and was not subsequently pursued. *See generally* REYKJAVIK REVISITED: STEPS TOWARD A WORLD FREE OF NUCLEAR WEAPONS (George P. Shultz et al. eds., 2008); *see generally* IMPLICATIONS OF THE REYKJAVIK SUMMIT ON ITS TWENTIETH ANNIVERSARY (Sidney D. Drell & George P. Shultz eds., 2007); *see* Thomas Blanton & Svetlana Savranskaya, *Reykjavik: When Abolition Was Within Reach*, 41 ARMS CONTROL TODAY 46 (Oct. 2011), *available at* http://www.armscontrol.org/act/2011_10/Reykjavik_When_Abolition_Was_Within_Reach (last visited Dec. 18, 2014).

132. George P. Shultz et al., *A World Free of Nuclear Weapons*, WALL ST. J., Jan. 4, 2007, at A15 (proposing "setting the goal of a world free of nuclear weapons and working energetically on the actions required to achieve that goal"). Additional op-ed pieces by this group followed in 2008, 2010, 2011 and 2013. *See* PHILIP TAUBMAN, THE PARTNERSHIP: FIVE COLD WARRIORS AND THEIR QUEST TO BAN THE BOMB (2012).

133. *See* GETTING TO ZERO: THE PATH TO NUCLEAR DISARMAMENT (Catherine McArdle Kelleher & Judith Reppy eds., 2011); RUSSIA AND THE DILEMMAS OF NUCLEAR DISARMAMENT, NUCLEAR THREAT INITIATIVE (Alexei Arbatov et al. eds., 2012); ELEMENTS OF A NUCLEAR DISARMAMENT TREATY (Barry M. Blechman & Alexander K. Bollfrass eds., 2010); CULTIVATING CONFIDENCE: VERIFICATION, MONITORING, AND ENFORCEMENT FOR A WORLD FREE OF NUCLEAR WEAPONS (Corey Hinderstein ed., 2010); STEVEN PIFER AND MICHAEL E. O'HANLON, THE OPPORTUNITY: NEXT STEPS IN REDUCING NUCLEAR ARMS

famously endorsed the concept of nuclear abolition in his celebrated Prague speech on April 5, 2009,[134] and the Security Council of the United Nations did likewise in resolution 1887 on September 24, 2009.[135] But the bubble of enthusiasm for disarmament seems to have deflated in the past couple of years, as fickle international politics zigzagged toward other topics.[136]

(2012); NUCLEAR DISARMAMENT: REGIONAL PERSPECTIVES ON PROGRESS (P.M. Kamath ed., 2013); Ivo Daalder & Jan Lodal, *The Logic of Zero: Toward a World Without Nuclear Weapons*, 87 FOREIGN AFF. 80 (2008); Christopher Ford, *A New Paradigm: Shattering Obsolete Thinking on Arms Control and Nonproliferation*, 38 ARMS CONTROL TODAY 12 (Nov. 2008), *available at* http://legacy.armscontrol.org/act/2008_11/ford (last visited Jan. 9, 2015); ABOLISHING NUCLEAR WEAPONS: A DEBATE (George Perkovich & James Acton, eds., 2009) [hereinafter Perkovich & Acton]; Michael Krepon, *Ban the Bomb. Really.*, 3 AMERICAN INTEREST, at 88 (Winter 2008); NUCLEAR ABOLITION FORUM, MOVING BEYOND NUCLEAR DETERRENCE TO A NUCLEAR WEAPONS FREE WORLD (Rob van Riet ed., 2013); JAMES M. ACTON, LOW NUMBERS: A PRACTICAL PATH TO DEEP NUCLEAR REDUCTIONS (2011), *available at* http://carnegieendowment.org/files/low_numbers.pdf (last visited Dec. 18, 2014); TAUBMAN, *supra* note 132, at 338-40 (discussing non-governmental groups focused on nuclear disarmament, the Nuclear Threat Institute (headed by Sam Nunn) and Global Zero (headed by Bruce Blair, Matt Brown and Barry Blechman)); G.A. Res. 67/56, U.N. GAOR, 67th Sess., U.N. Doc. A/RES/67/56 (Dec. 3, 2012) (creating an "open-ended working group" to develop proposals for the achievement of a world without nuclear weapons); MIDDLE POWERS INITIATIVE, *available at* http://www.middlepowers.org/about.html (last visited Dec. 18, 2014) (collection of NGOs working with "middle" states to promote nuclear disarmament).

134. Barack Obama, President of the United States, *Remarks by President Barack Obama at Hradcany Square in the Czech Republic* (Apr. 5, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-By-President-Barack-Obama-In-Prague-As-Delivered/ (last visited Dec. 18, 2014) (stating "America's commitment to seek the peace and security of a world without nuclear weapons"); *see also* SIDNEY D. DRELL & JAMES E. GOODBY, A WORLD WITHOUT NUCLEAR WEAPONS: END-STATE ISSUES 1-2 (2009) (quoting 2009 joint statement by President Obama and Russian President Dmitry Medvedev pledging both countries to pursue a nuclear weapons-free world).

135. S.C. Res 1887, U.N. Doc. S/RES/1887 (Sept. 24, 2009), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1887%282009%29 (last visited Dec. 18, 2014).

136. *See* William J. Perry, Commentary, *My Personal Journey at the Nuclear Brink*, EUR. LEADERSHIP NETWORK (June 17, 2013), *available at* http://www.europeanleadershipnetwork.org/my-personal-journey-at-the-nuclear-brink-by-bill-perry_633.html (last visited Dec. 18, 2014) (commenting that "in 2011 that progress and forward momentum [toward dealing with the nuclear legacy of the cold war] began to stall out and even reverse."); George P. Shultz et al., *Next Steps in Reducing Nuclear Risks: The Pace of Nonproliferation Work Today Doesn't Match the Urgency of the Threat*, WALL ST. J. (Mar. 5, 2013) (observing that "[t]he continuing risk posed by nuclear weapons remains an overarching strategic problem, but the pace of work doesn't match the urgency of the threat."); Ward Wilson, *The Myth of Nuclear Necessity*, *in* NUCLEAR ABOLITION FORUM, MOVING BEYOND NUCLEAR DETERRENCE TO A NUCLEAR WEAPONS FREE WORLD 1 (2013) (noting that "the abolition movement seems stalled."); GEORGE PERKOVICH, DO UNTO OTHERS: TOWARD A DEFENSIBLE NUCLEAR DOCTRINE 2 (2013), *available at*

The International Court of Justice ("ICJ"), the successor under the U.N. Charter to the PCIJ as the leading global judicial institution for the resolution of international legal disputes,[137] has addressed nuclear weapons in depth once,[138] and is now poised to do so again. In 1994, the General Assembly requested an "advisory opinion" from the court on the question, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" Participating states' disparate briefings and arguments on the matter, and the various ICJ judges' voluminous separate opinions, reveal a stark array of contradictory perspectives on point, but several key principles stand out.[139] The ICJ determined that: a) traditional standards of the law of armed conflict apply fully to nuclear weapons, as to all others;[140] b) a threat to conduct an illegal use of force is itself illegal under the U.N. Charter, even before it is carried out;[141] c) because nuclear weapons carry such widespread, severe and long-lasting effects, their use is "scarcely reconcilable" with the legal requirements of proportionality and avoidance of civilian casualties;[142] and d) nevertheless, the court was unable to conclude definitively that all possible uses of nuclear weapons would be categorically illegitimate – perhaps a detonation against an isolated military target far removed from civilian areas, or in circumstances where a nation's very survival depended upon the application of such overwhelming force could be legally tolerable.[143]

In 2014, nuclear weapons re-appeared on the ICJ docket. The

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http://carnegieendowment.org/files/do_unto_others.pdf (last visited Dec. 18, 2014) (asserting that "progress stopped" on nuclear disarmament in 2012).

137. U.N. Charter, *supra* note 2, art. 92; Statute of the International Court of Justice, art. 1, June 26, 1945, 59 Stat. 1055, 3 Bevans 1179.

138. *See also* Nuclear Tests, (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, 458 (Dec. 20) (concerning the legality of atmospheric nuclear tests conducted by France in the South Pacific); *see also* Nuclear Tests, (Austl. v. Fr.), Judgment, 1974 I.C.J. 97 (Dec. 20).

139. *See* Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226-28 (July 8) [hereinafter ICJ Advisory Opinion on Nuclear Weapons]; *see also* Dean Granoff & Jonathan Granoff, *International Humanitarian Law and Nuclear Weapons: Irreconcilable Differences,* 67 BULL. ATOMIC SCIENTISTS 53, 53-62 (2011); Charles J. Moxley, Jr., John Burroughs & Jonathan Granoff, *Nuclear Weapons and Compliance with International Humanitarian Law and the Nuclear Non-Proliferation Treaty,* 34 FORDHAM INT'L L. J. 595 (2011); Ken Berry et al., *Delegitimizing Nuclear Weapons,* MONTEREY INST. INT'L STUDIES 1, 30-33 (2010).

140. ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 105(2)(C)-(D) (unanimously concluding that the provisions of the U.N. Charter and of international humanitarian law apply to the threat or use of nuclear weapons).

141. *Id.* para 47.

142. *Id.* para 95.

143. *Id.* para 105(2)(E) (by seven votes to seven, with the president of the court casting the deciding vote).

Republic of the Marshall Islands filed nine cases, one against each of the nuclear-weapons-possessing countries, alleging that they had failed in their obligations, pursuant to treaty and customary international law, to pursue nuclear disarmament.[144] Six of these cases, brought against countries that have not accepted the "compulsory jurisdiction" of the ICJ, have not been entered onto the court's registry, and seem destined to go nowhere,[145] but the suits against India, Pakistan, and the United Kingdom may provide additional grist for nuclear arms control judicial machinery for years to come.[146]

Underpinning all these debates is a continuing dialectic about the "usability" of nuclear weapons. For some, a nuclear weapon is, basically, just a weapon like any other – it can be prudently deployed, brandished, and used against military targets to achieve desired warfighting goals.[147] Although nuclear weapons are immensely powerful, and they unleash a variety of novel and persistent types of effects, a clever design team could construct a very small, precisely-

144. Press Release No. 2014/18, International Court of Justice, The Republic of the Marshall Islands files Applications against nine States for their alleged failure to fulfill their obligations with respect to the cessation of the nuclear arms race at an early date and to nuclear disarmament, April 25, 2014, *available at* http://www.icj-cij.org/presscom/files/0/18300.pdf (last visited Dec. 18, 2014).

145. To be amenable to suit under the "contentious case" docket of the International Court of Justice, a state must "accept" the jurisdiction of the court. Three of the relevant countries have done so in the broadest fashion, pursuant to Article 36 (2) of the Statute of the Court, *supra* note 47. *See generally Basis of the Court's Jurisdiction*, INT'L CT. JUST., *available at* http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2 (last visited Dec. 18, 2014).

146. *See Cases*, INT'L. CT. JUST., *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=3 (last visited Dec. 18, 2014) (listing contentious cases on the court's docket). Of these three countries, only the United Kingdom is a party to the 1968 Nuclear Non-Proliferation Treaty, so the claims against India and Pakistan are grounded in customary international law.

147. *See* Al Pressin, *Rumsfeld Endorses Research on Earth Penetrating Weapon*, VOICE AM. (April 27, 2005), *available at* http://www.globalsecurity.org/wmd/library/news/usa/2005/usa-050427-327d6b1f.htm (last visited Dec. 18, 2014) (quoting then-Secretary of Defense Donald Rumsfeld as advocating development of small, precise nuclear weapons for attacking an enemy's hard and deeply buried targets, saying "The only thing we have is very large, very dirty, big nuclear weapons. So the choice is, do we want to have nothing and only a large dirty nuclear weapon, or would we rather have something in between. That is the issue."); Ann Scott Tyson, *Nuclear Plan Changes Calculus of Deterrence*, CHRISTIAN SCIENCE MONITOR (Mar. 12, 2002), *available at* http://www.csmonitor.com/2002/0314/p01s03-usmi.html (last visited Dec. 18, 2014) (quoting defense expert Loren Thompson saying "Most of the nuclear options at our disposal now are so gross that their use is not credible . . . To deter, we must have options that the enemy believes we will use."); Thomas Dowler & Joseph Howard III, *Countering the Threat of the Well-Armed Tyrant: A Modest Proposal for Small Nuclear Weapons*, 19 STRATEGIC REV. 34 (1991).

targeted nuclear weapon, which would occupy a range not very different from that of the largest conventional weapons, and the radiation and other unique effects could be tailored to particular types of combat missions.[148] For these advocates, it is a mistake to consider nuclear weapons to be categorically different from other ordnance; muddled thinking about a single, inviolable "nuclear threshold" simply impedes rational strategizing about deterrence in all its manifestations.[149]

Others, however, conclude that nuclear weapons are, indeed, "different," and people should continue to think of them as lying outside the realm of usability. In this view, nuclear weapons are irrelevant for any task other than deterring another actor's potential use of nuclear weapons.[150] For all other applications, they are simply too big

148. *See Nuclear Posture Review Report*, U.S. DEP'T DEF., (2002), *available at* http://www.stanford.edu/class/polisci211z/2.6/NPR2001leaked.pdf (last visited Dec. 18, 2014) (calling for greater flexibility in U.S. nuclear forces, seeking "Nuclear attack options that vary in scale, scope, and purpose."); Keith B. Payne, *The Nuclear Jitters*, 55.12 NAT'L REV. 22 (2003); Charles D. Ferguson, *Mini-Nuclear Weapons and the U.S. Nuclear Posture Review*, JAMES MARTIN CENTER FOR NONPROLIFERATION STUDIES (Jan. 8, 2002), *available at* http://cns.miis.edu/stories/020408.htm (last visited Dec. 18, 2014) (reporting controversy regarding concept of nuclear "bunker buster"); *Task Force Report: Resilient Military Systems and the Advanced Cyber Threat*, DEPT. DEF.: DEF. SCI. BOARD 8 (2013), *available at* http://cryptome.org/2013/07/cyber-war-racket-0014.pdf (last visited Dec. 18, 2014) (suggesting that a first use of nuclear weapons might be a suitable response to a cyber-attack); Julian Coman, *Pentagon Wants "Mini-Nukes" to Fight Terrorists*, TELEGRAPH (Oct. 26, 2003, 12:01 AM), *available at* http://www.telegraph.co.uk/news/worldnews/northamerica/usa/1445165/Pentagon-wants-mini-nukes-to-fight-terrorists.html (last visited Dec. 18, 2014).

149. *See* Michael S. Gerson, *No First Use: The Next Step for U.S. Nuclear Policy*, 35 INT'L SEC. 7, 12-13 (2010); *see* McGeorge Bundy, George G. Kennan, Robert S. McNamara & Gerard C. Smith, *Nuclear Weapons and the Atlantic Alliance*, 60 FOREIGN AFF. 753 (1982) [hereinafter Bundy et al.]; Barry Watts, *Nuclear-Conventional Firebreaks and the Nuclear Taboo*, CTR. STRATEGIC & BUDGETARY ASSESSMENTS 5-28 (2013), *available at* http://www.csbaonline.org/publications/2013/04/nuclear-conventional-firebreaks-and-the-nuclear-taboo/ (last visited Dec. 18, 2014); Colin Powell, *Nuclear Weapons Are Useless*, THINK PROGRESS (Jan. 27, 2010, 5:30 PM), *available at* http://thinkprogress.org/security/2010/01/27/175869/colin-powell-nuclear-weapons-are-useless/ (last visited Dec. 18, 2014) (quoting former Secretary of State Colin Powell as concluding that nuclear weapons were "useless."); HERMAN KAHN, ON ESCALATION: METAPHORS AND SCENARIOS (2009) (regarding the concept of limited, winnable nuclear war and the possible multi-rung nuclear escalation ladder).

150. *See* PERKOVICH, *supra* note 136, at 45-52, 73-74; Bundy et al., *supra* note 149, at 757 (arguing that "no one has ever succeeded in advancing any persuasive reason to believe that any use of nuclear weapons, even on the smallest scale, could reliably be expected to remain limited."); Daalder & Lodal, *supra* note 133, at 80, 81 (arguing that the sole purpose of U.S. nuclear weapons is to deter use by others; other functions "are no longer realistic or necessary for the United States."); Watts, *supra* note 149, at 1-2 (presenting as conventional wisdom the perception that nuclear weapons are "special" and qualitatively different from other weapons); Berry et al., *supra* note 139, at 47-49 (reporting views of U.S. and other

militarily; their effects are legally too indiscriminate, disproportional and long-lasting; and politically, the stigmatization from crossing this brightest of "red lines" would be intolerable.[151]

B. Efforts to Reduce the Threat of Nuclear Weapons.

As noted above, the world has already undertaken numerous valuable, albeit limited, steps to abate the threat of nuclear Armageddon.[152] The most important multilateral instrument is undoubtedly the 1968 Nuclear Non-Proliferation Treaty ("NPT").[153] Under it, the "non-nuclear-weapon states" ("NNWS") (i.e., almost all of the treaty's 189 parties) agree never to manufacture or acquire nuclear weapons; they promise additionally to submit to rigorous international inspection to verify their continued non-possession.[154] In return, the five "nuclear-weapon states" ("NWS") (i.e., China, France, Russia, the United Kingdom and the United States) agree, among other commitments,[155] to rein in their own nuclear armadas. In particular, in Article VI, "[e]ach of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and effective international control."[156]

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military leaders regarding utility of nuclear weapons).

151. *See* Ronald Reagan, President of the United States of America, *Address Before a Joint Session of the Congress on the State of the Union* (Jan. 25, 1984), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=40205 (last visited Dec. 18, 2014) (asserting that "A nuclear war cannot be won and must never be fought. The only value in our two nations possessing nuclear weapons is to make sure they will never be used. But then would it not be better to do away with them entirely."); Sidney D. Drell & James E. Goodby, *What Are Nuclear Weapons For? Recommendations for Restructuring U.S. Strategic Nuclear Forces,* ARMS CONTROL ASS'N REPORT (Oct. 2007).

152. *See supra* notes 8, 78-85 and accompanying text; *see also* Treaty Between the United States of America and the Russian Federation on Measures for the Further Reduction and Limitation of Strategic Offensive Arms, Apr. 8, 2010, S. TREATY DOC NO. 111-5 (2010), *available at* http://www.state.gov/documents/organization/140035.pdf (last visited Dec. 18, 2014) [hereinafter New START Treaty].

153. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 168 [hereinafter NPT].

154. *Id.* arts. II, III.

155. The treaty also specifies the inalienable right of all parties to use nuclear energy for peaceful purposes, and commits all parties to facilitate the fullest possible exchange of equipment, materials and information for those purposes. *Id.* art. IV.

156. *Id.* art. VI. Note that four states, each of which possesses nuclear weapons, are not parties to the NPT: India, Israel, North Korea, and Pakistan. *See* David S. Jonas, *Variations on Non-Nuclear: May the "Final Four" Join the Nuclear Non-Proliferation Treaty as Non-Nuclear Weapon States While Retaining Their Nuclear Weapons?*, 2005

The profound global controversy eating at the heart of the non-proliferation enterprise – a challenge that has strained the NPT regime for decades – concerns the extent of NWS compliance with their Article VI obligations. Several NNWS have vigorously complained that the NWS have consistently failed to "pursue negotiations in good faith" on the most critical of the anticipated "effective measures" toward nuclear arms control and disarmament. NNWS cite the fact that more than forty years after the conclusion of the NPT, nuclear weapons still exist in the thousands; the Comprehensive Test Ban Treaty is not in force; other associated instruments are not even under negotiation; and the nine nuclear powers seem no closer to a complete and permanent abandonment of their privileged position.[157]

Several of the "review conferences" for the NPT, held at five-year intervals, have been roiled by vigorous disputes over the NWS fidelity to Article VI; some of them have virtually broken down in discord.[158] In 1995, when the original twenty-five year duration of the NPT was

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MICH. ST. L. REV. 417 (2005); DANIEL H. JOYNER, INTERNATIONAL LAW AND THE PROLIFERATION OF WEAPONS OF MASS DESTRUCTION 56-76 (2009) (discussing article VI and the NPT regime).

157. NPT Review Conference, U.N. Doc. NPT/CONF.2010/50 (Vol. I), para. 80-86 (June 2010) (noting concern about large number of nuclear weapons deployed and stockpiled, and calling for further progress in diminishing the role of nuclear weapons in security policies); NPT Review Conference, Apr. 24 – May 19, 2000, U.N. Doc. NPT/CONF.2000/28 (Vol. I), para. 2 (2000) (expressing deep concern about nuclear weapons policies and accomplishments) [hereinafter NPT 2000 Review Conference Final Document]; Acheson, *supra* note 130, at 92; Kristensen, *supra* note 130; George Bunn & Roland M. Timerbaev, *Nuclear Disarmament: How Much have the Five Nuclear Powers Promised in the Non-Proliferation Treaty?*, *in* JOHN RHINELANDER & ADAM SCHEINMAN, AT THE NUCLEAR CROSSROADS 11 (1995); Hans M. Kristensen & Robert S. Norris, *Slowing Nuclear Weapon Reductions and Endless Nuclear Weapon Modernizations: A Challenge to the NPT*, 70 BULL. ATOMIC SCIENTISTS 94 (2014).

158. *See* Alexander Kmentt, *How Divergent Views on Nuclear Disarmament Threaten the NPT*, 43 ARMS CONTROL TODAY 8 (Dec. 2013), *available at* http://www.armscontrol.org/act/2013_12/How-Divergent-Views-on-Nuclear-Disarmament-Threaten-the-NPT (last visited Jan. 9, 2015); George Bunn & Jean du Preez, *More Than Words: The Value of U.S. Non-Nuclear-Use Promises*, 37 ARMS CONTROL TODAY (July/Aug. 2007), *available at* http://iis-db.stanford.edu/pubs/21935/Bunn_More_Than_Words__The_Value_of_U.S._Non-Nuclear-Use_Promises.pdf (last visited Jan. 9, 2015) (reporting that "An acrimonious debate about security assurances was among the reasons for the failed 2005 NPT review conference."); Gaukhar Mukhatzhanova, *Rough Seas Ahead: Issues for the 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY 20 (Apr. 2014), *available at* http://www.armscontrol.org/act/2014_04/Rough-Seas-Ahead_Issues-for-the-2015-NPT-Review-Conference (last visited Jan. 9, 2015); Tom Z. Collina, Lance Garrison, & Daniel Horner, *Stage Set for 2015 NPT Review Conference*, 44 ARMS CONTROL TODAY 25 (Apr. 2014), *available at* http://www.armscontrol.org/act/2014_06/News/Stage-Set-for-2015-NPT-Review-Conference (last visited Jan. 9, 2015); John Burroughs, *International Law, in Assuring Destruction*, *supra* note 130, at 115.

extended indefinitely,[159] the NNWS insisted upon faster progress and greater accountability.[160] In subsequent sessions, a series of thirteen "practical steps" and a roster of sixty-four "action items" were negotiated, in the so-far-futile effort to specify time-bound implementation of the NWS progress on point.[161]

C. No First Use Statements and Security Assurances.

The principal vehicles through which the NWS move toward fulfillment of their Article VI obligations are the series of agreements and unilateral actions that directly limit and reduce their respective nuclear firepower. As noted above, substantial success has been registered in capping these inventories, although the process is so far from complete that the NNWS are, reasonably, unsated.

An important subsidiary or associated set of measures in pursuit of the "basic bargain" of the NPT therefore consists of a series of additional promises or declarations that the NWS make regarding their plans and commitments about the future possible use and threat of nuclear weapons. These prominently include "no first use" ("NFU") pledges and related "security assurances." An NFU declaration is simply a statement that the country will not be the first to initiate a use of nuclear weapons; it could be formed as a revocable statement of intention, a political commitment or a legally binding undertaking. NFU attestations could be phrased in varying ways; typically they would (explicitly or implicitly) reserve the right to use nuclear weapons "second," if necessary to respond to an enemy's prior exercise of

159. The NPT had an initial duration of twenty-five years, so in 1995, the parties convened a conference to determine its fate. NPT, *supra* note 153, art. X.2. The conference decided to extend the treaty "indefinitely," and in the process, generated a series of commitments and understandings, including those related to article VI and nuclear arms control. *See* THOMAS GRAHAM, JR., DISARMAMENT SKETCHES: THREE DECADES OF ARMS CONTROL AND INTERNATIONAL LAW 257-93 (2002).

160. 1995 U.N. Disarmament Y.B. 23-25, U.N. Sales No. E.96.IX.1 (decision of 1995 Conference on Principles and Objectives for Nuclear Non-Proliferation and Disarmament, including provisions on nuclear weapon free zones and security assurances) [hereinafter 1995 RevCon decision].

161. NPT 2000 Review Conference Final Document, *supra* note 157, para. 15 (recording conference's agreement on thirteen "practical steps for the systematic and progressive efforts to implement Article VI of the Treaty."); *see* REACHING CRITICAL WILL, *supra* note 130, at 6 (summarizing steps taken in pursuit of 64-point Action Plan agreed at the 2010 NPT Review Conference and assessing NWS performance as disappointing on nuclear disarmament); *see* Mukhatzhanova, *supra* note 158, at 21 (noting that the rate of implementation of the disarmament actions has been so disappointing that some NWS "are bound to ask whether the action plan only creates the appearance of progress and whether a new approach is needed.").

nuclear weapons against the state (or its allies); other caveats might be added, too.[162]

Related are two types of security assurances. A "negative" security assurance ("NSA") is a promise that the offeror will refrain from using nuclear weapons against a particular state (or collection of states), typically subject to provisos such as the condition that the offeree refrain from pursuing or possessing nuclear weapons itself and that it not engage in warfare against the offeror in alliance with another NWS.[163] A "positive" security assurance ("PSA") is an avowal to come to the aid of a state that is victimized by another state's use of nuclear weapons; again, it could be subject to a variety of non-proliferation or other conditions.[164]

All of these NFU, NSA and PSA declarations could be issued in the context of the NPT, as part of another treaty, or independently. They could be extended to all states or they could privilege NPT members (in order to provide an additional incentive for outliers to join that treaty).[165]

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162. Harold A. Feiveson & Ernst Jan Hogendoorn, *No First Use of Nuclear Weapons*, 10 NONPROLIFERATION REV. 90 (summer 2003); *see* Scott Sagan, *The Case for No First Use*, 51 SURVIVAL 163 (2009); *see generally London Conference on No First Use of Nuclear Weapons*, PUGWASH CONFERENCES ON SCIENCE & W. AFFS. (November 18, 2002), *available at* http://pugwash.org/?s=no+first+use (last visited Dec. 18, 2014) (collection of scientific and political papers on NFU).

163. *See* JEFFREY W. KNOPF, SECURITY ASSURANCES AND NUCLEAR NONPROLIFERATION (2012); Feiveson & Hogendoorn, *supra* note 162; Bunn & du Preez, *supra* note 158; JAMES D. FRY, LEGAL RESOLUTION OF NUCLEAR NON-PROLIFERATION DISPUTES 88-96 (2013).

164. S.C. Res. 984, U.N. Doc. S/RES/ 984 (Apr. 11, 1995), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/984 (1995) (last visited Dec. 18, 2014) (expressing intention to assist states victimized by aggression with nuclear weapons or the threat of nuclear weapons); S.C. Res. 255, U.N. Doc. S/RES/255 (June 19, 1968), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/255(1968) (last visited Dec. 18, 2014).

165. 1995 RevCon decision, *supra* note 160, at 54-55; MOHAMED SHAKER, THE NUCLEAR NON-PROLIFERATION TREATY: ORIGIN AND IMPLEMENTATION 1959-1979, at 471-552 (Oceana, vol. II 1980); Richard H. Ullman, *No First Use of Nuclear Weapons*, 50 FOREIGN AFF. 669, 679-80, (1972); George Bunn & Roland M. Timerbaev, *Security Assurances to Non-Nuclear Weapon States*, NONPROLIFERATION REV. 11, 16-17 (1993) (suggesting a U.N. Security Council resolution as a mechanism for promulgating security assurances); *see also* Memorandum on Security Assurances in Connection with Ukraine's Accession to the Treaty on the Non-Proliferation of Nuclear Weapons, U.N. Doc. A/49/765 (Dec. 19, 1994), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/49/765 (last visited Dec. 19, 2014) (NSA and PSA extended by United States, Russia, and United Kingdom to Ukraine, when Ukraine gave up nuclear weapons and joined the NPT); G.A. Res. 68/58, U.N. Doc. A/RES/68/58 (Dec. 11, 2013), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/58 (last visited Dec. 18,

The strategy behind NFU, NSA and PSA undertakings is the calculation that NNWS are more likely to be content in their perpetual "second class citizenship" if they are reassured that their own national security will not unduly suffer thereby. If they are protected against the NWS threat or use of nuclear weapons, then eschewing the opportunity to acquire weapons on their own should be a more tolerable path. NNWS have therefore sought these commitments as a part of the NPT *quid pro quo,* and a frequent point of contention, at NPT review conferences and elsewhere, has been the precision, comprehensiveness and reliability of those NWS oaths.[166]

Outside the NPT context, the NWS have a checkered history with these commitments. During the Cold War, the Soviet Union issued a broad NFU pledge in June 1982, and challenged the United States to reciprocate. In contrast, because NATO feared that its conventional forces might then be insufficient to stem an envisioned Warsaw Pact invasion of Western Europe, the United States insisted that it might,

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2014) (requesting the commencement of negotiations on a treaty to prohibit the threat or use of nuclear weapons under any circumstances).

166. *See* John Simpson, *The Role of Security Assurances in the Nuclear Nonproliferation Regime*, *in* KNOPF, *supra* note 163 (surveying effectiveness of NSAs as a non-proliferation tool); Feiveson & Hogendoorn, *supra* note 162, at 91, 95-96 (noting that at the 1995 and 2000 NPT review conferences, NNWS strongly argued in favor of the NWS providing rigorous, legally binding NSAs and PSAs); New Zealand et al., *Security Assurances* (James Martin Ctr. for Nonproliferation Studies and King's Coll. Ctr. for Sci. and Sec. Studies, Working Paper J-4, 2003), *in* Prepatory Committee for the 2005 Review Conference of the Parties to the Treaty on Non-Proliferation of Nuclear Weapons, NPT/CONF.2005.PC.II/WP.11 (May 1, 2003), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=NPT/CONF.2005/PC.II/WP.11 (last visited Dec.18, 2014) [hereinafter CSSS Briefing Book]; REACHING CRITICAL WILL, *supra* note 130, at 12, 52-54 (assessing NWS progress on 2010 commitments regarding security assurances); 1995 RevCon decision, *supra* note 160, at 25, 50-64; Gerson, *supra* note 149, at 42; Bunn & Timerbaev, *supra* note 157, at 11, 13; Thomas Graham & Leonor Tomero, *"Obligations for Us All": NATO & Negative Security Assurances*, 49 DISARMAMENT DIPL. (2000), *available at* http://www.acronym.org.uk/49nato.htm (last visited Dec. 18, 2014) (tracing the evolution of NSAs in the NPT context); Leonard S. Spector & Aubrie Ohlde, *Negative Security Assurances: Revisiting the Nuclear-Weapon-Free Zone Option*, 35 ARMS CONTROL TODAY 13 (Apr. 2005), *available at* http://www.armscontrol.org/act/2005_04/Spector_Ohlde (last visited Jan. 9, 2015); *A New Look at No First Use*, STANLEY FOUND. 4 (Apr. 4, 2008), *available at* http://www.stanleyfoundation.org/publications/pdb/NoFirstUsePDB708.pdf (last visited Dec. 18, 2014); *see also* David S. Jonas, *General and Complete Disarmament: Not Just for Nuclear Weapons States Anymore*, 43 GEO. J. INT'L L. 587 (2012) (arguing that NPT article VI imposes obligations on all parties, not only the NWS, to pursue complete disarmament); G.A. Res. 68/28, para. 1, U.N. Doc. A/RES/68/28 (Dec. 9, 2013), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/28 (last visited Dec. 18, 2014) (reaffirming the urgent need for effective NSAs); Philipp C. Bleek & Eric B. Lorber, *Security Guarantees and Allied Nuclear Proliferation*, 58 J. CONFLICT RESOL. 429 (2013).

indeed, be the first to use nuclear weapons, if that were the only remaining bulwark against aggression. After the dissolution of the U.S.S.R., however, it was Russia, with its greatly diminished military prowess that felt the need for "strategic ambiguity" in its nuclear posture, and in 1993 it rescinded the no first use declaration.[167]

The U.S. NFU posture has likewise evolved. In the 1950s, the official policy explicitly endorsed the possibility of a first use, but by the 1970s, the turn of phrase favored an emphasis on restraint, subject to certain exceptions; these statements have been episodically tweaked and refined by successive administrations.[168] Under the current iteration, expressed in the April 2010 Nuclear Posture Review Report (the Department of Defense's highest-level strategy document), the United States "will not use or threaten to use nuclear weapons against non-nuclear weapons states that are party to the Nuclear Non-Proliferation Treaty ("NPT") and in compliance with their nuclear non-proliferation obligations."[169]

The most nearly concerted NWS position on NFU and NSAs came

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167. *See* Beatrice Heuser, *Warsaw Pact Military Doctrines in the 1970s and 1980s: Findings in the East German Archives*, 12 COMP. STRATEGY 437 (1993); Feiveson & Hogendoorn, *supra* note 162, at 92; Ullman, *supra* note 165, at 670-72; Yuri Fedorov, *Russia's Doctrine on the Use of Nuclear Weapons* (Pugwash Meeting No. 279, Working Paper, 2002).

168. *See* Feiveson & Hogendoorn, *supra* note 162, at 90-91 (highlighting the 2002 statements of the George W. Bush administration, reserving "the right to respond with overwhelming force – including through resort to all our options" to another state's aggression, and the 1953 policy of the Dwight D. Eisenhower administration that "In the event of hostilities, the United States will consider nuclear weapons to be as available for use as other munitions."); Bunn & du Preez, *supra* note 158; Bundy et al., *supra* note 149; John Steinbruner, *Looking Back: Carter's 1978 Declaration and the Significance of Security Assurances*, 38 ARMS CONTROL TODAY 57 (Oct. 2008), *available at* http://legacy.armscontrol.org/act/2008_10/lookingback (last visited Jan. 9, 2015); Gerson, *supra* note 149.

169. 2010 Nuclear Posture Review Report, *supra* note 126, at 15-16 (The report does not identify what the reference to "nuclear non-proliferation obligations" might consist of, other than the NPT. It also stresses that, while U.S. conventional forces would ordinarily be sufficient to respond to other severe provocations, such as an enemy's use of chemical or biological weapons, it is difficult to foresee how the catastrophic potential of bio-weapons might evolve in the future, so "the United States reserves the right to make any adjustment in the assurance that may be warranted by the evolution and proliferation of the biological weapons threat and U.S. capacities to counter that threat." The report also explains that the United States is not prepared at the present time to adopt a comprehensive NFU policy, "but will work to establish conditions under which such a policy could be safely adopted."); *see also Securing Britain in an Uncertain Future: The Strategic Defence and Security Review* (Oct. 2010), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62482/strategic-defence-security-review.pdf (last visited Dec. 18, 2014); *see also* Gerson, *supra* note 149.

on April 6, 1995, in connection with the extension of the NPT. There, all five NWS issued national statements; four of these were basically identical, promising not to use nuclear weapons against NNWS parties to the NPT, "except in the case of an invasion or any other attack on [the particular NWS], its territory, its armed forces or other troops, or against its allies or a State towards which it has a security commitment, carried out or sustained by such a State in alliance or association with a nuclear-weapon State."[170] China alone was considerably more generous, undertaking "not to be the first to use nuclear weapons at any time or under any circumstances" and "not to use or threaten to use nuclear weapons against non-nuclear-weapon States or nuclear-weapon-free zones at any time or under any circumstances."[171] The contents of

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170. *Letter from the Permanent Representative of France to the United Nations Addressed to the Secretary-General* (Apr. 6, 1995), *available at* http://globe.blogs.nouvelobs.com/media/01/01/40968903.pdf (last visited Dec. 18, 2014). Substantially identical, contemporaneous letters (also including PSA commitments) were authored by Russia (*Letter from the Permanent Representative of the Russian Federation to the United Nations* (Apr. 6, 1995), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20S1995261.pdf (last visited Dec. 1, 2014)); the United Kingdom (*Letter from Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations* (Apr. 6, 1995), *available at* http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Disarm%20S1995262.pdf (last visited Dec. 1, 2014)) and the United States (*Letter from the Permanent Mission of the United States of America to the United Nations addressed to the Secretary-General* (Apr. 6, 1995), *available at* http://globe.blogs.nouvelobs.com/media/01/00/1336803625.2.pdf (last visited Dec. 18, 2014)); 1995 RevCon decision, *supra* note 160, at 51-64; *see also* CSSS Briefing Book, *supra* note 166, at 1-3 (excerpting prior NSAs from NWS).

171. *Letter from the Permanent Representative of China to the United Nations Addressed to the Secretary-General* (Apr. 6, 1995), *available at* http://www.pircenter.org/media/content/files/10/13590930390.pdf (last visited Dec. 18, 2014). China's NFU and NSA commitments have traditionally been broad, but outsiders are sometimes skeptical about the sincerity of the undertakings. *See* CSSS Briefing Book, *supra* note 166, at 1; REACHING CRITICAL WILL, *supra* note 130, at 31-32; Kelsey Davenport & Marcus Taylor, *Assessing Progress on Nuclear Nonproliferation and Disarmament, Updated Report Card*, ARMS CONTROL ASS'N (2010-2013), *available at* http://www.armscontrol.org/files/ACA_2013_Nuclear_Report_Card.pdf (last visited Dec. 18, 2014) [hereinafter *Assessing Progress*]; *see* Jeffrey Lewis, China's Nuclear Idiosyncrasies and Their Challenges 17-18 (IFRI Security Studies Center Proliferation Paper 47, Nov.-Dec. 2013), *available at* www.ifri.org/downloads/pp47lewis.pdf (last visited Dec. 18, 2014); Ullman, *supra* note 165, at 669; *Annual Report to Congress on Military and Security Developments involving the People's Republic of China in 2014*, U.S. DEP'T DEF. at 28, *available at* http://www.defense.gov/pubs/2014_DoD_China_Report.pdf (last visited Dec. 18, 2014); *see* Gregory Kulacki, *Chickens Talking with Ducks: The U.S.-Chinese Nuclear Dialogue*, 41 ARMS CONTROL TODAY 15 (Oct. 2011), *available at* http://www.armscontrol.org/act/2011_10/U.S._Chinese_Nuclear_Dialogue (last visited Jan. 9, 2015); *see* Rebecca Heinrichs, China's Strategic Capabilities and Intent (Heritage Foundation Issue Brief No. 4111, Dec. 18, 2013); *see also* Bill Gertz, *Guess*

the various NFU and NSA postures of the NWS have ebbed and flowed since then.[172]

Similar drama has sometimes attended the NFU postures of other states, too. India, for example, has long asserted a declaration of no first use, either in blanket form or subject to limitations.[173] The maintenance of that tradition was briefly, but excitedly, called into question in April 2014, when the hardline Bharatiya Janata Party ("BJP") was poised to win the national election and seemed to equivocate about nuclear policy. Following a flare-up of adverse international reaction, however, the BJP election manifesto backpedaled, and reaffirmed the country's accustomed stance.[174]

In contrast, Pakistan's nuclear doctrine has expressly reserved the right to use nuclear weapons first, and it has reportedly threatened to do so against India on at least four occasions.[175] Israel and North Korea are not known to have issued authoritative NFU policy statements.[176]

Who's Coming to Dinner, Chinese General Who Threatened Nuclear Strike on U.S. Visits Washington This Week, WASH. FREE BEACON (2013) (quoting Chinese generals threatening to use nuclear weapons against the United States in a conflict over Taiwan).

172. REACHING CRITICAL WILL, *supra* note 130, at 53-54; Simpson, *supra* note 166, at 69-75; *Assessing Progress*, *supra* note 171, at 6, 12; Bunn & du Preez, *supra* note 158.

173. P.M. Kamath, *Indian Nuclear Doctrine: Arming to Disarm*, *in* NUCLEAR DISARMAMENT: REGIONAL PERSPECTIVES ON PROGRESS 63, 65 (2013) (reporting that India had pledged not to use nuclear weapons "against states which do not possess nuclear weapons, or are not aligned" with other nuclear weapons states; subsequently, India modified the pledge to say "if a non-nuclear power uses biological or chemical weapons (BWC), India will keep the option of using nuclear weapons open."); *Prime Minister Proposes No-First-Use of Nuclear Weapons*, INDIAN EXPRESS (Apr. 2, 2014, 2:26 PM), *available at* http://indianexpress.com/article/india/india-others/prime-minister-proposes-no-first-use-of-nuclear-weapons/ (last visited Dec. 18, 2014); Manmohan Singh, Inaugural Address on a Nuclear Weapon-Free World: From Conception to Reality (Apr. 2, 2014); *India Call for Global "No First Use" Nuke Policy*, GLOBAL SEC. NEWSWIRE (2010), *available at* http://www.nti.org/gsn/article/india-calls-for-global-no-first-use-nuke-policy/ (last visited Dec. 18, 2014); Feiveson & Hogendoorn, *supra* note 162, at 92; *Assessing Progress*, *supra* note 171, at 29-30.

174. *Indian Party Backpedals on Provocative Nuclear Policy Remarks*, GLOBAL SEC. NEWSWIRE (Apr. 9, 2014), *available at* http://www.nti.org/gsn/article/indian-party-backpedals-provocative-nuclear-policy-remarks/ (last visited Oct. 24, 2014); *BJP Puts No-First-Use Nuclear Policy in Doubt*, TIMES INDIA (Apr. 7, 2014), *available at* http://newsindiatimes.com/bjp-puts-no-first-use-nuclear-policy-in-doubt/ (last visited Dec. 18, 2014); P.R. Chari, *India's Nuclear Doctrine: Stirrings of Change*, CARNEGIE ENDOWMENT INT'L PEACE (June 4, 2014), *available at* http://carnegieendowment.org/2014/06/04/india-s-nuclear-doctrine-stirrings-of-change (last visited Dec. 18, 2014).

175. *See* Feiveson & Hogendoorn, *supra* note 162, at 92; *but see Assessing Progress*, *supra* note 171, at 35 (discussing Pakistani NFU pledge).

176. *See* Feiveson & Hogendoorn, *supra* note 162, at 92; *Assessing Progress*, *supra* note 171, at 38 (noting North Korean nuclear threats).

D. Nuclear Weapon Free Zones.

Another important forum in which NSAs have been expressed has been a series of regional "nuclear weapon free zones" ("NWFZs"). Typically, a zone of this sort is established by a treaty among the states in a particular geographic area; it reinforces the NPT by fostering additional non-proliferation undertakings that may be more precisely tailored to conditions in the particular region, and by engrafting additional, more intrusive verification arrangements that might be more acceptable among states that already know and trust each other relatively well.[177] Five such zones are currently in place, for Latin America (1967 Treaty of Tlatelolco);[178] the South Pacific (1985 Treaty of Raratonga);[179] Southeast Asia (1995 Treaty of Bangkok);[180] Africa (1996 Treaty of Pelindaba);[181] and Central Asia (2006 Treaty of Semipalatinsk).[182]

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177. *See generally* U.N. Report of the Disarmament Commission, U.N. Doc. A/54/42; GAOR, 54th Sess., Supp. No, 42 (1999), *available at* http://www.un.org/ga/search/view_doc.asp?symbol=A/54/42(SUPP) (last visited Dec. 18, 2014) (identifying criteria for establishing a regional NWFZ); *Nuclear-Weapon-Free Zones*, U.N. OFFICE FOR DISARMAMENT AFFS., *available at* http://www.un.org/disarmament/WMD/Nuclear/NWFZ.shtml (last visited Dec. 18, 2014); Comprehensive Study of the Question of Nuclear-Weapon-Free Zones in All Its Aspects, G.A. Res. 3472 (XXX) (1975), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3472(XXX)&Lang=E&Area=RESOLUTION (last visited Dec. 18, 2014); *Nuclear-Weapon-Free Zones at a Glance*, ARMS CONTROL ASS'N (Sept. 2012), *available at* http://www.armscontrol.org/print/2567 (last visited Oct. 24, 2014); *Nuclear Weapons Free Zones*, NUCLEAR AGE PEACE FOUND., *available at* http://nuclearfiles.org/menu/library/treaties/nuclear-free-zones/trty_nuclear-free-zone-index.htm# (last visited Dec. 18, 2014); NPT, *supra* note 153, art. VII (noting explicitly the parties' rights to develop regional non-proliferation measures); Jozef Goldblat, *Nuclear-Weapon-Free Zones: A History and Assessment*, NONPROLIFERATION REV. 18 (1997); *Assessing Progress*, *supra* note 171, at 6, 12; REACHING CRITICAL WILL, *supra* note 130, at 12, 56-66; CSSS Briefing Book, *supra* note 166, at sec. F; 1995 RevCon decision, *supra* note 160, at 25, 65-87.

178. Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 634 U.N.T.S. 326 [hereinafter Treaty of Tlatelolco].

179. South Pacific Nuclear Weapon Free Zone Treaty, Aug. 6, 1985, 1445 U.N.T.S. 177 [hereinafter Treaty of Raratonga].

180. Southeast Asia Nuclear-Weapon-Free Zone Treaty, Dec. 15, 1995, 35 I.L.M. 635 [hereinafter Treaty of Bangkok].

181. African Nuclear-Weapon-Free-Zone Treaty, Apr., 11, 1996, 35 I.L.M. 698 [hereinafter Treaty of Pelindaba]; 1995 RevCon decision, *supra* note 160, at 67-72.

182. Treaty on a Nuclear-Weapon-Free-Zone in Central Asia (Treaty of Semipalatinsk), Sept. 8, 2006, No. 51633 *available at* http://disarmament.un.org/treaties/t/canwfz/text (last visited Jan. 9, 2015). In addition, Mongolia has declared itself to be a nuclear weapons free zone, and the leading nuclear weapons states have formally acknowledged that status. *See* Daryl G. Kimball, *Mongolia Recognized as Nuclear-Free Zone*, 42 ARMS CONTROL TODAY 6 (Oct. 2012), *available at* http://www.armscontrol.org/act/2012_10/Mongolia-Recognized-as-Nuclear-Free-Zone%20 (last visited

Each of the NWFZ agreements also includes protocols[183] in which the NWS are invited to affirm (in text that varies somewhat from treaty to treaty) that they will respect the non-nuclear status of the region, such as by not stationing or testing nuclear weapons in the area. In addition, these protocols ask the NWS to declare robust NSAs – promising that they will not use nuclear weapons against states that have joined the relevant treaty. In the Treaty of Tlatelolco, for example, the relevant protocol passage asserts "[t]he Governments represented by the undersigned Plenipotentiaries also undertake not to use or threaten to use nuclear weapons against the Contracting Parties of the Treaty for the Prohibition of Nuclear Weapons in Latin America."[184]

In joining that protocol in 1971, however, the United States appended an understanding or declaration[185] that "the United States Government would have to consider that an armed attack by a Contracting Party, in which it was assisted by a nuclear-weapon state, would be incompatible with the Contracting Party's corresponding

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Dec. 18, 2013). A proposal to make the Middle East a zone free of all weapons of mass destruction has also been developed. Mukhatzhanova, *supra* note 158, at 22; Kelsey Davenport, *No Date Set for Middle East Zone Meeting*, 43 ARMS CONTROL TODAY 32 (NOV. 2013), *available at* http://www.armscontrol.org/act/2013_11/No-Date-Set-For-Middle-Eas-Zone-Meeting (last visited Jan. 9, 2015). In addition, at least some nuclear weapons activities have been banned by treaty from Antarctica. *See, e.g.*, Antarctic Treaty, art. V, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; outer space (Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, art. IV, Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347, 610 U.N.T.S. 205); and the ocean floor (Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof, art. I, Feb. 11, 1971, 23 U.S.T. 701, 955 U.N.T.S. 115, T.I.A.S. No. 7337).

183. Under international law, there is no distinction between a treaty denominated as a "protocol" and any other. *See* Vienna Convention on the Law of Treaties, *supra* note 97, (defining "treaty," noting that any "particular designation" is immaterial). Often, the term "protocol" is applied to a document that is attached to, or otherwise associated with, some other treaty; what is unusual in the NWFZ context is the fact that in each instance, the treaty and the protocol have completely non-overlapping sets of parties. *See generally* Marco Roscini, *Negative Security Assurances in the Protocols Additional to the Treaties Establishing Nuclear Weapon-Free Zones*, *in* OBAMA AND THE BOMB: THE VISION OF A WORLD FREE OF NUCLEAR WEAPONS 129 (Heinz Gartner ed., 2011).

184. Additional Protocol II to the Treaty for the Treaty of Tlatelolco, art. 3, Apr. 1, 1968, *available at* http://disarmament.un.org/treaties/t/tlateloco_p2/text (last visited Jan. 9, 2015).

185. *See* RICHARD F. GRIMMETT, CONG. RESEARCH SERV., S.PRT.106-71, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (2001), *available at* http://www.gpo.gov/fdsys/pkg/CPRT-106SPRT66922/pdf/CPRT-106SPRT66922.pdf (last visited Dec. 18, 2014) (noting different types of reservations, understandings, declarations and other conditions the Senate might assert in its consideration of a treaty; the vocabulary has been applied inconsistently).

obligations under Article 1 of the Treaty."[186] With this reservation, the United States significantly restricted the scope of the original NSA, apparently excluding from the pledge a possible first use of nuclear weapons against an NNWS who was aligned in war with an NWS.[187] Other NWS have likewise sometimes reined in the scope of their NSA commitments in other NWFZ instruments.[188] The United States Senate is now considering providing advice and consent to the ratification of the protocols for the Pelindaba and Raratonga NWFZ treaties; it remains to be seen whether additional reservations to the NSA statements in those documents will be appended.[189]

E. Assessment of the Non-Use Declarations.

Although the population of NFU, NSA, and PSA statements is now rather large, their overall efficacy is quite restricted. First, they are far from comprehensive or uniform in content. The United States and other NWS have frequently inserted distinct national caveats and subtle disclaimers that have undercut the potentially bold reach, reserving the

186. GRAHAM, JR. & LAVERA, *supra* note 13, at 57 (quoting Richard Nixon, Ratification of Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America (1971)).

187. The content of this 1971 condition is somewhat more restrictive than the current global U.S. NSA policy, as reflected in the 2010 Nuclear Posture Review Report, *supra* note 126. *See* Bunn & du Preez, *supra* note 158.

188. *See Nuclear-Weapon-Free Zones*, U.N. OFFICE FOR DISARMAMENT AFFS., *available at* http://www.un.org/disarmament/WMD/Nuclear/NWFZ.shtml (last visited Dec. 18, 2014) (collecting NWS statements attached to ratification of protocols to NWFZ treaties); *Assessing Progress*, *supra* note 171, at 14, 17, 20, 22; *see also* Spector & Ohlde, *supra* note 166 (arguing that NWFZ protocols are superior to unilateral NSAs for entrenching legal protections); Roscini, *supra* note 183, at 134-38.

189. Peter Crail, *The Nuclear Weapons Free Zone Treaty Protocols and U.S. National Security*, ARMS CONTROL ASS'N ISSUE BRIEF, May 20, 2011; *see also* Feiveson & Hogendoorn, *supra* note 162, at 96 (discussing U.S. 1996 statement upon signing protocol to Treaty of Pelindaba). Notably, NWFZs seem to be one of the few arms control topics on which the NWS have recently been able to collaborate effectively, despite their other ongoing political difficulties. Regarding the Central Asia zone, for example, the leading countries had long been irreconcilably divided regarding one provision of the Semipalatinsk Treaty which appeared to give Russia a right to re-introduce nuclear weapons into the region. After five years of frustrated negotiations among the NWS, a solution to the problem was suddenly developed in April 2014, and the protocol was quickly signed by all five states. *See* Rachel Oswald, *Five Powers Agree to Respect Central Asian Nuclear-Free Zone*, GLOBAL SEC. NEWSWIRE (Apr. 30, 2014), *available at* http://www.nti.org/gsn/article/five-nuclear-powers-agree-sign-protocol-central-asian-nuclear-free-zone/ (last visited Dec. 18, 2014); Office of the Spokesperson, *United States Signs Protocol to Central Asian Nuclear-Weapon-Free Zone Treaty*, U.S. DEPT. ST. (May 6, 2014), *available at* http://www.state.gov/r/pa/prs/ps/2014/05/225681.htm (last visited Dec. 18, 2014).

right to use nuclear weapons first, even against an NNWS, in open-ended circumstances.[190] Second, many of the commitments are not global; they apply only to states in specified geographic regions, or who otherwise meet the designated criteria.[191]

Third, the NWS statements are of contested legal status. The NSAs inscribed in an NWFZ protocol are authoritative for the countries that have joined the instrument, but the pledges extended in the context of NPT review conferences are more dubious. NNWS contend that the commitments are key elements of a bargained-for exchange, but the NWS have waffled.[192] Fourth, the assurances consist solely of words on papers – there is no "operationalization" of the commitments, no concrete steps that the NWS must undertake to validate the seriousness of the undertakings. When nothing has to change in the real world regarding the number, status or treatment of the nuclear forces, the NNWS cannot be fully confident in reliability of the declarations. Certainly, even a naked verbal commitment counts for something, but it is equally clear that such a declaration is, as a practical matter, unverifiable and subject to being swiftly revised or even ignored as circumstances demand *in extremis*.

As a result, the existing NFU, NSA, and PSA statements have not been fully satisfactory to the NNWS. The undertakings have not provided sufficient reassurance that it is reliably safe to forego a possible nuclear weapons option, and have therefore not achieved the non-proliferation value the NWS anticipated. Viewed differently, the heavily qualified NFU, NSA and PSA rhetoric has not succeeded in communicating any diminished future importance for nuclear weapons. The NWS sought to convey a message of restraint, suggesting that nuclear weapons are not to be forever "the coin of the realm," not the indelible badge of first-class national status in the world. But their collective slipperiness in declining to offer comprehensive assurances seems to implant precisely the opposite signal. If the NWS are unwilling to overtly and unconditionally agree not to use nuclear weapons first, why should the NNWS not emphasize and perhaps

190. Simpson, *supra* note 166, at 64 (reporting dissatisfaction among NNWS because the NSAs were not uniform or issued jointly by all the NWS).

191. Spector & Ohlde, *supra* note 166 (comparing NWFZ and NSA approaches; also noting that the non-parties to the NPT (India, Israel, North Korea and Pakistan) are not allowed to join the protocols to the NWFZ treaties).

192. *See* Bunn & du Preez, *supra* note 158; Simpson, *supra* note 166, at 64; Feiveson & Hogendoorn, *supra* note 162, at 96; New Zealand Working Paper, *in* CSSS Briefing Book, *supra* note 166, at J-4; Graham & Tomero, *supra* note 166; Spector & Ohlde, *supra* note 166.

pursue those arms, too? If the NWS, with their enormous conventional weapons capabilities and elite army, navy, air force, and Marines, report that they cannot entirely dispense with the possibility that it might be necessary to use nuclear weapons first, how could other, smaller and less well-defended states ignore that same hawkish logic?[193]

In fact, nuclear weapons remain firmly lodged in a priority position in international relations. People sometimes observe that these arms have not been used since 1945, but in another, deeper sense, they are "used" every day – to deter, coerce, and intimidate – even without being detonated. And the United States has quite frequently considered the possibility of using nuclear weapons in the explosive sense, too. By one count, on at least twenty-five occasions, the U.S. leadership seriously contemplated a first application of the awesome power.[194] Sometimes, the perpetual threat of nuclear weapons is made overt, such as by communicating the ominous suggestion that "all options are on the table" for a response to a particular crisis – nothing could be a more vivid reminder that the United States retains the physical capacity and the legal right to flex its strongest muscles at will.[195]

Finally, it must be observed that the NWS are certainly not acting

193. Feiveson & Hogendoorn, *supra* note 162, at 95 (stating that "the continued reliance on hedged no-first-use policies by the United States and other nuclear powers is often one of the rationales nuclear weapons advocates from non-nuclear-weapons states offer as justification for abandoning NPT commitments and developing their own nuclear weapons."); Bunn & du Preez, *supra* note 158; Gerson, *supra* note 149, at 41-42 (arguing that U.S. retention of the option to use nuclear weapons first "undermines the NPT regime by signaling that even the world's most affluent and powerful nation continues to believe that nuclear weapons are important instruments of national power."); *see* Graham & Tomero, *supra* note 166.

194. *See* Daniel Ellsberg, *Roots of the Upcoming Nuclear Crisis*, *in* THE CHALLENGE OF ABOLISHING NUCLEAR WEAPONS 45, 52-53 (David Krieger ed., 2009) (listing twenty-five occasions from 1948 to 2008 when the United States threatened or considered the first use of nuclear weapons).

195. *Id.* at 47 (citing examples of U.S. leaders emphasizing that "all options are on the table," clearly including nuclear weapons); *id.* at 56-57 (highlighting the unspoken, but clear, threat to use nuclear weapons against Iraq in 1991 if Saddam Hussein used chemical weapons); *see also* Jeremy Bender, *The US is Conducting a Massive Nuclear Arms Drill Days After a Russian Nuclear Exercise*, BUS. INSIDER (May 12, 2014), *available at* http://www.businessinsider.com/us-conducting-a-massive-nuclear-arms-drill-20 14-5 (last visited Dec. 18, 2014) (noting that in the midst of the 2014 crisis over Ukraine, both the United States and Russia conducted nuclear weapons exercises); *Assessing Progress*, *supra* note 171, at 26 (noting that President Obama asserted that he "will take no options off the table" in responding to Iran's nuclear program); *see also Russian General Calls for Preemptive Nuclear Strike Doctrine Against NATO*, MOSCOW TIMES (Sept. 3, 2014), *available at* http://www.themoscowtimes.com/business/article/russian-general-calls-for-preemptive-nuclear-strike-doctrine-against-nato/506370.html (last visited Dec. 18, 2014) (recent Russian rhetoric about preemptive military strike).

as if they intend to get out of the nuclear weapons business at any point in the foreseeable future. Even while the numbers of deployed, operational nuclear weapons are falling or stable for some of the nine possessing states,[196] there are other indicators of an emerging nuclear bull market. Russia is undertaking a substantial modernization of its strategic weapons, investing in new generations of land- and sea-based missiles.[197] China, India, and Pakistan are building up, too.[198] In the United States, there is no ongoing construction of additional nuclear weaponry, but medium-term plans call for a massive recapitalization of all three legs of the "triad" (land-based missiles, submarine-based missiles, and long-range bombers), and the imperative for indefinitely sustaining the infrastructure that supports, maintains, and operates the nuclear establishment is routinely stressed.[199]

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196. *See* sources cited *supra* notes 129-30 and accompanying text.

197. REACHING CRITICAL WILL, *supra* note 130, at 34; Watts, *supra* note 149, at 44-45; Kristensen, *supra* note 130; Pavel Podvig, *Russian Federation*, *in Assuring Destruction*, *supra* note 130, at 59-66.

198. *Assessing Progress*, *supra* note 171, at vi, 29, 35; Hui Zhang, *China*, *in* Assuring Destruction, *supra* note 130, at 17-26; M.V. Ramana, *India*, *in Assuring Destruction*, *supra* note 130, at 34-43; Zia Mian, *Pakistan*, *in Assuring Destruction*, *supra* note 130, at 51-58; Tim Craig & Karen DeYoung, *Pakistan Is Eyeing Sea-Based and Short-Range Nuclear Weapons, Analysts Say*, WASH. POST (Sept. 21, 2014), *available at* http://www.washingtonpost.com/world/asia_pacific/pakistan-is-eyeing-sea-based-and-short-range-nuclear-weapons-analysts-say/2014/09/20/1bd9436a-11bb-11e4-8936-26932bcfd6ed_story.html (last visited Dec. 18, 2014).

199. Amy F. Woolf, *Nuclear Modernization in an Age of Austerity*, 44 ARMS CONTROL TODAY 20 (Mar. 2014), *available at* http://www.armscontrol.org/act/2013_03/Nuclear-Modernization-in-an-Age-of-Austerity (last visited Dec. 18, 2014) (quoting Secretary of Defense Chuck Hagel regarding U.S. plans to "invest in the modernization we need"); Jon B. Wolfshtal et al., *The Trillion Dollar Nuclear Triad: US Strategic Nuclear Modernization Over the Next Thirty Years*, JAMES MARTIN CTR. FOR NONPROLIFERATION STUD. 28 (Jan. 2014), *available at* http://cns.miis.edu/opapers/pdfs/140107_trillion_dollar_nuclear_triad.pdf (last visited Dec. 18, 2014) (concluding that the United States plans to spend approximately one trillion dollars maintaining its current nuclear missiles, submarines, bombers and other weapons, procuring replacement systems, and upgrading existing bombs); William J. Broad & David E. Sanger, *U.S. Ramping up Major Renewal in Nuclear Arms*, N.Y. TIMES (Sept. 21, 2014), *available at* http://www.nytimes.com/2014/09/22/us/us-ramping-up-major-renewal-in-nuclear-arms.html?_r=0 (last visited Dec. 18, 2014); Andrew Lichterman, *United States*, *in Assuring Destruction*, *supra* note 130, at 89-111; REACHING CRITICAL WILL, *supra* note 130, at 38-39; Kristensen & Norris, *US Nuclear Forces*, *supra* note 127; Acheson, *supra* note 130; Tom Z. Collina, *U.S. Nuclear Arms Spending Set to Rise*, 44 ARMS CONTROL TODAY 31 (Apr. 2014), *available at* http://www.armscontrol.org/act/2014_04/U-S-Nuclear-Arms-Spending-Set-to-Rise%20 (last visited Dec. 18, 2014); Kristensen, *supra* note 130. *But see* Al Mauroni, *A Rational Approach to Nuclear Weapons Policy*, WAR ON THE ROCKS (Apr. 28, 2014), *available at* http://warontherocks.com/2014/04/a-rational-approach-to-nuclear-weapons-policy/ (last visited Dec. 18, 2014) (arguing that a U.S. reinvestment in nuclear weapons is overdue and affordable).

IV. A PROPOSED NEW TREATY

This section presents the draft text of a proposed new treaty,[200] together with annotations that explain the provisions and highlight key precedents. It is styled as a "Nuclear Kellogg-Briand Pact," and attempts to provide the "nuts and bolts" that can build upon some of the lessons identified in Section II and address the problems highlighted in Section III.

Nuclear Kellogg-Briand Pact
General Treaty for the Renunciation of Nuclear War as an Instrument of National Policy

The States Parties to this Treaty,

Deeply sensible of their solemn duty to promote the welfare of mankind;[201]

Considering the devastation that would be visited upon all mankind by a nuclear war and the consequent need to make every effort to avert the danger of such a war and to take measures to safeguard the security of peoples;[202]

Sharing the view that a nuclear war cannot be won and must never be fought;[203]

Acknowledging the obligations contained in article VI of the 1968 Treaty on the Non-Proliferation of Nuclear Weapons, "to pursue negotiations in good faith on effective measures relating to the cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a Treaty on general and complete disarmament under strict and

200. *Compare* the proposed treaty *with* N.Z., New Agenda Coal., *Security Assurances* J-4 to -6 (Prep. Comm. for the 2005 Review Conf. of the Parties to the Treaty on Non-Prolif. of Nuclear Weapons, Working Paper, 2003), *in* CSSS Briefing Book, *supra* note 166, at J-5 (describing a draft treaty "on the prohibition of the use or threat of use of nuclear weapons against non-nuclear weapon states parties to the treaty on the non-proliferation of nuclear weapons"), *and* Bunn & Timerbaev, *supra* note 165, at 18 (presenting brief draft declaration and U.N. Security Council resolution on NSAs).

201. This paragraph copies the first preambular paragraph of the 1928 Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1.

202. This paragraph copies the first preambular paragraph of the NPT. NPT, *supra* note 153; *see also* sources cited *supra* note 124.

203. This passage comes from Ronald Reagan's Third State of the Union Address in 1984. Reagan, *supra* note 151. It is reflected in the preambles to the Nuclear Risk Reduction Centers Agreement, *supra* note 82, 1530 U.N.T.S 387; second preambular paragraph and the Ballistic Missile Launch Notification Agreement, *supra* note 83, 27 I.L.M. 1200.

effective international control";[204]

Recalling the Advisory Opinion of the International Court of Justice of July 8, 1996, which affirmed that in view of the widespread, long-lasting and severe effects of nuclear weapons, the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and that nuclear weapons are generally subject to the same rules of international law applicable to all other weapons;[205]

Recalling also that, in accordance with the Charter of the United Nations, States must refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, and that the establishment and maintenance of international peace and security are to be promoted with the least diversion for armaments of the world's human and economic resources;[206]

Persuaded that the time has come when a frank renunciation of nuclear war as an instrument of national policy should be made to the end that the peaceful and friendly relations now existing between their peoples may be perpetuated;[207]

Convinced that all changes in their relations with one another should be sought only by pacific means and be the result of a peaceful and orderly process and that no Party should promote its national interests by resort to nuclear war;[208]

Hopeful that, encouraged by their example, all the other nations of the world will join in this humane endeavor and by adhering to the present Treaty as soon as it comes into force, bring together their peoples within the scope of its beneficent provisions, thus uniting the nations of the world in a common renunciation of nuclear war as an instrument of their national policy;[209]

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204. NPT, *supra* note 153, art. VI.

205. *See* ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, at 266.

206. This paragraph is taken from the twelfth preambular paragraph of the NPT. NPT, *supra* note 153.

207. This paragraph is adapted from the second preambular paragraph of the original Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1. The comment about "peaceful and friendly relations now existing" is probably about as true today as it was in 1928.

208. This paragraph is adapted from the third preambular paragraph of the original Kellogg-Briand Pact and modified to avoid the 1928 treaty's insistence upon reciprocity; this document is intended to have global coverage. Kellogg-Briand Pact, *supra* note 1.

209. This paragraph is adapted from the fourth (final) preambular paragraph of the original Kellogg-Briand Pact. Kellogg-Briand Pact, *supra* note 1.

Have agreed as follows:

Article I. Renunciation

The Parties solemnly declare in the names of their respective peoples[210] that they condemn and renounce recourse to nuclear war[211] for the solution of international controversies,[212] as an instrument of national policy, or for any other reason.[213]

Article II. Dispute Resolution

The Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[214]

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210. This reference to the "peoples," instead of solely to the states or their governments, reflects the populist anti-war sentiment propelling the 1928 negotiations; it was included in the 1928 agreement, Kellogg-Briand Pact, *supra* note 1, but is no longer customary; *cf.* U.N. Charter, *supra* note 2, at preamble (stating that "We the peoples of the United Nations" are determined to achieve specified objectives; and "Accordingly, our respective Governments" establish the U.N. organization).

211. Like the 1928 Kellogg-Briand Pact, this proposed treaty does not confine the term "war" to the sense of formally declared war; it applies to all uses of nuclear weapons in international and non-international armed conflict. Note that the U.N. Charter, *supra* note 2, art. 2 para 4, refers to a "use of force," in order to avoid any suggestion that states might escape some legal responsibility simply by fighting without officially declaring war. *See also* Kellogg-Briand Pact, *supra* note 1, art. 1.

212. This sentence omits "in their relations with one another" from the 1928 treaty, in order to ensure that the protections of the nuclear treaty are applicable to all countries, regardless of whether they join the agreement, as well as to non-state actors or any other target. This proposed treaty thus also exceeds the coverage of the existing Nuclear Weapon Free Zone treaties and associated protocols, *supra* notes 178-89, which provide non-use guaranties only to states in particular geographic regions.

213. *See* Kellogg-Briand Pact, *supra* note 1, art. 1. This sentence re-works the syntax of the original Kellogg-Briand passage, and adds "or for any other reason," to avoid the criticism that the 1928 agreement might have been interpreted to permit a recourse to war that was somehow construed not to be "for the solution of international controversies" or "as an instrument of national policy." *Id.*; *see also* sources cited *supra* note 25.

214. *See* Kellogg-Briand Pact, *supra* note 1, art. 2. This article is substantively identical to article II of the 1928 treaty. It does not specify any particular pacific means for settling or solving international disputes or conflicts, and neither this accord nor the 1928 original establishes any new institutions or organizations for those purposes. In the interwar period, the League of Nations and multiple other institutions contributed to peaceful resolution of disputes. *See* League of Nations Covenant, *supra* note 36. Today, the United Nations family offers even more possibilities. *See* U.N. Charter, *supra* note 2; *see also* sources cited *supra* note 11 (organizations created by arms control treaties). Unlike the

Article III. Declarations

Each Party shall declare, upon entry into force of this agreement for it, that it renounces any right to use nuclear weapons[215] absolutely, under any circumstances, at any time, and against any target, or that it reserves the right to use nuclear weapons, subject to the laws of armed conflict,[216] in response to a first use of nuclear weapons against it, its armed forces, or its allies.[217] The Party may rescind or modify this

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Covenant of the League of Nations, this agreement does not specify a "cooling off period" for use of alternative dispute resolution forums prior to a recourse to force. *See* League of Nations Covenant, *supra* note 36, art. 12.

215. The treaty might offer a definition of the term "nuclear weapon," to exclude so-called "dirty bombs" (which use nuclear materials, but do not involve a nuclear explosion) and "peaceful nuclear explosions" (which would use nuclear explosive power for civil engineering purposes).

216. Many believe that, in view of the devastating power and long-term effects, a use of nuclear weapons can never conform to the law of armed conflict principles of discrimination and proportionality, but the ICJ has been unable definitively to reach such a conclusion. *See* ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 105(2)(E).

217. The text of the 1928 treaty does not contain any overt limitation or exemption from the broad prohibition against recourse to war, but the negotiating history clearly establishes a distinction between aggressive or offensive war vs. defensive or responsive war. *See* sources cited *supra* note 29 and accompanying text. This proposed text makes the distinction explicit between "first use" of nuclear weapons and "second use," and allows each party to reserve the right to respond in kind against an attacker's initiating the use of nuclear weapons. Presumably, the NNWS parties to the NPT, who have given up the right to possess nuclear weapons, would opt for the "absolute" renunciation of nuclear weapons, while the NWS might retain the legal right to use nuclear weapons responsively. The distinction between aggressive and defensive conventional war can be quite elusive; the facts about who shot first or which state committed the first offensive action could be uncertain and contested under the 1928 Kellogg-Briand structure. In contrast, the line-drawing required by this proposed nuclear treaty should be simpler—it should ordinarily be relatively easy to determine whether a nuclear weapon has been used, and against whom, releasing a victim state from its formal renunciation of nuclear weapons. In some circumstances, perhaps, attribution of the nuclear explosion to a particular user might be contested. *See Understanding Nuclear Forensics in 5 Questions*, INT'L ATOMIC ENERGY AGENCY (2014), *available at* https://www.iaea.org/sites/default/files/forensics070714_0.pdf (last visited Dec. 18, 2014) (discussing problems of determining the origin of nuclear materials and steps to improve that capability).

Under this proposed treaty, even a single use of one nuclear weapon would release the victim state from its non-use pledge. But that would not imply that there would then be "no limits" on its legally permitted nuclear response; the traditional law of armed conflict requirements (necessity, proportionality, discrimination, avoidance of unnecessary suffering) would still apply. *See generally*, GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR (2010); MARY ELLEN O'CONNELL, INTERNATIONAL LAW AND THE USE OF FORCE: CASES AND MATERIALS (2d ed. 2009); *The White House, Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, WHITE HOUSE (June 19, 2013), *available at* http://www.whitehouse.gov/the-press-

declaration at any time by providing notification to the Depositary.[218]

Article IV. Threats

No Party shall, directly or indirectly, threaten a first use of nuclear weapons.[219] No Party shall engage in military or other preparations for the first use of nuclear weapons.[220]

Article V. Security Assurances

Each Party shall provide or support immediate, meaningful assistance to any state victimized by a first use of a nuclear weapon.[221] Each Party shall resist and reject any first use of a nuclear weapon by any state.[222]

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office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states (last visited Dec. 18, 2014) (official U.S. government statement that all plans for the possible use of nuclear weapons must be consistent with the fundamental principles of the law of armed conflict). The proposed treaty text would also prohibit any "pre-emptive" use of a nuclear weapon, even in circumstances of "anticipatory self-defense," in which it was clear that an enemy was preparing to launch an imminent attack.

218. The states possessing nuclear weapons have occasionally altered their respective statements about "no first use" and "negative security assurances." *See supra* Section III.C.

219. *See* ICJ Advisory Opinion on Nuclear Weapons, *supra* note 139, para. 47 (concluding that a threat to use force in an illegal manner is itself a violation of the U.N. Charter). Of course, the mere continued possession of nuclear weapons constitutes a type of ongoing tacit "threat" to use them. This provision is intended to bar overt threats, as well as implicit threats, such as an assertion that "all options are on the table" to respond to a particular crisis. *See* sources cited *supra* note 194-95.

220. *Cf.* CWC, *supra* note 8, art. I.1(c) (prohibiting military preparations to use chemical weapons). Note that some acts undertaken in preparation for a possible second use of nuclear weapons can be indistinguishable from acts that would be undertaken in anticipation of using those weapons first; treaty negotiators would have to assume the burden of drawing delicate lines in this area.

221. This provision is deliberately vague, not specifying the manner or extent to which the assistance must be provided. It is a weak form of Positive Security Assurance, not requiring, for example, any automatic use of armed force to defend the state victimized by a first nuclear strike. The assistance may consist of political, diplomatic, medical, scientific, humanitarian, or other aid.

222. This provision is likewise vague; it requires parties to oppose any first use of nuclear weapons, but does not specify the form in which that opposition will be registered. National decisions and U.N. Security Council measures containing particular reactions to any first use of nuclear weapons will depend heavily upon the immediate facts. Some have argued that the Kellogg-Briand Pact rendered the concept of "neutrality" moot, requiring all states to unite against aggression. *See* Baratta, supra note 43, at 702-03.

Article VI. Accidents

The Parties shall cooperate to the fullest extent possible to prevent the possibility of nuclear war arising by accident, misunderstanding, miscalculation, unauthorized action, or in any other way.[223]

Article VII. Consultations

The Parties shall consult, on an urgent and high-level basis, in the event of any accident, incident, or event that might lead to a threat or first use of nuclear weapons. They shall make every effort to resolve the problem without recourse to force.[224]

Article VIII. Public Statements

Each Party shall moderate its official public statements[225] about

223. *See* Agreement on Measures to Reduce the Risk of Outbreak of Nuclear War Between The United States of America and The Union of Soviet Socialist Republics, U.S.-Russ., narrative, Sept. 30, 1971, 22 U.S.T. 1590, *available at* http://www.state.gov/t/isn/4692.htm (last visited Dec. 18, 2014) (observing "[t]he very existence of nuclear-weapon systems, even under the most sophisticated command-and-control procedures, obviously is a source of constant concern. Despite the most elaborate precautions, it is conceivable that technical malfunction or human failure, a misinterpreted incident or unauthorized action, could trigger a nuclear disaster or nuclear war."); *see generally* Patricia Lewis, Heather Wlliams, Benoît Pelopidas & Sasan Aghlani, *Too Close for Comfort: Cases of Near Nuclear Use and Options for Policy,* CHATHAM HOUSE (Apr. 2014), *available at* http://www.chathamhouse.org/publications/papers/view/199200 (last visited Dec. 18, 2014) (studying several cases of miscommunication, technical failure, or accidents that could have escalated into nuclear confrontation).

224. *Cf. supra* notes 78-86 (for a list of confidence-building treaties that require consultation during crises).

225. It is unusual for a treaty to commit the parties to constrain the rhetoric in their public policy statements. Partial precedents include the International Covenant on Civil and Political Rights, art. 20, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 386, which prohibits propaganda for war and advocacy of national, racial or religious hatred, and the International Convention on the Elimination of All Forms of Racial Discrimination, art. 2, 660 U.N.T.S. 195, 5 I.L.M. 352 (1966), which commits parties not to "sponsor, defend or support" racial discrimination. *See* Steven E. Miller, *The Utility of Nuclear Weapons and the Strategy of No-First-Use* (Nov. 15, 2002), *available at* http://pugwashconferences.files.wordpress.com/2014/05/200211_london_nws_paper_miller.pdf (last visited Dec. 18, 2014) (arguing that changes in public rhetoric alone will not convince the world that a no first use policy is firmly in place, but they can help send the message); *see also Russian General Calls for Preemptive Nuclear Strike Doctrine Against NATO*, MOSCOW TIMES, (Sept. 3, 2014, 5:40 PM), *available at* http://www.themoscowtimes.com/business/article/russian-general-calls-for-preemptive-nuclear-strike-doctrine-against-nato/506370.html (last visited Dec. 18, 2014) (illustrating

nuclear weapons and nuclear warfare, to emphasize the Parties' collective judgments that nuclear war must never be fought; that nuclear weapons must never be used; that nuclear weapons are categorically different from all other weapons; and that the only valid purpose for any continued possession of nuclear weapons is deterrence of a nuclear attack.[226]

Article IX. Defense Plans

Each Party that possesses nuclear weapons shall modify its defense policy guidance, plans and doctrine[227] to eliminate the concept of launching a first use of nuclear weapons; to reduce or eliminate the concept of launching its nuclear weapons "on warning";[228] to eliminate any automatic or immediate reliance upon a doctrine of massive

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the kind of unhelpful recent rhetoric that this provision would restrict).

226. Each of these judgments reflects an effort to stigmatize nuclear weapons as being beyond the pale of what states tolerate, even in the extreme case of armed conflict, and to reinforce the longstanding international taboo against their use. *See* NINA TANNENWALD, THE NUCLEAR TABOO: THE UNITED STATES AND THE NON-USE OF NUCLEAR WEAPONS SINCE 1945 2997 (2008); Daryl G. Press, Scott D. Sagan, & Benjamin A. Valentino, *Atomic Aversion: Experimental Evidence on Taboos, Traditions, and the Non-Use of Nuclear Weapons*, AM. POL. SCIENCE REV. 1 (Feb. 2013), *available at* http://iis-db.stanford.edu/pubs/24013/FINAL_APSR_Atomic_Aversion.pdf (last visited Dec. 18, 2014) [hereinafter Press et al.]; PERKOVICH, *supra* note 136, at 73-78 (arguing to strengthen the taboo against use of nuclear weapons); *see also supra* text accompanying notes 147-51 (summarizing debate about the usability of nuclear weapons).

227. Different countries have different types of military planning documents. For the United States, see *Report on Nuclear Employment Strategy of the United States, Specified in Section 491 of 10 U.S.C.*, U.S. DEPT. DEF. (June 19, 2013), *available at* http://www.defense.gov/pubs/ReporttoCongressonUSNuclearEmploymentStrategy_Section491.pdf (last visited Dec. 18, 2014); *Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, WHITE HOUSE (June 19, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/06/19/fact-sheet-nuclear-weapons-employment-strategy-united-states (last visited Dec. 18, 2014) (announcing that the United States will "examine and reduce the role of launch under attack in contingency planning"); *National Security Strategy*, U.S. GOV'T (May 2010), *available at* http://nssarchive.us/NSSR/2010.pdf (last visited Dec. 18, 2014); 2010 Nuclear Posture Review Report, *supra* note 126; *see also* G.A. Res. 68/40, U.N. Doc. A/RES/68/40 (Dec. 5, 2013), *available at* http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/68/40 (last visited Dec. 18, 2014) (calling for review of nuclear doctrines).

228. The concepts of "launch on warning," "launch under attack," and related doctrines are imprecise, but can be clarified in the negotiating history of the agreement. *See* Arbatov et al., *supra* note 133, at 193-96 (discussing doctrines of launch on warning and launch under attack; noting that only the United States and Russia have adopted these concepts); Actions Report, *supra* note 86, at 4-5 (declaring that the United States will reduce the role of launch under attack in nuclear planning).

retaliation;[229] and to emphasize reliance upon non-nuclear options.[230]

Article X. Alert Status

Each Party that possesses nuclear weapons shall reduce the ordinary readiness and alert status of its nuclear weapons.[231]

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229. Sometimes, the doctrine of avoiding a full-scale, automatic, immediate nuclear response to a first strike is referred to as "no early second use." Miller, *supra* note 225.

230. These elements are designed to promote movement away from any first use of nuclear weapons, as well as to signal a reduction in the overall importance, salience, and usability of nuclear weapons, and to diminish any sense that a use of nuclear weapons would automatically or inevitably follow from certain provocations. They also help promote additional time for mature reflection and consideration of non-nuclear options, even in a crisis or war. *See id.* (arguing that a policy of no first use "cannot be real if militaries develop war plans that include, or even depend upon, the expectation of first-use of nuclear weapons."); *Fact Sheet: Nuclear Weapons Employment Strategy of the United States*, *supra* note 227 (discussing efforts toward "reducing the role of nuclear weapons in our security strategy.").

231. This provision attempts to reduce the "hair trigger" status of nuclear weapons, to increase the decision-making time before they could be used. *See* REACHING CRITICAL WILL, *supra* note 130, at 39 (reporting that the United States and Russia have about 1800 strategic nuclear warheads on high alert on land- and sea-based ballistic missiles; France and the United Kingdom have respectively 80 and 48 of their weapons on submarines fully operational, but at a lower level of readiness than U.S. and Russian weapons; China does not maintain its weapons in fully operational status); Hans M. Kristensen & Matthew McKinzie, Reducing Alert Rates of Nuclear Weapons, U.N. INST. FOR DISARMAMENT RESEARCH (2012); *Assessing Progress*, *supra* note 171, at 5, 12 ((assessing readiness of states' nuclear weapons), 13 (China), 16 (France), 18 (Russia), 21 (United Kingdom), 25 (United States), 29 (India), 31-32 (Israel), 35 (Pakistan)); *see also* Kamath, *supra* note 133, at 66 (describing steps to reduce alert status of weapons, to make a "no first use" pledge more reliable, such as removing warheads from missiles or pinning open the submarine missile ignition switches); 2010 NPT Review Conference Final Document, *supra* note 157, para. 90 (calling for reductions in operational status of nuclear weapons, to enhance confidence and diminish the role of nuclear weapons); Kulacki, *supra* note 171; John Burroughs, *A Global Undertaking: Realizing the Disarmament Promise of the NPT*, MIDDLE POWERS INITIATIVE BRIEFING PAPER (Jan. 21, 2010), *available at* http://www.middlepowers.org/pubs/Atlanta_Briefing_Paper_2010.pdf (last visited Dec. 18, 2014); *Actions Report*, *supra* note 86, at 4 (describing U.S. decision to continue the practice of keeping nuclear-capable bombers off day-to-day alert); Arbatov et al., *supra* note 133, at 196-204 (providing examples of steps that could be taken to reduce the readiness and alert level of nuclear weapons); Decreasing the Operational Readiness of Nuclear Weapons Systems, G.A. Res. 67/46, U.N. Doc. A/RES/67/46 (Dec. 3, 2012).

This provision does not specify how much reduction is required in alert status, nor does it require that all weapons be held at the same (lowered) level of alert; treaty negotiators will have to assume the challenge of working out these terms in additional detail. The provision applies to the weapons' "ordinary" status, allowing a country to increase the alert status of weapons during a crisis or war. Some may object that increasing the response time before nuclear weapons could be used would increase a state's vulnerability to a surprise "bolt from the blue" attack; others would respond that this type of instantaneous attack is now

Article XI. De-Targeting

Each Party that possesses nuclear weapons deployed on ballistic or cruise missiles shall alter the deployments so that ordinarily a missile contains no targeting codes or is targeted by default toward unpopulated ocean areas.[232]

Article XII. Training Exercises

Each Party that possesses nuclear weapons shall refrain from undertaking any military or other training exercises related to launching a first use of nuclear weapons.[233]

Article XIII. Arms Reductions

The Parties that possess nuclear weapons shall cooperatively, promptly, and significantly reduce the number of nuclear weapons they possess and deploy.[234] They shall particularly reduce or eliminate the

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vanishingly unlikely, and that the contrary dangers of an accidental, unauthorized, or imprudent use of nuclear weapons now pose the greater threat. *See PDI Live Debate 5: De-alerting*, CENTER FOR STRATEGIC & INT'L STUD. (Nov. 5, 2009), *available at* http://csis.org/event/pdi-live-debate-5-john-steinbruner-walter-slocombe-de-alerting (last visited Dec. 18, 2014); Peter Huessy, *Should the U.S. De-Alert its Nuclear Missiles?* GATESTONE INST. (Aug. 10, 2012, 4:30 AM), *available at* http://www.gatestoneinstitute.org/3266/us-nuclear-missiles-alert (last visited Dec. 18, 2014).

232. *See Assessing Progress*, *supra* note 171, at 13, 16, 21, 25 (assessing states' practices in maintaining active targeting of nuclear missiles); *Actions Report*, *supra* note 86, at 4 (explaining that the United States will continue the practice of "open-ocean targeting" of all deployed strategic nuclear missiles); Kristensen & McKinzie, *supra* note 231, at 18-19 (noting de-targeting steps by United States, Russia, and China).

233. The purpose of this provision is to reinforce the previous measures by ensuring that parties do not practice or train to undertake the actions they have agreed not to do. *See* Miller, *supra* note 225 (noting the aphorism that militaries fight the way they train, so a NFU regime should ban military exercises that include practicing a first use of nuclear weapons). Many of the provisions of this proposed treaty are not subject to external verification of compliance, as most modern arms control treaties are, but fidelity to this provision can be at least partially corroborated, as remote sensors can observe large-scale training exercises.

234. The concept behind this provision is that countries will not need so many nuclear weapons, if the function of those systems is confined solely to the role of deterring the threat of a nuclear strike. Reductions of excess nuclear weapons could be undertaken unilaterally or pursuant to formal or informal agreements. The depth of NNWS dissatisfaction with NWS compliance with article VI of the NPT, *supra* note 153, requires that any "good faith negotiations" in this area should be brought to a successful conclusion quickly. Note also

types of nuclear weapons that would be most suitable for a first use or whose use would be incompatible with the law of armed conflict.[235]

Article XIV. Nuclear Disarmament

1. The Parties shall accelerate their efforts in pursuit of the total elimination of nuclear weapons.[236] They shall undertake immediate steps[237] toward that goal, and shall promote in a joint enterprise[238] the objective of the permanent, global, comprehensive, and verifiable abolition of all nuclear weapons.[239]

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that nuclear arms reductions can save parties a great deal of money. *See* DAVID KRIEGER, THE CHALLENGE OF ABOLISHING NUCLEAR WEAPONS (2009) (estimating that the United States has spent $7.5 trillion on nuclear weapons and their delivery systems); *Atomic Audit: The Costs and Consequences of U.S. Nuclear Weapons Since 1940*, BROOKINGS INST. (June 29, 1988), *available at* http://www.brookings.edu/research/books/1998/atomic (estimating the cost of the nuclear arsenal at $5.5 trillion through 1998) (last visited Dec. 18, 2014); Dana Priest, *Aging U.S. Nuclear Arsenal Slated for Costly and Long-Delayed Modernization*, WASHINGTON POST (Sept. 15, 2012).

235. *See* Miller, *supra* note 225 (arguing that under a no first use regime, countries would require far fewer weapons; forward-based and shorter-range nuclear forces would be unnecessary; and the key criterion would be the survivability of nuclear weapons, not their ability to be used immediately). Under this structure, countries would be especially encouraged to divest themselves of vulnerable systems that would be subject to "use it or lose it" calculations, forward-based systems that would be used very early in a war, weapons that would be intended to attack hardened or deeply buried command bunkers, and large, inaccurate weapons that would target population centers in a disproportionate or indiscriminate way. *See, e.g., B61-11 Earth-Penetrating Weapon Tested for First Time in Seven Years*, HOMELAND SEC. NEWSWIRE (Jan. 15, 2014), *available at* http://www.homelandsecuritynewswire.com/dr20140115-b6111-earthpenetrating-weapon-tested-for-first-time-in-seven-years (last visited Dec. 18, 2014); *U.S. Deploys Two More Nuclear-Capable Bombers to Europe*, GLOBAL SEC. NEWSWIRE (June 9, 2014), *available at* http://www.nti.org/gsn/article/us-deploys-two-more-nuclear-capable-bombers-europe/ (last visited Dec. 18, 2014); Barry Blechman & Russell Rumbaugh, *Bombs Away: The Case for Phasing out U.S. Tactical Nukes in Europe*, 93 FOREIGN AFF. 163 (July/Aug. 2014).

236. Parties to the NPT are already committed to pursue negotiations in good faith toward this objective. *See supra* text accompanying notes 153-61.

237. *See* Shultz et al., *supra* note 132 (arguing that both a long-term goal of nuclear disarmament and a series of practical, short-term steps in pursuit of that goal are necessary, "Without the bold vision, the actions will not be perceived as fair or urgent. Without the actions, the vision will not be perceived as realistic or possible.").

238. *See generally* Max M. Kampelman & Steven P. Andreasen, *Turning the Goal of a World without Nuclear Weapons into a Joint Enterprise*, *in* REYKJAVIK REVISITED, 429, 429-47 (George P. Shultz, Steven P. Andreasen, Sidney D. Drell, & James E. Goodby eds., 2008); *see* James Goodby, *A World Without Nuclear Weapons is a Joint Enterprise*, 41 ARMS CONTROL TODAY 23 (May 2011), *available at* https://www.armscontrol.org/act/2011_05/Goodby (last visited Jan. 9, 2015) (arguing that all states, not just the United States and Russia, must participate in the effort to pursue nuclear disarmament).

239. *See* David A. Koplow, *What Would Zero Look Like? A Treaty for the Abolition of*

2. The Parties that possess nuclear weapons shall maintain the safety and security of those weapons for as long as they exist, but shall not consider this to be a permanent function.[240]

Article XV. Final Provisions[241]

1. This Treaty shall be open for signature by all states indefinitely.[242]

2. This Treaty shall be subject to ratification by signatory states according to their respective constitutional processes.

3. This Treaty shall enter into force 180 days after the deposit of instruments of ratification by twenty states.[243] For any state depositing

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Nuclear Weapons, 45 GEO. J. INT'L L. 683, 712-15 (2014) (presenting a draft of a nuclear weapons abolition treaty, specifying the "mantra" of criteria such an instrument must satisfy).

240. Preservation of the safety and security of nuclear weapons is critical. *See* Barack Obama, President of the United States, *Remarks by President Barack Obama at Hradcany Square in the Czech Republic*, *supra* note 134 (promising that as long as nuclear weapons exist, the United States will maintain a safe, secure, and effective arsenal), but the point of this provision is to underscore that the goal of nuclear disarmament is not simply an impossibly-distant goal and that nuclear weapons should not be a perpetual fact of life.

241. These provisions are traditionally split into several separate articles; they are combined here simply for convenience. For comparison, see START I, *supra* note 8, arts. XVII-XIX; CWC, *supra* note 8, arts. VIII-XXIV; and CTBT, *supra* note 8, arts. VII-XVII.

242. The 1928 Kellogg-Briand Pact was initially open for a select group of parties, whose participation was required before the treaty could come into force; other states were also invited to join. *See supra* notes 69-70 and accompanying text. In this proposal, the nuclear treaty would be open for all states on an equal basis.

243. There are several possible formulas for the entry-into-force provision of this treaty. As drafted, the instrument will become operational as soon as any twenty countries join. An alternative would be to require a higher number, and perhaps to require the participation of some or all nine countries currently possessing nuclear weapons, thereby ensuring a strong degree of consensus among the most affected states. However, the most demanding approach would also, in effect, give each nuclear weapons possessing country a "veto" over the treaty's entry into force for any state. That sort of provision has proven highly problematic for the CTBT, which names 44 countries whose ratification is required to bring the treaty into force. CTBT *supra* note 8, art. XIV.1, Annex 2. This provision has had the effect of blocking the treaty's execution, despite the ratification by 161 states. *See The Status of the Comprehensive Test Ban Treaty: Signatories and Ratifiers*, ARMS CONTROL ASS'N (2014), *available at* http://www.armscontrol.org/factsheets/ctbtsig (last visited Dec. 18, 2014). Alternatively, the nuclear treaty could establish a high threshold for entry into force, but also allow individual states to waive that requirement, bringing the Treaty into force sooner for them. Treaty of Tlatelolco, *supra* note 178, art. 28.2.

an instrument of ratification thereafter, the Treaty shall enter into force thirty days after the deposit.

4. This Treaty shall not be subject to reservations that are incompatible with its object and purpose.[244]

5. This Treaty shall be of unlimited duration.[245]

6. This Treaty shall be subject to amendment as follows[246]: Any Party may propose an amendment, which shall be submitted to the Depositary for prompt circulation to all Parties. If one-third or more of the Parties notify the Depositary within sixty days after its circulation that they support further consideration of the proposal, it shall be considered at an Amendment Conference. If the proposed amendment is adopted at the Amendment Conference by a majority vote of all Parties, with no Party casting a negative vote, the amendment shall enter into force for all Parties ninety days after the deposit of instruments of ratification by a majority of all Parties.

7. Each Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests.[247] It shall give ninety days' advance notice[248] of such

244. A "tougher" alternative would be to prohibit all reservations, or to permit some types of reservations, but not those that would be attached to the most important provisions. *See, e.g.*, CWC, *supra* note 8, art. XXII; CTBT, *supra* note 8, art. XV.

245. Some arms control treaties are of unlimited (permanent) duration. *See, e.g.*, CWC, *supra* note 8, art. XVI.1; CTBT, *supra* note 8, art. IX.1. Others have fixed terms. *See, e.g.*, New START, *supra* note 152, art. XIV.2; NPT, *supra* note 153, art. X.2 (specifying an initial term of twenty-five years, after which a conference of parties determined an indefinite extension).

246. Modern treaties contain multiple variations regarding amendment; some also permit modification of technical or administrative provisions pursuant to an accelerated process. *See, e.g.*, CWC, *supra* note 8, art. XV; CTBT, *supra* note 8, art. VII; *see also* Natural Res. Def. Council vs. Envtl. Prot. Agency, 464 F.3d 1, 9, 10 (D.C. Cir. 2006) (limiting ability to modify an international agreement via a process that does not involve presidential decision and Senate agreement).

247. This is the standard "supreme interests withdrawal" clause, common to arms control treaties. It provides an "escape hatch" from the obligations, making it safer for states to enter the agreement in the first place. *See* CWC, *supra* note 8, art. XVI; CTBT, *supra* note 8, art. IX; New START Treaty, *supra* note 152, art. XIV.3. Withdrawal from an arms control treaty has been rare, with only the 2002 U.S. withdrawal from the SALT I Anti-Ballistic Missile Treaty and the 2003 North Korean withdrawal from the NPT as precedents. Christer Ahlstrom, *Withdrawal from Arms Control Treaties*, STOCKHOLM INT'L

withdrawal, including a statement of the extraordinary events it regards as having jeopardized its supreme interests.

8. Nothing in this Treaty shall be interpreted as in any way limiting or detracting from the obligations of the Parties under other international law. A Party's withdrawal from this Treaty shall not in any way affect its obligations under other international law, including other arms control or disarmament treaties.[249]

9. Seven years after the entry into force of this Treaty, and at seven year intervals thereafter, the Parties shall assemble in a Review Conference to assess the operation and effectiveness of the Treaty, with a view to ensuring that the object and purpose of the Treaty are being realized.[250]

10. The Secretary-General of the United Nations is hereby designated as the Depositary of this Treaty, and shall perform all appropriate duties, including registering this Treaty pursuant to Article 102 of the Charter of the United Nations.[251]

11. The Arabic, Chinese, English, French, Russian and Spanish texts of this Treaty are equally authentic.[252]

In witness whereof, the undersigned, being duly authorized to that effect, have signed this Treaty.

PEACE RESEARCH INST. YEARBOOK 763, 764 (2004), *available at* http://www.sipri.org/yearbook/2004/19 (last visited Dec. 18, 2014). Alternatively, the treaty could depart from precedent and prohibit withdrawal (except, perhaps, in the case of material breach of the treaty by another party).

248. Alternatively, the time period specified for withdrawal could be shorter or longer. *See* START I, *supra* note 8, art. XVII.3 (six months); CTBT, *supra* note 8, art. IX.3 (six months); CWC, *supra* note 8, art. XVI.2 (ninety days). A longer notification period provides other parties additional time to react to the impending withdrawal, but in the case of nuclear weapons, parties may feel the need for an ability to respond very quickly to the most severe challenges.

249. This provision is designed to ensure the continuation in force of the 1928 Kellogg-Briand Pact. *Cf.* CWC, *supra* note 8, art. XVI.3 (specifying that withdrawal from the CWC would not affect a party's status under the 1925 Geneva Protocol, *supra* note 54).

250. *See, e.g.*, CTBT, *supra* note 8, art. VIII (providing for review conferences every ten years); CWC, *supra* note 8, art. VIII.22 (providing for review conferences at five year intervals).

251. CTBT, *supra* note 8, art. XVI.1; CWC, *supra* note 8, art. XXIII.

252. CTBT, *supra* note 8, art. XVII; CWC, *supra* note 8, art. XXIV.

Done at (place) on (date).

V. CONCLUSION

The underlying goal of this article, and the purpose of the extended thought exercise in drafting a nuclear version of the Kellogg-Briand Pact, is to try to prompt a social psychic shift. The treaty-makers in 1928 succeeded in that type of grand enterprise; they midwifed an important, lasting alteration in the predominant paradigm of international warfare. Now it's time for governments and populations around the world to exert a similar bit of radically creative fresh thinking about nuclear war, in particular.

In today's security environment, we should no longer think of nuclear weapons as a normal, inevitable part of the global architecture; we should not contemplate them as "ordinary," usable implements in the military toolkit that can lawfully be wielded as a matter of unilateral national choice. Likewise, we should not deem nuclear weapons to be inherently essential to our national well-being, and we should definitely not perpetuate them as permanent fixtures in the defense firmament or as indelible badges of big power status.[253]

Instead, people in the United States, in the other NWS, and around the world, should appreciate that the era of nuclear weapons is historically anomalous and that the hypertrophy of sizes, types, numbers and sophistication of nuclear explosive devices was an artifact of the bizarre circumstances prevailing during World War II and the cold war. That absurd explosive Sword of Damocles need not hang over humanity's head forever; we can progress to a safer, more modern global society in which nuclear warfare no longer occupies a central place.[254]

The rationales for adopting a nuclear Kellogg-Briand today spring from multiple sources:

—*Legally*, almost any first use of nuclear weapons would violate the accepted conventional and customary law of armed conflict. The ICJ, in its 1996 nuclear weapons advisory opinion, was not quite able to conclude categorically that all uses of nuclear weapons would be *per se*

253. *See* Berry et al., *supra* note 139, at 41-58 (emphasizing the importance of delegitimizing nuclear weapons and stigmatizing their use).

254. *See* Schell, *supra* note 128, at 30 (offering the comparison that "[i]f I carry a rifle on my shoulder during a war, it means one thing. If I continue to carry the rifle after the war has ended, it means something very different.").

illegal, but it is clear that in virtually all realistic applications, considerations of necessity, proportionality, and discrimination would rule out a legitimate first use.[255]

—*Militarily*, the United States no longer needs to dangle the threat of crossing the nuclear threshold; for all credible scenarios, the array of conventional munitions would suffice, without engaging the "overkill" of atomic power.[256]

—*Strategically*, abandonment of first use scenarios could reinforce deterrence, by making it perfectly clear that the nuclear armada has precisely one function: to deter a first use of nuclear weapons by anyone else; that the nuclear arsenal should be optimized to perform only that specified mission; and that conventional forces must be made adequate for all other types of applications.[257]

—*Politically*, retaining the existing strategic ambiguity undercuts our vital non-proliferation efforts, by degrading Article VI of the NPT; the NNWS want comprehensive, binding NSAs in order to validate their continued adherence to the most vital cornerstone of international security.[258]

—*Financially*, reducing and simplifying the nuclear weapons infrastructure would save untold billions.[259]

—*Prudentially*, de-alerting and de-targeting nuclear weapons would further reduce the likelihood of hair-trigger accidental or

255. Feiveson & Hogendoorn, *supra* note 162, at 94 (arguing that "a nuclear response to chemical or biological weapon use would in most instances be out of all proportion to the initial attack, and thus politically and morally indefensible"); PERKOVICH, *supra* note 136, at 49 (whether nuclear weapons could be used in compliance with international legal standards "remains highly problematic").

256. Gerson, *supra* note 149; Bundy et al., *supra* note 149. *But see* PERKOVICH, *supra* note 136, at 9 (arguing for retaining the option of first use in selected circumstances).

257. Gerson, *supra* note 149, at 39-40; Graham and Tomero, *supra* note 166, at 4 (arguing that "Threatening to use nuclear weapons against an NPT non-nuclear-weapon state party undermines the credibility of a strong US and NATO conventional deterrent, and may incite proliferation by emphasizing our sole strategic vulnerability.").

258. 2010 Nuclear Posture Review Report, *supra* note 126, at 7 (asserting that U.S. compliance with NPT article VI can help persuade NNWS to adopt measures needed to reinvigorate the non-proliferation regime); Feiveson & Hogendoorn, *supra* note 162, at 91 (arguing that "the use of nuclear weapons by the United States or another nuclear weapon state could shatter the NPT regime and lead to the rapid spread of nuclear weapons to several more countries"); Graham & Tomero, *supra* note 166, at 4 (arguing that maintaining the option to use nuclear weapons first "reduces US leverage to stem the proliferation of nuclear weapons").

259. *See* sources cited *supra*, note 234 (regarding the financial costs of nuclear weapons programs).

unauthorized nuclear war.[260]

—*Reciprocally,* refraining from threatening to use nuclear weapons first would reinforce the global taboo against those arms, diminishing the portrait of them as weapons that are necessary and usable – including potentially usable against us.[261]

—Most of all, *psychologically,* creating and promoting a nuclear Kellogg-Briand could help shift global public and elite opinion away from the notion that these are "normal" weapons. Even if there is only an indirect, unreliable connection between public policy pronouncements and physical actions in the real world, where we have the possibility of nudging things in a safer direction, we should act.[262]

The version of a nuclear Kellogg-Briand presented here has some important similarities and as well as differences from the concept of the 1928 original, as those features were highlighted in Section II.D. In the realm of "lessons learned," or at least analogies selected, the proposed nuclear treaty, like the template, would be legally binding, multilateral and public. It would also be, essentially, a "no first use" promise, although the difficulty of drawing lines between first and second uses should be appreciably simpler in the nuclear context. Like the original, the nuclear variant would reinforce parties' commitment to non-violent means of alternative dispute resolution, although it would not, on its own, create new judicial, arbitral, or other institutions. Continuing with the similarities, the nuclear treaty would be permanent (but would have provisions for amendment and for "supreme interests" withdrawal) and would not deal with criminal prosecution of individuals or states.

Regarding the salient differences, the proposed nuclear treaty would include "operational" provisions, running well beyond a simple declaration of renunciation and condemnation, to include specific national action obligations. Notable among these undertakings would be de-alerting and de-targeting nuclear missiles; revision of national war plans, training exercises, and rhetoric; and a renewed commitment to immediate and long-term measures of disarmament. And unlike the *paterfamilias,* the undertakings in the proposed nuclear treaty would be global in scope, not confined by reciprocity.

The Kellogg-Briand Pact was, of course, a flawed instrument. Its authors' ambition and rhetoric far exceeded their grasp; the treaty left as many questions unanswered and problems unaddressed as it resolved.

260. *See* Lewis, *supra* note 171.

261. *See* Sagan, *supra* note 162, at 175 (arguing that "U.S. [behavior], including nuclear posture and doctrine, is in fact highly influential.").

262. *See* Tannenwald, *supra* note 226; Press et al., *supra* note 226.

In such a concise format, it could hardly have succeeded as a lasting macro-scale reformation in international political affairs. Kellogg-Briand gained barely fifteen minutes of fame, and perhaps did not deserve much enduring influence after the cataclysm of German, Italian, and Japanese aggression and World War II.

This article's proposed draft treaty, likewise, is far from complete; it is hardly a ready-for-signature outlawry instrument. In particular, the absence of meaningful provisions on verification is highly contestable – the draft has none of the obligations regarding data reporting, inspections, enforcement, and the like, which have become *de rigueur* in modern arms control treaty practice. In fact, many of its provisions are so "internal" to each state's military structures that they are inherently unverifiable – the required revisions of war plans and national policy statements, for example, or the de-alerting and de-targeting of nuclear missiles, are probably not reliably subject to external corroboration. Moreover, the proposed document does not address fundamental political questions about how to persuade possibly reluctant NWS to jump aboard this bandwagon, or whether and how the United States and any "coalition of the willing" should proceed immediately with less than unanimous initial participation.

Most fundamentally, this proposal, like the original Kellogg-Briand, is subject to the valid criticism that there could be an important gap – perhaps a yawning chasm – between a country's publicly-announced "declaratory policy" and its possibly-covert "action policy." That is, regardless of whether a sovereign says it renounces war in general, or nuclear war in particular, it may in practice still resort to the forbidden avenue when the chips are down. Public postures and unregulated treaties do not physically constrain countries – as long as a state possesses nuclear weapons, it may elect to employ them at will.[263] Just as Kellogg-Briand failed to prevent World War II, this article's version cannot guarantee that no state would be willing to pay the price

263. Feiveson & Hogendoorn, *supra* note 162, at 97 (arguing that this continuing uncertainty about the reliability of a non-use pledge can be a benefit, providing an additional element of deterrence to the regime); Ullman, *supra* note 165 at 680-81 (arguing that a NFU pledge is "self-enforcing," because if one nation violates its promise, the others are released from theirs); Gerson, *supra* note 149, at 45 (arguing that "Skeptics of the believability of NFU underestimate the international and domestic audience costs incurred by a clear NFU commitment."); Sagan, *supra* note 162, at 177 (arguing that "declaratory policy is not about making 'promises' about future restraint; it is about signaling intent and therefore shaping the expectations of allies and adversaries alike."); Pierce S. Corden, *Ethics and Deterrence: Moving Beyond the Just-War Tradition*, *in* ETHICS AND NUCLEAR STRATEGY? 156, 177 (Harold P. Ford & Francis X. Winters eds., 1977) (addressing ethics and strategy of declaratory and action policies).

of violating the nuclear agreement. Indeed, there are strong indications that the Soviet Union, for example, was acting in bad faith when it offered its "no first use" pledge during the cold war; it was cynically prepared to abandon that puffery at a moment's notice, if need be.[264]

Still, that type of hypocrisy has its price, and a declaratory policy can make a difference. Public presentations, especially when clad in the garb of binding international treaty law, do help shape attitudes about what is legitimate, about how honorable people and countries behave. World public opinion is hardly all powerful, especially when dealing with authoritarian regimes, but it can exert influence.[265] Likewise, the proposed treaty's "operational" provisions, going beyond the structure of Kellogg-Briand by engrafting additional required behaviors, such as progress toward nuclear abolition and constraints upon military plans and exercises, can play a role. Complex organizations will do best at the routines they have repeatedly practiced, and inhibitions upon training algorithms can have meaningful impact in functional settings.[266]

Certainly, there are risks from eschewing nuclear weapons, and a policy to legally abandon any possible first use of those arms can have potential costs. But there are risks on the other side of the ledger, too. In particular, our collective clinging to nuclear arsenals and our continued emphasis upon those arms as essential, indispensable components of our security posture, carry the inevitable danger of proliferation. The NNWS have made it clear that they will not permanently tolerate a two-tiered world in which a privileged few possess nuclear weapons that the vast majority of have surrendered; if the NWS fail to redeem the promise of Article VI of the NPT, the dangers will accelerate. A nuclear Kellogg-Briand, helping to move the world an important step away from nuclear weapons, nuclear war, and the fetish of all things nuclear, can make a contribution to that long-term

264. Heuser, *supra* note 167; Feiveson & Hogendoorn, *supra* note 162, at 92. Some skeptics likewise doubt the sincerity and reliability of China's NFU commitments. *See* Rachel Oswald, *China's New Defense Paper Causes Stir Over No-First-Use Nuke Policy*, GLOBAL SEC. NEWSWIRE (Apr. 24, 2013); Kulacki, *supra* note 171; *China Reaffirms "No First Use" Nuke Rule*, GLOBAL SEC. NEWSWIRE (Jan. 6, 2011); Stephanie Spies, *China's Nuclear Policy: (No) First Use?*, CTR. STRATEGIC & INT'L STUDIES, *available at* http://csis.org/blog/chinas-nuclear-policy-no-first-use (last visited Dec. 18, 2014).

265. *See* Iriye, *supra* note 34, at 68 (noting that the notion of "'world public opinion' was a typically Wilsonian concept," connoting the existence of a moral force emanating from people everywhere, rather than from their leaders, which could be mightier than armed power and provided the best safeguard of peace and stability).

266. *A New Look at No First Use*, *supra* note 166, at 2 (emphasizing the importance of cultivating a "culture of nonuse" of nuclear weapons within the military).

pursuit of security and stability.

To some, the Kellogg-Briand Pact may seem obsolete, an antique remnant of a long-distant past. But in reality, it wasn't that long ago. The 1928 negotiation of Kellogg-Briand is closer to the 1968 NPT and the 1969-1972 negotiation of SALT I (both indisputably central elements in the modern cannon of arms control) than the NPT and SALT I are to us today. And even if Kellogg-Briand were "ancient history," sometimes there's something to be gained from "repurposing" those hoary sources.

ECONOMIC DEMOCRACY, MADE IN GERMANY: THE MIETSHÄUSER SYNDIKAT MODEL AS A FRAMEWORK FOR DEVELOPING DEMOCRATIC ENTERPRISES

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CONTENTS

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Although cooperatives have long been a fixture of the world economy, the 2008 financial crisis sparked renewed interest in cooperatives as a democratic and sustainable alternative to conventional business forms, and the United Nations named 2012 the "International Year of [the] Cooperatives."[1] This renewed enthusiasm for cooperatives has taken many forms, including the "Bank Transfer Day", also known as "Move Your Money" day, which led to an influx of new members at credits unions.[2] For its part, Germany has not only been the

1. *See generally* Julian B. Heron, Jr. & David B. Friedman, *Retrospective: New Challenges for California Agriculture in World Export Markets*, 1 SAN JOAQUIN AGRIC. L. REV. 1, 30 (1991) *reprinted in* 20 SAN JOAQUIN AGRIC. L. REV. 239, 268 (2011) (suggesting transnational agricultural cooperatives as a method of securing access to markets for Californian agricultural goods); U.N. DEP'T OF ECON. & SOC. AFFAIRS DIV. FOR SOC. POL'Y & DEV., INTERNATIONAL YEAR OF COOPERATIVES 2012, *available at* http://social.un.org/coopsyear/uncoops.html (last visited Nov. 16, 2014).

2. David Dayen, *Move Your Money: Hundreds of Thousands of Transfers from Big Banks to Small in the Last Three Months*, FIREDOGLAKE (Feb. 3, 2012, 7:35 AM), *available at* http://news.firedoglake.com/2012/02/03/move-your-money-hundreds-of-thousands-of-transfers-from-big-banks-to-small-in-last-three-months/ (last visited Nov. 16, 2014). The effort led to over 5 million new members at credit unions and small banks. *Id.*

site of an economic boom in recent years[3] but has also witnessed an exponential increase in the number of cooperatives being organized.[4] The proliferation of renewable energy cooperatives has received the most sustained media attention, but agricultural, housing and even beer-brewing cooperatives have been a part of this upsurge.[5]

While the upswing in cooperative development in Germany is notable in its own right, of even greater significance is the application of a new organizational model to cooperative projects, which both facilitates the growth of democratic enterprises and organizes them in cohesive networks.[6] Pioneered by the Mietshäuser Syndikat in over eighty established projects across Germany, the use of limited liability companies held jointly by the local residents and a larger network has proven both effective as an engine of growth and compatible with the democratic and constitutive ideals so closely identified with cooperatives.[7] Notably, the organization is entirely democratic yet has discarded the standard cooperative model as too inflexible and overburdened by regulation to operate in an economy of scale.[8]

This note argues that the Mietshäuser Syndikat model can be re-purposed from the development of housing cooperatives to the development of networks of democratic enterprises in both civil and common law jurisdictions. Furthermore, it argues that the Mietshäuser Syndikat model offers considerable advantages over conventional cooperatives because of its relative flexibility and ability to guarantee democratic management. As such, the Mietshäuser Syndikat is better

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3. *See Regierung sieht deutsche Wirtschaft vor starkem Aufschwung*, DIE ZEIT (Oct. 23, 2013 1:06 PM), *available at* http://www.zeit.de/wirtschaft/2013-10/wachstumsprognose-deutsche-wirtschaft (last visited Nov 16, 2014).

4. *See* Christiane Grefe, *Und jetzt alle – Gemeinsam Strom erzeugen, Häuser bauen, Banken besitzen: Genossenschaften haben wieder Zulauf*, DIE ZEIT (Apr. 23, 2012, 7:51 PM), *available at* http://www.zeit.de/2012/17/Genossenschaften (last visited Nov. 16, 2014) (detailing the uptick in the number of cooperatives founded since the turn of the century).

5. *See generally id.*; *see also* Nina Anika-Klotz, *No Offence, liebe Biertrinker!*, DIE ZEIT (July 25, 2013, 1:47 PM), *available at* http://www.zeit.de/lebensart/essen-trinken/2013-07/craft-beer-vagabund-brauerei (last visited Nov. 16, 2014); Nadine Oberhuber, *Mein Strom, dein Strom*, DIE ZEIT at 28 (October 23, 2014), *available at* http://www.zeit.de/2014/44/erneuerbare-energien-strom-energiewende (describing the advantages of investing in green energy cooperatives, described by experts as particularly stable entities with a bankruptcy rate of 0.1%).

6. *See* Anika Kreller, *Vom Hausbesetzer zum Hausbesitzer*, DIE ZEIT (June 25, 2012, 3:39 PM), *available at* www.zeit.de/wirtschaft/2012-06/immobilien-berlin (last visited Nov. 15, 2014).

7. *See Standortkarte*, MIETSHÄUSER SYNDIKAT, *available at* http://www.syndikat.org/de/standortkarte/ (last visited Nov. 16, 2014).

8. *See Die Verbundbausteine*, MIETSHÄUSER SYNDIKAT, *available at* http://www.syndikat.org/de/syndikat/verbundbausteine/ (last visited Nov. 16, 2014).

suited to stimulating sustainable, democratic and equitable economic development than any other existing large-scale cooperative models. Thus, while other prominent cooperative enterprises sacrificed aspects of their democratic character in the name of economic necessity, the Mietshäuser Syndikat has successfully persevered in maintaining direct, large-scale, consensus-based democracy. This model will make it possible to establish networks of democratic enterprises that are sustainable, geared for growth and operable in both common law and civil law jurisdictions.

To evaluate and test the applicability of the Mietshäuser Syndikat's model to other national contexts this note will consider two examples of cooperative development: the famed Mondragon Cooperative network based in Spain and the Evergreen Cooperatives in Cleveland, Ohio.[9] For contextual purposes, Parts I through III will examine the legal and regulatory practices in Germany, Spain and the United States with regard to limited liability companies ("LLCs"), cooperatives and non-profit entities. While the background on these three countries' law and regulation will inform the reader's understanding of each enterprise's development and operations, Spain and the U.S. will also serve as theoretical stand-ins for other civil and common law countries, illustrating the reproducibility of the Mietshäuser Syndikat model in other jurisdictions. Part IV will then focus on the two established cooperative enterprises of scale, Mondragon and Evergreen, noting their prominent features and characteristics. Finally, Part V will examine the Mietshäuser Syndikat, compare it with the enterprises discussed in Part IV and consider the applicability, merits and advantages of the Mietshäuser Syndikat's model in the development of democratic enterprises.

I. GERMAN LAW, REGULATIONS AND PRACTICES

In Germany business entities are generally termed "stock corporations."[10] Within this category there exist several corporate

9. *See generally* MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/ENG.aspx?language=en-US (last visited Nov. 16, 2014); EVERGREEN COOPERATIVES, *available at* http://evergreencooperatives.com/ (last visited Sept. 13, 2014); *Field Study No. 2: The Evergreen Cooperatives*, CAPITAL INST., *available at* http://www.capitalinstitute.org/sites/capitalinstitute.org/files/docs/FS2-Evergreen%20full%20article.pdf (last visited Nov. 16, 2014) [hereinafter *Evergreen Field Study*] (independent study and evaluation of the Evergreen Cooperative); MIETSHÄUSER SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16, 2014).

10. Susan-Jacqueline Butler, *Models of Modern Corporations: A Comparative Analysis*

forms, the most common of which is the Limited Liability Company ("GmbH").[11] The GmbH is the single most important entity utilized by the Mietshäuser Syndikat and serves, in democratized form, as a replacement for the cooperative.[12] Cooperatives are governed by substantially different laws and regulations, although the names and duties of officers are often identical to a GmbH's.[13] The principal non-profit entity in Germany is the *Verein* (Association), which serves a range of charitable and service functions.[14]

A. The GmbH: The German LLC

GmbHs are the single most common business entity in Germany.[15] The process of founding a GmbH requires €25,000 in starting capital,[16] half of which must be on hand at the time of registration,[17] an operating agreement for the GmbH, and identification of the company's officers.[18] GmbHs with fewer than 500 employees are permitted to operate under a single manager, whereas larger GmbHs must employ the dual governance structure where a board of directors oversees management on behalf of the shareholders.[19] As such, GmbHs are especially suitable for smaller or closely-held enterprises.[20] However, there are also a number of so-called "GmbH giants," often local affiliates or

of German and U.S. Corporate Structures, 17 ARIZ. J. INT'L & COMP. LAW 555, 555 (2000) (German: "Aktiengesellschaften").

11. *See id.* at 556 n.1 (German: Gesellschaft mit beschränkter Haftung).

12. *See Die Verbundbausteine*, *supra* note 8.

13. *See* Gesets betreffend die Erwerbs-und Wirtschaftsgenossenschaften [GENOSSENSCHAFTSGESETZ] [GenG] [Cooperatives Act], May 1, 1889, BGBL. as amended, § 9 (Ger.), *available at* http://www.gesetze-im-internet.de/bundesrecht/geng/gesamt.pdf (last visited Nov. 16, 2014) [hereinafter Cooperatives Act].

14. *See* Bürgerliches Gesetzbuch [BGB] [Civil Code], BUNDESMINISTERIUM DER JUSTIZ UND FUR VERBRAUCHERSCHUTZ (Aug. 18, 1896), as amended, §§ 21-22 (Ger.), *available at* http://www.gesetze-im-internet.de/bgb/BJNR001950896.html (last visited Sept. 13, 2014) [hereinafter Civil Code].

15. *See* Ingrid Lynn Lenhardt, *The Corporate and Tax Advantages of a Limited Liability Company: A German Perspective*, 64 U. CIN. L. REV. 551, 552-54 (1996); *see* Gesetz betreffend die Gesellschaften mit beschränkter Haftung [GMBHG] [Limited Liability Companies Act], (Apr. 20, 1892), as amended (Ger.), *available at* http://www.gesetze-im-internet.de/gmbhg/ (last visited Sept. 13, 2014) [hereinafter Limited Liability Companies Act].

16. *See* Limited Liability Companies Act § 5 (Ger.).

17. *See id.* § 7(2).

18. *See id.* § 8.

19. *See* Lenhardt, *supra* note 15, at 557-58 (smaller GmbHs may opt for dual governance if they so desire).

20. *See id.* at 562 (the GmbH is also the entity of choice for sole proprietors and partnerships).

subsidiaries of foreign corporations.[21]

B. German Cooperatives

The history of modern cooperatives in Germany dates to the Cooperative Act of 1889.[22] Legal changes in 1933 and 1973 moved the Cooperative Law in the direction of increasingly limited liability, including cooperatives where members bore no liability whatsoever.[23] In 2006, further amendments resolved issues concerning the management and supervisory boards, permitting, for example, one-person management boards in cooperatives with few members.[24]

German law distinguishes cooperatives from other business entities on three bases: cooperatives do not pursue "corporate" profit, instead seeking profit and advantage for their members;[25] they are not closed in terms of membership, which may fluctuate;[26] and finally, their democratic administration.[27] Contemporary German legal scholars tend to place greater emphasis on the last aspect, which contrasts with the typical "top-down" structure of corporations.[28]

The Cooperative Law requires that every cooperative have a management board.[29] It also requires a supervisory board, on which at least three persons must serve without compensation.[30] Members of

21. *See id.* at 553 (two examples noted are Bosch GmbH and IBM Deutschland GmbH).

22. *See* Cooperatives Act (Ger.) (stating the date of issue as May 1, 1889).

23. *See* Udo Kornblum, *Das Weiterleben der Genossenschaft*, IN RECHT, GERICHT, GENOSSENSCHAFT UND POLICEY: STUDIEN ZU GRUNDBEGRIFFEN DER GERMANISTISCHEN RECHTSHISTORIE, 168, 174 (1986) (noting the [West] German legislature's express intent to permit cooperatives without member liability); *see also* Christoph Bernhardt, *Wir bauen eine neue Stadt – Im Verein gegen die Wohnungsnot*, DIE ZEIT (June 25, 2012, 3:39 PM), *available at* http://www.zeit.de/2013/22/geschichte-baugenossenschaften-wohnen (last visited Nov. 16, 2014) (detailing the genesis of housing cooperatives from the nineteenth century to the present).

24. Cooperatives Act §§ 24, 36 (Ger.).

25. *Id.* § 24(3).

26. *See* Wolfgang Kohte, *Die Genossenschaft—eine Rechtsform mit Zukunft? – neue Impulse aus Brüssel für eine alte Rechtsform*, 12 ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 905, 906 (1991).

27. *See id.*; Cooperatives Act § 1 (Ger.).

28. *See* Volker Beuthien, *Die eingetragene Genossenschaft als verbundenes Unternehmen*, *in* DAS GESELLSCHAFTSRECHT DER KONZERNE IM INTERNATIONALEN VERGLEICH, 133, 135 (1991) (contrasting the top-to-bottom 'command path' of conventional business entities with the collective, democratic decision-making process in cooperatives); Kornblum, *supra* note 23, at 168.

29. Cooperatives Act § 9 (Ger.).

30. *Id.* §§ 9, 36. (German: "Aufsichtsrat"; cooperatives with under twenty members are allowed one-person management boards).

both boards must also be members of the cooperative.[31] Although recent amendments to the law have expanded supervisory and management board members' power to act on behalf of the cooperative, the General Assembly remains the main decision-making body of cooperatives.[32] Indeed, the law expressly prohibits investor vetoes of members' decisions.[33]

The Cooperative Law also specifies that the investment contributions made by members to obtain membership must comprise at least a tenth of the cooperative's total assets.[34] In keeping with the principle that cooperatives serve to benefit their members, the Cooperative Law provides for a default procedure in the distribution of profits that all cooperatives must follow absent an explicit procedure set out in the cooperative's charter.[35] However, even where cooperatives develop their own procedures, profits are paid out to members in portions equal to their shares—cooperatives may regulate *how* profits are disbursed, but not the amount.[36]

The 1973 and 2006 amendments to the Cooperative Law have permitted the acquisition of more than one share by members, although the rule of "one man, one vote" still defines cooperative governance.[37] A cooperative's charter may even *require* members to purchase more than one share, but only if the requirement is enforced on an equal basis for all members.[38] Dissolution of a cooperative requires a three-quarters majority vote of its members.[39]

Probably the single most defining feature of the Cooperative Law in comparison to other countries is its placement of regulatory power in private, non-state hands.[40] All cooperatives are required to join a Cooperative Auditing Association ("CAA"), which acts as a quasi-governmental regulatory agency.[41] Cooperatives with less than

31. *Id.* § 9.

32. *Id.* § 8(2).

33. *Id.* ("the Charter may provide for . . . the admittance of investing members [but] must insure through appropriate bylaws that investing members are in no instance able to overrule [the decision of] other members").

34. Cooperatives Act § 7 (Ger.).

35. *See id.* § 19 (for example, a cooperative's charter may provide that profits flow into financial reserves instead).

36. *Id.*

37. *Id.* § 7(a); *see* Kornblum, *supra* note 23 at 168 (cooperatives may also restrict the acquisition of additional shares in any way they see fit).

38. Cooperatives Act § 7(a) (Ger.).

39. *See id.* § 78.

40. *See id.* §§ 53-55.

41. *See id.* § 54 (German: "Prüfungsverband").

€2,000,000 in assets must submit to inspection every two years, while those with more undergo yearly inspections.[42] This is a fairly invasive process in which an inspector from the CAA receives full access to ledgers, financial statements, financial instruments and even the cooperative's goods and wares.[43]

C. German Non-Profit Entities

Non-profit entities typically take the form of registered or unregistered associations in Germany.[44] Within each category associations are further divided between for-profit and non-profit associations.[45] Registered associations, as their name implies, are registered with a local court agency, which approves or rejects its charter.[46] Unregistered associations may become active almost immediately without registration.[47] Both registered and unregistered associations may acquire interests in LLCs, even as non-profits, although in practice local court agencies have been loathe to allow unregistered associations to do so.[48] In all other respects, such as the liability of an association's officers, associations are generally treated like other corporate entities.[49]

II. SPANISH LAW, REGULATIONS, AND PRACTICES

Spanish law provides for LLCs and the relevant laws are comparable to those of Germany and the U.S.[50] By contrast, the

42. *Id.* § 53.

43. Cooperatives Act § 57 (Ger.).

44. Civil Code §§ 21-22, 54 (Ger.) (German: "Verein"); *see* MIETSHÄUSER SYNDIKAT, HANDBUCH 5 (2013) (handbook of the Mietshäuser Syndikat, on file with author) [hereinafter HANDBUCH].

45. *See* Civil Code §§ 21-22, 54 (Ger.) (non-profit associations enjoy several advantages, chief among them favorable tax treatment).

46. *Id.* (German: "Amtsgericht"); *see* HANDBUCH, *supra* note 44, at 5 (identifying language that is decisive in a local court agency's determination of whether an association is for-profit or not-for-profit).

47. *See* HANDBUCH, *supra* note 44, at 5.

48. *See id.* at 5 (identifying language that is decisive in a local court agency's determination of whether an association is for-profit or not-for-profit).

49. *See* Civil Code §§ 31-31b (Ger.) (liability of an association for its representatives and personal liability of board members); Limited Liability Companies Act §§ 13, 15 (Ger.).

50. *See* CÓDIGO DE COMERCIO [C. COM. 1889] [Commercial Code] art. 125, 145 (Spain), *available at* http://www.boe.es/buscar/act.php?id=BOE-A-1885-6627 (last visited Sept. 15, 2014); Limited Liability Companies Act §§ 5-7 (Ger.); UNIFORM LTD. LIAB. CO. ACT (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Oct. 28, 2014).

Spanish Cooperative Law is much more flexible than its counterparts, providing for the organization of cooperatives in larger "second-degree" cooperatives and permitting legal entities to acquire interests in cooperatives.[51] Spanish non-profit entities, like those in Germany and the U.S., are also permitted to acquire interests in other entities and may be organized democratically.[52]

A. The Sociedad de Responsabilidad Limitada: The Spanish LLC

Limited liability companies in Spain are founded through execution of a deed in the presence of a public notary and registration with the Mercantile Registry.[53] Spanish law requires €3,000 starting capital and LLCs are not permitted to issue shares but instead divide their capital into "participation interests," which non-partner investors may acquire.[54] LLC partners bear no personal liability for company debts and directors are liable solely to the partners and the holders of participation interests.[55] The partners and participation holders elect the directors and may remove them.[56] Other entities, whether businesses or non-profits, may acquire interests in Spanish LLCs.[57]

B. Spanish Cooperatives

Cooperatives were not a prominent component of the Spanish economy until the second half of the 20th century.[58] The earliest modern legislation concerning cooperatives was the Associations Act of 1887 and the Farm Unions Act of 1906, which provided a legal framework for agricultural cooperatives and led to the rapid proliferation of farm unions.[59] This process continued during the Second Republic[60] and the

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51. Cooperative Law arts. 8, 12 (B.O.E. 1999, 27) (Spain), *available at* https://www.boe.es/buscar/act.php?id=BOE-A-1999-15681 (last visited Oct. 28, 2014).

52. *See id.* art. 5(2).

53. Commercial Code art. 125, 145 (Spain).

54. *See id.* art. 125; Limited Liability Company Law art. 4 (B.O.E 1995, 2) (Spain), *available at* https://www.boe.es/boe/dias/1995/03/24/pdfs/A09181-09206.pdf (last visited Nov. 16, 2014) (the text of the law still lists the amount in pesetas, so the amount of 3,000 € is an approximation).

55. Commercial Code arts. 127, 147 (Spain).

56. *See id.* art. 125.

57. Limited Liability Company Law art. 87 (Spain) (defining when an LLC is considered "dominant" in relation to another).

58. *See* Juan Francisco Juliá Igual & Sergio Marí Vidal, *Farm Cooperatives and the Social Economy: The Case of Spain*, 30 J. RURAL COOPERATION 119, 121-22 (2002), *available at* http://ageconsearch.umn.edu/handle/59573 (last visited Nov. 16, 2014).

59. *See id.* at 121-22; WILLIAM FOOTE WHYTE & KATHLEEN KING WHYTE, MAKING MONDRAGON: THE GROWTH AND DYNAMICS OF THE WORKER COOPERATIVE COMPLEX 18-19 (2d ed. 1991) (noting that the first recorded consumer cooperative was in 1880, preceding

Spanish Civil War, only to be abruptly altered following the victory of the Falangistas under Francisco Franco.[61] Nevertheless, the role of cooperatives in the Spanish economy continued to grow and during the transitional years of the Third Republic, two legislative acts[62] shifted the focus to actively fostering business development.[63]

The prominence of cooperatives in Spain's economy is largely due to the Mondragón Cooperatives, founded in 1956.[64] This initial worker-owned and -managed enterprise flowered into an extensive and highly variegated cooperative network, discussed in detail below.[65] In terms of its influence on the Spanish economy, Mondragón demonstrated that worker cooperatives were economically viable and could serve as engines of prosperity.[66] As an example of cooperatives' present role in the Spanish economy, at the dawn of this century in the agricultural sector alone there were nearly 4,000 cooperatives with over a million members.[67]

Spanish cooperatives are governed by the country's Cooperative Law, although the Commercial Code also applies under certain circumstances.[68] The Cooperative Act provides for two types of cooperatives: first- and second-degree cooperatives.[69] A first-degree

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the Cooperative Act by some seven years).

60. *See* Igual & Vidal, *supra* note 58, at 122 (the 1931 Cooperatives Act also provided for a cooperative registry maintained by the Ministry of Labor that would give cooperatives legal standing); WHYTE & WHYTE, *supra* note 59, at 18-21.

61. *See* George Orwell, *Homage to Catalonia*, LIBCOM.ORG 3-4 (1938), *available at* http://libcom.org/files/Homage%20to%20Catalonia%20-%20George%20Orwell.pdf (last visited Nov. 16, 2014) (containing the famed author's first-hand account of the economic changes undertaken during the Spanish Civil War); *see also* Igual & Vidal, *supra* note 58, at 122 (the 1942 Cooperatives Act enabled the official trade union to veto candidates in cooperative elections).

62. The Cooperatives General Act of 1974 and the Regulations for Cooperative Societies, passed in 1978. *See* Igual & Vidal, *supra* note 58, at 122.

63. *See id.* at 122.

64. *See* MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/co-operative-experience/history/ (last visited Oct. 28, 2014) (relating the significant early dates in the cooperatives' development).

65. *See* WHYTE & WHYTE, *supra* note 59, at 32-35.

66. *See id.* at 46-48; Christopher S. Axworthy, *Worker Co-Operatives in Mondragon, the U.K. and France: Some Reflections*, UNIVER. SASKATCHEWAN CENTRE FOR THE STUDY OF CO-OPERATIVES: OCCASIONAL PAPERS 3 (1985).

67. Igual & Vidal, *supra* note 58, at 123. Moreover, in 1996 agricultural cooperatives were responsible for 45% of Spain's fruit produce, 15% of vegetable produce, 27% of milk production and 20% of its cereal production. *Id.* at 125.

68. Cooperatives Law art. 1 (Spain) ("[L]as cooperativas de producción . . . quedarán sujetas a las disposiciones de este Código cuando se dedicaren a actos de comercio extraños a la mutalidad.").

69. *See id.* arts. 1, 7-8, 12.

cooperative is constituted by at least three persons (natural, juridical or both), while a second-degree cooperative consists of two or more cooperatives organized in a network.[70] Founding both types requires execution of a public deed registered with the local Registry of Cooperatives.[71] The deed must contain a number of key pieces of information, including by-laws, identification of members, as well as evidence that they have invested the funds necessary to become members.[72]

Under the Spanish Cooperative Act, all members of the cooperative have the right to participate in the decision-making process, although it permits unequal influence on the basis of unequal investment.[73] A member of a first-degree cooperative may not obtain more than a third of the voting share.[74] Cooperatives may also establish special voting regimes for certain situations, e.g. total voting equality among members when deciding whether to dissolve.[75] To alter the cooperatives by-laws, dissolve or merge with another cooperative, or convert the cooperative into another entity, a two-thirds majority of votes is required by law.[76]

With regard to second-degree cooperatives, legal entities other than cooperatives may attain membership.[77] Non-cooperative entities may not make up more than 45% of the membership, although in contrast to first-degree cooperatives member entities are permitted to acquire more than a 30% capital interest in the second-degree cooperative.[78] However, the relationship between first- and second-degree cooperatives is not merely constitutive under Spanish law, but is instead conceived as a hierarchical relationship in which the second-degree cooperative commands and controls the first-degree cooperative.[79]

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70. *See id.* arts. 8, 12.

71. *See id.* art. 7 (Spanish: "Registro de Sociedades Cooperativas").

72. *Id.* art. 10; *see also* FERNANDO POMBO, DOING BUSINESS IN SPAIN § 12.04[2] (2012).

73. Cooperative Law art. 1, 26 (Spain).

74. *See id.* art. 26 ("[L]os Estatutos fijarán con claridad los criterios de proporcionalidad, sin que el número de votos de un socio pueda ser superior al tercio de los votos totales de la cooperativa").

75. *See id.* art. 26(7) ("[L]os Estatutos deberán regular los supuestos en que será imperativo el voto igualitario").

76. *Id.* art. 28.

77. *See id.* art. 77 ("También pueden integrarse en calidad de socios otras personas jurídicas, públicas o privadas y empresarios individuales, hasta un máximo del cuarenta y cinco por ciento del total de los socios").

78. *See* Cooperative Law art. 77 (Spain).

79. *See id.* art. 17, 78(1).

C. Spanish Non-Profit Entities

The standard non-profit entity in Spain is the non-profit association.[80] Spanish non-profit associations must show at the time of incorporation that they have a social purpose, e.g. the defense of human rights, the promotion of volunteerism or advancing the "social economy."[81] Such associations must use at least 70% of their corporate income for that stated purpose.[82] Although formally subject to corporate taxes, a number of types of income are exempt, including donations and any dividends from interests in other entities.[83] The process of incorporation is largely identical to that of other corporate entities except that the entity is entered into a separate registry for such non-profit associations.[84]

III. U.S. LAW, REGULATIONS AND PRACTICES

In the Republic's early history, corporations were relatively unimportant, there being only 317 at the dawn of the 19th century by one count.[85] This changed rapidly, however, and by the end of the 19th century the U.S. boasted some of the largest and most successful corporations in the world.[86] This development has continued into the present, with the LLC representing a recent addition to U.S. business entities.[87] As in Europe, U.S. cooperatives can trace their roots back to early 1800s but did not attain any economic significance until the 20th century.[88] In contrast to their counterparts, however, worker

80. Law on the Fiscal Regime for Non-Profit Entities and Charitable Incentives, Declaration of Motives II (B.O.E. 2002, 49) (Spain), *available at* http://www.boe.es/boe/dias/2002/12/24/pdfs/A45229-45243.pdf (last visited Nov. 16, 2014) (Spanish: "entidad sin fines lucrativos").

81. *See id.* art. 3(1) ("de fomenta de la economía social").

82. *See id.* art. 3(2).

83. *See id.* art. 6(2) ("Están exentas. . .los dividendos y participaciones en beneficios de sociedades").

84. *See id.* art. 3(7).

85. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 300 (1990).

86. *See* MATTHEW JOSEPHSON, THE ROBBER BARONS: THE GREAT AMERICAN CAPITALISTS 1861-1901, at 253-64, 284-87 (Transaction Publishers 2011) (1934). This classic of American history offers a particular focus on the titans of industry that helped make the U.S. "in very short order the premier industrial nation of the world." *Id.* at 254.

87. *Prefatory Note,* UNIFORM LTD. LIAB. CO. ACT (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Nov. 16, 2014).

88. *See* Christine A. Varney, *The Capper-Volstead, Agricultural Cooperatives and Antitrust Immunity*, THE ANTITRUST SOURCE 1-3 (Dec. 2010), *available at*

cooperatives are often defined narrowly, precluding the acquisition of an interest by another legal entity, and state laws often make no provision for a cooperative network.[89] U.S. non-profits generally enjoy the same powers as their European counterparts, including the acquisition of interests in business entities and determination of their own structure and by-laws.[90]

A. U.S. Limited Liability Companies

State legislatures have been the primary agents in the creation and spread of the LLC as a legal entity.[91] The first state to introduce this particular form was Wyoming in 1977 but by the time the Uniform Law Commission promulgated its Uniform Limited Liability Company Act in 1996 a majority of state legislatures had provided for LLCs.[92] The LLC is meant to provide the "pass-through" tax advantages of a partnership (from which the form is derived) and the liability advantages of a corporation.[93]

The federal structure of the United States affords a high degree of sovereignty to individual states such that the regulation of LLCs across the country is subject to variation.[94] As a result, the focus here will be on federal regulation and those requirements common to most, if not all, states so as to offer a general impression of LLC formation and regulation in the U.S.[95]

Limited Liability Companies are formed by filing articles of organization, often with the local secretary of state.[96] The articles of organization must indicate the name of the LLC, its location and

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http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/Dec10_Varney12_21.authcheckdam.pdf (last visited Nov. 16, 2014) (summarizing the early growth of agricultural cooperatives and attendant legislation).

89. *See* MASS. GEN. LAWS ANN. ch. 157A, § 7 (West 2014).

90. *See generally* 26 U.S.C. § 501(c) (2014).

91. *See Prefatory Note*, UNIFORM LTD. LIAB. CO. ACT 1 (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Nov. 14, 2014).

92. *See id.* at 2.

93. *See id.* at 1-6.

94. *See generally* Lucian Bebchuk, Alma Cohen & Allen Ferrell, *Does the Evidence favor State Competition in Corporate Law?*, 90 CAL. L. REV. 1775, 1800-02, 1812-17 (2002) (noting the variety and effect of state anti-takeover statutes in retaining in-state corporations and attracting out-of-state corporations).

95. The Uniform Law Commission's revised Uniform Limited Liability Company Act will figure prominently here. *See* UNIFORM LTD. LIAB. CO. ACT (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Nov. 16, 2014).

96. *See id.* § 201.

identify stakeholders.[97] Many state laws set as a default equal distributions by the LLC to its members but all permit unequal distribution schemes by agreement.[98] An LLC is prohibited from making distributions that would hinder its ability to satisfy outstanding debts.[99] The Uniform Act also provides that an LLC is a member-managed entity unless the operating agreement explicitly provides otherwise.[100] While state taxation of Limited Liability Companies vary,[101] the IRS will generally treat LLC members as partners and affords them a partnership's income "pass-through" advantage, preventing the "double-taxation" that standard corporations experience.[102]

B. U.S. Cooperatives

The earliest U.S. cooperatives were developed in the agricultural sector and continued to increase in influence until by the mid-20th century cooperatives were mainstays of farming, husbandry and food-production.[103] These were the first cooperatives to receive any legislative treatment at the federal or state levels, notably the provisions of the Capper-Volstead Act of 1922 that immunized agricultural cooperatives from anti-trust legislation.[104] Another common example is the cooperative credit union, which was introduced to the United States from Germany via Quebec, with the first cooperative credit union in the U.S. opening its doors in Manchester, New Hampshire in 1908.[105] Over

97. *See id.* (the Uniform Act provides for the formation of an LLC even when no members are yet named).

98. *See id.* § 405.

99. *See id.*

100. *See* UNIFORM LTD. LIAB. CO. ACT § 407 (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Nov. 16, 2014) (this section also contains detailed provisions for the appointment and removal of managers, as well as the effects of dissociating a member who is also a manager).

101. *See* INTERNAL REVENUE SERVICE, LIMITED LIABILITY COMPANY, *available at* http://www.irs.gov/Businesses/Small-Businesses-&-Self-Employed/Limited-Liability-Company-LLC (last visited Nov. 16, 2014).

102. *See id.* (single-member LLCs are deemed entities that are not separate from the owner for income tax, but separate for employment and some excise taxes).

103. *See* Varney, *supra* note 88, at 1.

104. *See id.* at 1, 4; 7 U.S.C. §§ 291-92 (2010) (providing for administrative action against cooperatives that restrain trade in the place of judicial action). Pending class action suits may re-define some cooperative's immunity to anti-trust actions. *See* In re Fresh & Process Potatoes Antitrust Litigation, 2012 U.S. Dist. LEXIS 106666, 6-7 (D. Idaho July 27, 2012).

105. *See* WENDELL V. FOUNTAIN, THE NEW EMERGING CREDIT UNION WORLD: THEORY, PROCESS, PRACTICE CASES & APPLICATION 9 (2d Edition 2012). An excellent summary of

the next decades credit unions spread across the country, culminating in the Federal Credit Union Act of 1934, a national regimen for chartering and supervising credit unions.[106] Workers' cooperatives, by contrast, long operated without specific statutory provision until the advent of Massachusetts' General Law 157A in 1982.[107]

As in Europe, regulations concerning cooperatives followed their spread through the United States.[108] Among the states there is some variation: some address only agricultural cooperatives and treat others more or less the same as other corporate entities,[109] but a few have established specific legal regimens for cooperatives.[110] Incorporation of a cooperative mirrors that of a corporation in many respects: the prospective founders file a certificate of incorporation with the relevant agency, usually the secretary of state, which includes all essential information concerning contact information, the identity of the interest-holders, whether and in what amounts stock will be offered, etc.[111]

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the early genesis of credit unions is available from the NATIONAL CREDIT UNION ADMINISTRATION, *available at* http://www.ncua.gov/about/history/Pages/CUHistory.aspx (last visited Nov. 16, 2014). La Caisse Populaire, Ste-Marie is still an active credit union in Manchester, NH, *available at* http://www.stmarysbank.com/about-st-marys-bank/our-history.asp (last visited Nov. 16, 2014).

106. Specifically, the Federal Credit Union Act provided for the creation of the National Credit Union Administration with the power to charter credit unions, collect fees, provide share insurance for members and ensure credit unions' compliance with regulatory directives. Federal Credit Union Act (FCUA), 12 U.S.C. §§ 1752a, 1755, 1781, 1785, 1790d (2013).

107. *See* David Ellerman & Peter Pitegoff, *The Democratic Corporation: The New Worker Cooperative Statute in Massachusetts*, 11 N.Y.U. REV. L. & SOC. CHANGE 441, 442-43 (1983).

108. *See* Sean Flynn, *A Short History of Cooperative Law and Regulation Reform in Developing Countries*, *in* U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT, ENABLING COOPERATIVE DEVELOPMENT: PRINCIPLES FOR LEGAL REFORM 43 (2006) (noting that cooperatives in North America and Europe developed in a bottom-up fashion and that "laws generally followed and recognized the initial development of a cooperative sector").

109. This has sometimes forced would-be cooperators to form a corporation with altered by-laws. *MGL 157a, the Massachusetts Statute for Employee Cooperative Corporations*, AM. COOPERATIVE WORKER (Jan. 29, 2011, 10:57 AM), *available at* http://www.american.coop/node/275 (last visited Oct. 28, 2014); *see* Lynn Pitman, *Limited Cooperative Association Statutes: An Update* 2 (Univ. of Wis. Ctr. for Coops., Staff Paper No. 7, April 2008).

110. *See* N.C. GEN. STAT. §§ 54-111 to -118 (2013); *North Carolina Co-op Law Information*, CO-OP LAW.ORG, *available at* http://www.cooplaw.org/statebystate/northcarolina/ (last visited Oct. 28, 2014) (commenting on the North Carolina Cooperative Associations Statute); MASS. GEN. LAWS ANN. ch. 157A (West 1982).

111. *See* MASS. GEN. LAWS ANN ch. 155 (West 2004) (general corporate law providing for incorporation of all "business corporations"); N.C. GEN. STAT. §§ 54-113 (last amended 1985); N.Y. COOP. CORP. LAW arts. 2, § 11, 15 (McKinney 2013) (indicating the required contents of the certificate and filing with the secretary of state).

However, some states provide for particular protections for cooperatives, a common one being prohibitions on the use of the word "cooperative" in the name of any entity not conforming with the statutory definition.[112] Some states also require that only members have the power to amend a cooperative's by-laws, excluding non-member stockholders from management decisions.[113] Furthermore, states that have specific provisions for workers cooperatives often preclude legal entities from acquiring a voting share in the enterprise.[114]

Under federal tax law cooperatives are categorized as "Farmers' Tax Exempt Cooperatives" or "Non-Exempt Cooperatives," meaning that non-agricultural cooperatives must pay corporate income tax.[115] However, like LLCs, cooperatives are permitted to "pass through" corporate income to their members without paying corporate income tax.[116] State taxation can vary but cooperatives are usually taxed at the same rate as other corporate entities.[117] Yet, in some cases, states tack closely to federal law, exempting some types of cooperatives entirely.[118]

C. U.S. Non-Profit Entities

Although non-profits are incorporated at the state level, Federal law plays an outsized role in their foundation and operation because

112. MASS. GEN. LAWS ANN. ch. 157, § 8 (West 2014) (providing that any corporate entity using the word "co-operative" that is not structured in accordance with the statutory requirements for cooperatives "shall forfeit to the commonwealth not more than ten dollars for every day. . .such name or title is so used" and potentially face injunctions against continued operation); N.Y. COOP. CORP. LAW § 11 (McKinney 2014) (requiring cooperatives to use the word "cooperative" in their names).

113. *See* MASS. GEN. LAWS ANN. CH. 157A, § 7 (West 2014) ("No capital stock other than membership shares shall be given voting power in an employee cooperative."); N.H. REV. STAT. ANN. § 301-A:1 (2014) (defining consumer cooperatives as entities in which "each member has one and only one vote" and in which "voting by proxy is prohibited.").

114. *See* MASS. GEN. LAWS ANN. CH. 157A, § 7 (West 2014).

115. *See Instructions for Form 1120-C*, INTERNAL REVENUE SERVICE 7 (2013), *available at* http://www.irs.gov/pub/irs-pdf/i1120c.pdf (last visited Nov. 16, 2014); 26 U.S.C. § 521 (2004).

116. *See* 26 U.S.C. § 1382(b) (2014) (this income is termed "patronage").

117. For example, North Carolina taxes cooperatives at the same rate as other corporate entities, although it applies federal deductions for patronage dividends. *Tax Rate and Basis for the Tax*, N.C. DEP'T REVENUE, *available at* http://www.dornc.com/taxes/corporate/rate.html (last visited Nov. 16, 2014); *Form CD-418*, N.C. DEP'T REVENUE, *available at* http://www.dornc.com/downloads/cd418.pdf (last visited Nov. 16, 2014).

118. *See Corporate Excise Tax*, MASS. DEP'T REVENUE, *available at* http://www.mass.gov/dor/businesses/current-tax-info/guide-to-employer-tax-obligations/business-income-taxes/corporations/corporate-excise-tax.html (last visited Nov. 16, 2014) (exempting from income tax all corporations organized under Section 501 of the Internal Revenue Code, including some cooperative corporations).

they are subject to a special federal tax regimen.[119] As such, most non-profit entities are identified by their exemption category under the U.S. Code, e.g. 501(c)(3), 501(c)(6), etc.[120] The statute covers a variety of entities, including civic leagues, business leagues, and mutual insurance funds, among others.[121]

If an organization qualifies as a 501(c) entity and receives approval by the IRS, its corporate income is generally tax-exempt.[122] This status is subject to section 503(b), which lists prohibited transactions resulting in denial of tax-exempt status, including overcompensation for personal services or making the organization's services available on a preferential basis.[123] Income from trade or business unrelated to the entity's purpose remains taxable.[124] Important for this article is that Federal tax law does not distinguish between tax-exempt entities on the basis of their form of organization, nor does it prescribe any particular organizational format.[125]

IV. ESTABLISHED LARGE-SCALE COOPERATIVE MODELS: MONDRAGON AND EVERGREEN

A. The Mondragon Cooperative Corporation

The Mondragon Cooperative Corporation grew out of a vocational school founded by the Catholic priest José María Arizmendiarrieta in the town of Mondragon in the Basque region of Spain.[126] A number of Arizmendiarrieta's students, who had moved on to positions in private enterprises, were dissatisfied with the stratified and adversarial environment in which they were employed.[127] After unsuccessful efforts to convince company managers and government officials to permit worker ownership of enterprises, they turned to their former teacher for advice.[128]

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119. *See generally* 26 U.S.C. § 501(c) (2014).

120. *See id.*

121. *See id.*

122. *See id.*; *see also* 26 U.S.C. § 501 (2014); 26 U.S.C. § 503 (2014).

123. *See* 26 U.S.C. § 503(b) (2014).

124. *See* 26 U.S.C. § 513(a) (2014).

125. *See* 26 U.S.C. § 503 (2014).

126. *See* WHYTE & WHYTE, *supra* note 59, at 28-31.

127. *See id.* at 32.

128. *See id.* at 33; Fernando Molina, *The Spirituality of Economics: Historical Roots of Mondragon, 1940-1974*, *in* BASQUE COOPERATIVISM 13, 20 (Baleren Bakaikoa & Eneka Albizu eds., 2011) (relating police suspicion of Arizmendiarrieta, resulting in interference even with Catholic Youth pilgrimages organized by the priest).

Arizmendiarrieta and the small group of students chose to form their own cooperative enterprise and, after prodigious community fund-raising and overcoming bureaucratic hurdles, the five students founded Ulgor and obtained a license to produce home appliances.[129] From 1956 to 1959 the number of "worker-shareholders" increased from 10 to 143.[130] However, the defining act that set the Mondragon project on the path to success was the founding of the "Caja Laboral Popular" in 1959, a cooperative banking institution founded specifically to finance the foundation and operation of worker cooperatives.[131] With the help of credit extended by this institution, dozens of new worker cooperatives were established during the 1960s.[132] The Mondragon Cooperative Corporation continued to grow at a steady pace, numbering 160 cooperatives with 19,000 members by 1985.[133]

At present the Mondragon group includes 289 enterprises with over 80,000 employees.[134] The Mondragon Corporation as a whole is a highly centralized organization,[135] with several intermediary layers between the individual cooperatives and the *Caja Laboral*.[136] For ease of understanding, the rest of this section moves from the 'bottom' of the hierarchy (at the level of the individual cooperative) to the 'top' (at the level of the Caja Laboral).

1. Basic Cooperative Structure

The individual cooperatives have their own internal governance structure, in which the General Assembly of all cooperative members is the highest decision-making organ.[137] The General Assembly elects the Governing Council, which acts as a Board of Directors.[138] The

129. *See* WHYTE & WHYTE, *supra* note 59, at 34; Molina, *supra* note 128, at 23.

130. Molina, *supra* note 128, at 23.

131. *Id.* at 23-24.

132. *Id.* at 24.

133. Axworthy, *supra* note 66, at 3.

134. MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/ (last visited Nov. 16, 2014) (noting that Mondragon enterprises are present on five continents, including numerous branches in North and South America).

135. *See* Axworthy, *supra* note 66, at 11.

136. *See* WHYTE & WHYTE, *supra* note 59, at 36, 59-61.

137. *Id.* at 35 (Spanish: "Asemblea General"); *Governance – Organization*, MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/about-us/governance/organization/ (last visited Nov. 15, 2014).

138. *See* WHYTE & WHYTE, *supra* note 59, at 35-37 (Spanish: "Junta Rectora"); *see Governance – Organization*, MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/about-us/governance/organization/ (last visited Nov. 16, 2014) (contrasting boards of directors at other private firms to the Governing Council, made up exclusively of member-employees of the cooperative).

Governing Council also appoints the manager of the cooperative and oversees their activities.[139] All cooperatives also have an Audit Committee, which monitors the finances of the enterprise, a Management Council consisting of a cooperative's manager and department heads, and the Social Council, which serves as an ersatz union, advising the Management and Governing Councils on subjects as varied as compensation plans, working conditions and employment decisions.[140] These councils facilitate the operations of the cooperative while also keeping one another in check.[141]

2. Intermediate Organizations & "Second-Degree Co-operatives"

Within the Mondragon group individual cooperatives are organized in second-degree cooperatives.[142] Long-standing examples include the *Caja Laboral Popular* (the group's financial institution), *Ikerlan* (research) and *Lagun Aro* (social and medical services), but there are also other industrial or regional organizations.[143] Formally, the governing structure of these second-degree cooperatives mirrors that of the individual cooperatives: each cooperative has a single, equal vote and the cooperatives elect a Governing Council, which appoints the General Management[144] that coordinates commercial policies.[145] One significant difference is that persons employed directly in the second-degree organization are also considered members of that cooperative and have a right to elect delegates to represent their interests.[146]

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139. *See* WHYTE & WHYTE, *supra* note 59, at 37 (supporting both managers and members of the Governing Council are subject to term limits).

140. *See id.* at 39-40 (discussing that while the General Council is elected at-large, the constitution of the Social Council follows a different procedure, one designed to ensure that it is not dominated by managers or the Governing Council: First, members of the Social Council are elected from within the departments of the cooperative; second, any member of the Governing Council drawing the lowest pay grade is automatically a member of the Social Council, which is meant to ensure that less-skilled or newer members are not unduly disadvantaged). Social Council, which is meant to ensure that less-skilled or newer members are not unduly disadvantaged. *Id.*

141. *See id.* at 41 (describing how, if a serious disagreement arises between the Social Council and the Governing Council, the former may refer the issue to the General Assembly for all cooperative members to decide).

142. *See id.* at 59-60. I have chosen to use the term "second-degree cooperative" because it is the most direct translation from the Spanish term and is common in both the relevant laws and in most scholarly works. *See id.*

143. *See* Axworthy, *supra* note 66, at 3 (explaining the individual cooperatives are also linked to *Eroski*, the consumers' cooperative).

144. *See* WHYTE & WHYTE, *supra* note 59, at 60 (Spanish: "dirección general").

145. *See id.* at 60.

146. *See* Axworthy, *supra* note 66, at 3 (this includes the Caja Laboral, discussed in greater detail in the next section).

Another is that the second-degree cooperative management both enjoys significant latitude in directing the actions of member cooperatives and is largely insulated from the individual cooperatives' control.[147] Second-degree cooperatives also pool profits and losses across their members and facilitate labor transfers among cooperatives, reducing redundancies or expanding workforces as needed.[148]

3. The Caja Laboral Popular as a Managing Entity

In theory, all second-degree cooperatives enjoy equal standing, but in practice the *Caja Laboral Popular* is the nerve center of Mondragon, holding member equity, managing savings accounts and making loans to member cooperatives.[149] Although nominally just the Mondragon "bank," the Caja wields considerable influence through its "Entrepreneurial Division," which controls the expansion and development of the entire group.[150] The Caja is headed by a governing council of twelve members, eight drawn from the individual cooperatives and four from Caja employees.[151] The representatives from the cooperatives are usually top management figures from the larger and more influential enterprises.[152]

The Caja's Entrepreneurial Division assesses all proposals for new cooperatives, which take the form of loan applications by the prospective cooperative members to the Caja.[153] If the Caja deems the project a worthy addition to the group, the new cooperative enters into a "contract of association."[154] This contract not only governs the cooperative's relationship with the Mondragon group but also prescribes a specific organizational framework.[155] For example, the contract mandates democratic control by cooperative members and lays out the procedures for making decisions.[156] The cooperative is barred from discriminating on the basis of political association, religion or gender and obligated to stay under a maximum ratio of non-member to

147. Cooperative Law art. 17, 78(1) (Spain).

148. *See* WHYTE & WHYTE, *supra* note 59, at 61.

149. *See id.* at 52.

150. *See* Axworthy, *supra* note 66, at 3; WHYTE & WHYTE, *supra* note 59, at 69.

151. *See* WHYTE & WHYTE, *supra* note 59, at 68.

152. *See id.* at 68 (quoting a conversation with then-chairman of the Caja, Alfonso Gorroñogoitia, as indicating that the "top industrial leaders of the complex . . . usually dominate the council").

153. *See* Axworthy, *supra* note 66, at 5.

154. *See* WHYTE & WHYTE, *supra* note 59, at 69.

155. *See id.* at 36, 69 (referring to the chart on page 36 that represents the typical structure of a Mondragon cooperative).

156. *See id.* at 69-70.

member employees.[157] The contract of association compels the cooperative to submit to audits every four years and to maintain a two-to-one ratio in capital reserves versus borrowed capital.[158]

The contract of association also grants the Caja considerable power to intervene in the internal affairs of individual cooperatives.[159] All Mondragon cooperatives must deposit a portion of their surplus income with the Caja, enabling it to offer loans to prospective cooperatives at better rates.[160] If a cooperative fails to make loan payments or fulfill any of its obligations under the contract of association, the Caja may intervene directly, even appointing a manager on its own authority.[161] While at times essential to ensuring the financial health and stability of the Mondragon group as a whole, such intrusive power suggests that the formally democratic Mondragon structure is tempered by a heavy dose of paternalism.[162] Furthermore, descriptions of the Caja's working culture indicate that many Caja employees treat Mondragon as a business that happens to consist of cooperatives, rather than a group of cooperatives doing business.[163]

B. The Evergreen Cooperatives

The Evergreen Cooperative Corporation ("ECC") is the product of an effort by Cleveland area institutions to create sustainable living-wage jobs in low-income areas.[164] In 2009 the first two cooperatives,

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157. *See id.* at 69-70 (noting that in the 1980s non-members were not permitted to make up more than 10% of a cooperative's workforce. With the rapid expansion of Mondragon since 1992, this principle has given way to greater numbers of non-member employees, the bulk of which are located outside the Basque country); *see Co-operative Experience – FAQs – How Many of Your Employees are Cooperative Members and How Many are Not?*, MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/co-operative-experience/faqs/ (last visited Nov. 16, 2014) (noting that the company's figures put the global proportion of member-employees at about 33%, although a plan for extending membership to all Eroski employees foresees 75% global membership within three years).

158. *See* WHYTE & WHYTE, *supra* note 59, at 70.

159. *See* Axworthy, *supra* note 66, at 6; WHYTE & WHYTE, *supra* note 59, at 179-80.

160. *See* Axworthy, *supra* note 66, at 6.

161. *See* WHYTE & WHYTE, *supra* note 59, at 178-81.

162. *See* Axworthy, *supra* note 66, at 7, 11-12 (noting that the attitude and bearing among Caja employees "was aloof and [they] appeared not to be part of the workforce." He also noted that Caja employees referred to other cooperative workers "as being uneducated, glad of a job, not very knowledg[e]able about the business of their co-operatives, even [as] peasants.").

163. *See id.* at 7; WHYTE & WHYTE, *supra* note 59, at 178-81 (demonstrating that the Intervention Department, which oversees the restructuring and management of cooperatives in financial distress, is a salient example of the technocratic character of the Caja).

164. *See The Evergreen Cooperatives Story*, EVERGREEN COOPERATIVES (2012),

Evergreen Cooperative Laundry and Ohio Cooperative Solar, opened for business.[165] Green City Growers, the largest urban hydroponic food production greenhouse in the U.S., began operations in 2011 and made its first harvest in early 2013.[166] The ECC acts as a "holding company" that manages the cooperatives and guides business development, with a long-term goal of creating "a robust network" of enterprises that emphasizes environmental sustainability and "green collar" jobs.[167]

During the planning leading up to the foundation of the ECC, representatives from the participating institutions visited Mondragon cooperatives in Spain and actively adopted a number of its organizational aspects.[168] The single greatest similarity is the presence of an "umbrella organization, modeled on Mondragon's [Caja Laboral], to be the keeper of its 'vision' and a source of continuity for all of its cooperative enterprises."[169] The following description of the ECC's structure will start at the top and move down to the ground-level organizations.

1. The Evergreen Cooperative Corporation

A fifteen person Board of Directors governs the ECC and includes representatives from the founding "anchor institution[s,]" investors and representatives from the individual cooperatives.[170] Parallel to the ECC and answering to the Board of Directors are an Executive Committee and an Audit and Finance Credit Committee.[171]

Directly under the ECC are the Evergreen Cooperative Development Fund, the Evergreen Land Trust, the Evergreen Business Services LLC and the cooperatives themselves.[172] The ECC is the sole

available at http://evergreencooperatives.com/about/evergreen-story/ (last visited Oct. 23, 2014) (noting the institutions include the Cleveland Foundation, local hospitals, Case Western Reserve University and the city government); *see also* Sara Tonnesen, Note, *Stronger Together: Worker Cooperatives as a Community Economic Development Strategy*, 20 GEO. J. ON POVERTY L. & POL'Y 187, 195 (2012).

165. *Evergreen Field Study*, *supra* note 9, at 7.

166. *See id.*; *see also Green City Growers Cooperative: The Third Evergreen Company is Open for Business!*, EVERGREEN COOPERATIVES (Feb. 28, 2013), *available at* http://evergreencooperatives.com/2013/02/green-city-growers-cooperative-the-third-evergreen-company-is-open-for-business/ (last visited Oct. 24, 2014).

167. *See Vision & Broad Goals*, EVERGREEN COOPERATIVES (2012), *available at* http://evergreencooperatives.com/about/mission-goals-and-principles/ (last visited Oct. 24, 2014).

168. *See Evergreen Field Study*, *supra* note 9, at 6.

169. *See id.*

170. *See id.* at 14.

171. *See id.*

172. *See id.*

member of the Evergreen Cooperative Development Fund, whose director belongs to the ECC management staff.[173] The ECC also has sole control over the Evergreen Land Trust, whose aim is the acquisition of "logistically advantageous sites for future enterprises" and the preservation of manageable start-up costs for new businesses.[174] The Evergreen Business Services LLC is also controlled directly by the ECC, focusing on "driving revenue, profitability, and new business growth through existing and new Evergreen related enterprises."[175] None of these LLCs are cooperatives and there is no provision for the representation of these entities' employees on the ECC board of directors.[176] The ECC also has direct representation in each individual cooperative as well as a 20% stake in the enterprise.[177] In contrast to Mondragon, the ECC currently appoints managers for the individual cooperatives.[178]

2. The Structure of the Individual Evergreen Cooperatives

The individual cooperatives, currently three in number,[179] were conceived as democratic institutions.[180] Enfranchisement comes with full membership, which requires acceptance by the majority of current members and then the purchase, in installments, of an equal share in the cooperative.[181] However, this represents the extent of the public information concerning the individual cooperatives' governing

173. *See Evergreen Field Study*, *supra* note 9, at 14; *see also Structure & Leadership*, EVERGREEN COOPERATIVES (2012), *available at* http://evergreencooperatives.com/about/structure-leadership/ (last visited Oct. 24, 2014).

174. *See Evergreen Field Study*, *supra* note 9, at 17.

175. *Businesses – Evergreen Business Services*, EVERGREEN COOPERATIVES (2012), *available at* http://evergreencooperatives.com/businesses/evergreen-business-services/ (last visited Oct. 24, 2014).

176. *See generally Structure & Leadership*, EVERGREEN COOPERATIVES (2012), *available at* http://evergreencooperatives.com/about/structure-leadership/ (last visited Oct. 24, 2014).

177. *Evergreen Field Study*, *supra* note 9, at 14.

178. *See Structure & Leadership*, EVERGREEN COOPERATIVES (2012), *available at* http://evergreencooperatives.com/about/structure-leadership/ (last visited Oct. 24, 2014) (describing that the managers of the three cooperatives are staff employed directly by the ECC).

179. *Id.* (Evergreen Cooperative Laundry, Evergreen Energy Solutions and Green City Growers Cooperative).

180. *Evergreen Field Study*, *supra* note 9, at 22.

181. *See Introduction to the Evergreen Cooperatives 2.0*, EVERGREEN COOPERATIVES (Oct. 15, 2011), *available at* http://evergreencooperatives.com/2011/10/new-video-introduction-to-the-evergreen-cooperatives-2-0/ (last visited Oct. 24, 2014) (promotional video produced by the Evergreen Cooperatives presenting the ECC model).

structure.[182]

The ECC has published no information regarding the ratio of member to non-member employees, although the stated goal of the organization is to rapidly increase both the number of employees and members.[183] In its publications and presentations, the ECC has been silent concerning the cooperatives' governance, by-laws and decision-making process.[184] This contrasts sharply with its general affirmations of workplace democracy, which figure prominently in its public message.[185] The ECC's vagueness about the implementation of democratic management is especially odd given its willingness to regularly present business and accounting information to the public.[186] Financial transparency is itself both welcome and necessary, given that the ECC is funded and continues to be guided by several large partner organizations.[187] Yet, a significant part of the ECC's appeal is that it envisions not only job creation but also democratic economic development.[188] The dearth of information on this subject can only stimulate speculation and provoke questions as to the extent of the ECC's commitment to workplace democracy.[189]

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182. *See id.*

183. *Evergreen Field Study*, *supra* note 9, at 8 (the Evergreen Laundry employed 21 people as of 2011 but aims to employ 50 once it reached full operational capacity).

184. The only specific detail yielded in the various ECC materials was the statement by one employee-owner that cooperative members voted on whether to grant membership to a probational employee. *Introduction to the Evergreen Cooperatives 2.0*, EVERGREEN COOPERATIVES (Oct. 15, 2011), *available at* http://evergreencooperatives.com/2011/10/new-video-introduction-to-the-evergreen-cooperatives-2-0/ (last visited Oct. 27, 2014).

185. *Id.*; *Evergreen Field Study*, *supra* note 9, at 22 (Ted Howard, co-founder of the Democracy Collaborative, one of the principal institutions involved in the development of the ECC: "The way our economic system works today at all levels, you go to work and hang your democratic rights at the door. . . . The Evergreen model is about people determining together whether they give themselves a raise, how much goes into their pocket today and how much goes for the future."); *About*, EVERGREEN COOPERATIVE LAUNDRY, *available at* http://evergreencooperatives.com/business/evergreen-laundry/about/ (last visited Oct. 27, 2014) (the Evergreen Cooperative Laundry web site introduces its CEO, apparently appointed by the ECC, followed by a brief mention of the "worker-owners," described as the "heart of the company").

186. *See Evergreen Field Study*, *supra* note 9, at 8, 11-12 (publishing the lending arrangements as well as providing information concerning the actual and projected performance of each cooperative).

187. *See id.* at 4.

188. The novelty of democratic enterprises of scale has attracted considerable attention, including a prominent place in the documentary SHIFT CHANGE (Moving Images 2012), *in Now: Fixing the Future* (PBS broadcast Nov. 17, 2010) and Al-Jazeera, *Fault Lines: Working through the US Jobs Crisis* (Aug. 29, 2010), *available at*, http://www.aljazeera.com/programmes/faultlines/2010/04/201048125199l166.html (last visited Nov. 16, 2014).

189. SHIFT CHANGE (Moving Images 2012) *in Now: Fixing the Future* (PBS broadcast

V. THE MIETHÄUSER SYNDIKAT MODEL

A. History and Development

Germany's post-war history has been plagued by housing shortages of varying urgency.[190] Starting in the 1960s, residential buildings in large numbers were occupied by squatters, both to secure living space and to protest the inflation of living costs through real estate speculation.[191] The occupation of many of these buildings continues today, some 'legitimized' by purchase or alternative means,[192] while others are still the focus of intense struggles.[193] Many of the individual housing projects now organized in the Mietshäuser Syndikat were former "squat houses" that had persisted for years or even decades in organizational isolation.[194]

Nov. 17, 2010).

190. *See* FED. RESEARCH DIVIS., GERMANY: A COUNTRY STUDY (Eric Solsten ed., 1996) *available at* http://babel.hathitrust.org/cgi/pt?id=mdp.39015039072544;view=1up;seq=1 (last visited Oct. 27, 2014) ("Housing" chapter).

191. *See generally* Klaus Pokatzky, *"Noch viel mehr Polizei!"*, DIE ZEIT (Oct. 18, 1985), *archived version available at* http://www.zeit.de/1985/43/noch-viel-mehr-polizei/seite-1 (last visited Nov. 16, 2014) (describing the tensions in the city of Freiburg in connection with several housing projects, which served as a nexus for the student left and the punk scene). The fall of the Berlin Wall led to the reunification of the city and spread the squatters' movement from west to east, where East Berliners sought both political change and resisted the incursion of West German investors. *See* Geschichte – Die HausbesetzerInnenbewegung in Ost-Berlin, Teil 1, SQUATTER, *available at* http://www.squatter.w3brigade.de/content/geschichte/die-hausbesetzerbewegung-ost-berlin-teil1 (last visited on Nov. 16, 2014).

192. One example is the "Pferdestall" in Frankfurt am Main, now a community center. *See* AKTIONSGEMEINSCHAFT WESTEND E.V., *available at* http://www.aktionsgemeinschaft-westend.de/ (last visited Nov. 16, 2014).

193. One such 'hot-spot' is the Rote Flora house in Hamburg, whose legal owner threatened to finally clear the house of squatters after decades of occupation. *See* Jörg Ziercke, *BKA-Chef warnt vor Gewalteskalationen wie in Hamburg*, DIE ZEIT (Jan. 23, 2014, 18:12), *available at* http://www.zeit.de/politik/deutschland/2014-01/hamburg-krawalle-bka-chef-warnung-gewaltspirale (last visited Nov. 16, 2014). This in turn led to considerable social unrest in late 2013 and early 2014, including street battles between Hamburg police and demonstrators. *See* Kersten Augustin, *Mit dem Fingerspitzengefühl eines Polizeiknüppels*, DIE ZEIT (Jan. 14, 2014, 15:43), *available at* http://www.zeit.de/gesellschaft/zeitgeschehen/2014-01/gefahrengebiet-hamburg-kommentar (last visited Nov. 16, 2014) (opinion piece condemning the mayor of Hamburg's policing policies as having "the tact of a billy club"). At the time of writing the Rote Flora's fate remained uncertain. *See* Christoph Twickel & Marc Widmann, *"Wir machen das": Die Rote Flora gehöhrt jetzt der Lawaetz-Stiftung; Was hat sie damit vor?*, DIE ZEIT (November 6, 2014, 12:00) *available at* http://www.zeit.de/2014/46/rote-flora-lawaetz-stiftung (last visited Dec. 17, 2014) (describing the purchase of the property by a third party that hopes to mediate between the activists and the city).

194. *See Linie 206*, MIETSHÄUSER-SYNDIKAT, *available at* http://www.syndikat.org/de/projekte/linie206/ (last visited Dec. 17 2014) (description of a

The Mietshäuser Syndikat was founded in Freiburg in 1992.[195] The Syndikat was the product of efforts by members of the "Grether" housing project, a former metal foundry that was converted into housing units in 1988 and became the Syndikat's first member project.[196] The aim of the founders, as stated by one member, was to capitalize on the success of the Grether Project to finance similar efforts and use the members' collective experience to aid such projects.[197] The Syndikat's goal is to help groups obtain affordable housing outside the conventional tenancy relationship.[198] The Syndikat's guiding principles are self-organization, solidarity, and the "neutralization of property," i.e. freeing residential property from speculative influence.[199]

Starting in the mid-1990s, the Mietshäuser Syndikat aided in the foundation of several housing projects, which continues at the steady pace of about one to three new projects a year.[200] At present there are eighty-four projects and twenty-eight initiatives in development.[201] While some of the member projects pre-date the Syndikat, the vast majority of the projects were founded with the Syndikat's assistance.[202] Out of all the initiatives organized in cooperation with the Syndikat only a handful have failed, twice due to being outbid by another prospective purchaser of a building and once because the owner of a building refused to sell to the Syndikat.[203] Three other initiatives have voluntarily dissolved without ever attempting to purchase a building.[204] Of the completed projects only one has ever experienced insolvency.[205]

Berlin project originally occupied by squatters in 1990).

195. MIETSHÄUSER-SYNDIKAT, *Presentation in Barcelona, Spain: Das Mietshäuser-Syndikat – The Tenement Syndicate* at Slide 7 (July 7, 2013) [hereinafter *Presentation*] (unpublished PowerPoint, on file with author) (power point presentation delivered by members of the Syndikat in July of 2013 to potential member-investors in a project in Barcelona, Spain).

196. *ARD Ratgeber Bauen + Wohnen* (ARD television broadcast May 10, 2009).

197. *Id.* (the Grether Project members found it important to "provid[e] know-how to other projects so that they wouldn't have to re-invent the wheel").

198. ALTÖTTINGER MIETER KONVENT E.V., *Flyer: Wohnen geht auch anders!* (2009) (unpublished flyer)(on file with author) [hereinafter AMK Flyer] ("We would like to establish self-determined and self-organized free spaces for all residents and thereby dissolve traditional power relations between renters and lessors.").

199. *Presentation, supra* note 195, slides 12-13.

200. *Presentation, supra* note 195, slide 7.

201. *Standortkarte*, MIETSHÄUSER SYNDIKAT, *supra* note 7 (last visited Nov. 16, 2014) (increase of three new projects over the prior year).

202. *See Linie 206*, MIETSHÄUSER SYNDIKAT, *supra* note 194.

203. *See Chronik*, MIETSHÄUSER SYNDIKAT, *available at* www.syndikat.org/de/syndikat/chronik/ (last visited on Nov. 16, 2014).

204. *See id.*

205. *See id.* (the project in question was the "Eilhardshof" Project in Neustadt-an-der-

There are now nearly 2,000 residents living within almost 60,000 square meters of living space in Syndikat projects.[206] Since its inception the Syndikat has invested over €60,000,000 in housing projects.[207]

1. Organization and Structure

The Mietshäuser Syndikat represents a formal, hierarchical constellation of several entities.[208] At the apex stands the non-profit Mietshäuser Syndikat Association (hereinafter "Syndikat Association"),[209] which is the sole proprietor of the Mietshäuser Syndikat LLC (hereinafter "Syndikat LLC"),[210] the entity that manages the finances related to the various projects and assists in their formation and administration.[211] The Syndikat LLC is in turn a forty-nine percent stakeholder in each individual project's LLC, with the local non-profit "Residents' Association"[212] controlling the remainder.[213] However, the Residents' Associations also become members of the Syndikat Association, resulting in a constitutive feedback loop unique among the entities discussed here.[214] Beyond guaranteeing the residents a seat at the table of their local LLC they are offered control over the entire Syndikat organization through their Association, ensuring that no decisions are made over their heads.[215]

Also notable is that the Syndikat's individual project entities are not cooperatives but LLCs.[216] The founders of the Mietshäuser Syndikat initially intended to use cooperatives.[217] They discovered,

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Weinstraße).

206. *Linie 206*, MIETSHÄUSER SYNDIKAT, *supra* note 194.

207. *Presentation*, *supra* note 195, slide 9.

208. An excellent organizational chart is available on the Mietshäuser Syndikat website. *See The Joint Venture*, MIETSHÄUSER SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/joint_venture/ (last visited on Dec. 17, 2014).

209. *Id.* (German: "Mietshäuser Syndikat e.V.").

210. *Id.* (German: "Mietshäuser Syndikat GmbH").

211. *Id.*; *see also* AMK Flyer, *supra* note 198 (explaining the role of the Syndikat in the AMK project).

212. *The Joint Venture*, MIETSHÄUSER SYNDIKAT, *supra* note 208 (German: "Hausverein").

213. *Presentation*, *supra* note 195, slides 14-15; AMK Flyer, *supra* note 198 (explaining that in any project the Syndikat and Residents' Association are the sole owners of the LLC that formally owns a given property and that each has a single, equal vote).

214. *See* HANDBUCH, *supra* note 44, at 28-29 (membership qualifications of the Syndikat Association); *see id.* at 30 (copy of the Syndikat Gmbh's charter, listing the Syndikat Association as the sole interest holder); *see* Presentation, *supra* note 195, slide 14-15.

215. *See* HANDBUCH, *supra* note 44, at 29.

216. *See id.* at 29.

217. *See Die Verbundbausteine – Keine Genossenschaft*, MIETSHÄUSER-SYNDIKAT,

however, that there would be almost no effective way to bind a series of individual housing cooperatives together.[218] At the same time, a single large-scale cooperative encompassing all the housing projects would be unwieldy and severely limit the autonomy of the individual projects.[219] This prompted the use of LLCs, which provided control to prevent sale of the properties while also being flexible enough to permit democratic management.[220]

2. On the Ground: The Project LLCs and Residents' Associations

The first step for those seeking to found a new housing project or associate an existing one with the Syndikat is to form a non-profit association.[221] Once the formalities for the association are complete,[222] the new Residents' Association may apply to the Syndikat Association for membership and to the Syndikat LLC for practical assistance.[223] Once approved by the Members' Assembly[224] of the Syndikat Association, the Residents' Association is granted membership and the process of founding the housing project LLC begins.[225] The Syndikat LLC acquires a forty-nine percent interest and while the Residents' Association is technically the majority interest-holder, the operating agreement of each LLC provides that the Syndikat LLC enjoys absolute voting parity with the Residents' Association on questions of alienation of the property or its privatization.[226] In this way the Syndikat may

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available at www.syndikat.org (last visited Nov. 16, 2014).

218. *See id.*

219. *See id.*

220. *See id.*

221. Civil Code §§ 21-22 (Ger.).

222. For registered associations this requires the presentation of the charter and some other documentation to a local court agency (German: *Amtsgericht*). *Id.*

223. *See* MIETSHÄUSER SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16, 2014); *see also* HANDBUCH, *supra* note 44, at 28-29, 32-34 (explaining the conditions and advantages of membership in the Syndikat Association, as well as offering an example of a cost-sharing agreement between the Syndikat LLC and one of the House Project LLCs). The Members' Assembly of the Syndikat Association decides on the admission of all members. HANDBUCH, *supra* note 44, at 29.

224. HANDBUCH, *supra* note 44, at 10, 29 (German: "Mitgliedversammlung").

225. *Id.*

226. *Presentation, supra* note 195, slides 14-15; AMK Flyer, *supra* note 198; HANDBUCH, *supra* note 44, at 28. Other requirements concern non-discrimination policies in the acceptance of new resident members and the adoption of transparent accounting practices and democratic governance. Lending agreements include separate, further controls related to the repayment of loans but terminate once these debts are satisfied. *See* HANDBUCH, *supra* note 44, at 28, 32-34. Although further requirements are not formally included in the individual project agreements, the Members' Assembly of the Syndikat Association is able to engage in a process of selection: while it affirms the need for diversity

ensure that the Residents' Association does not subvert the original purpose of the project.[227] Beyond these fundamental concerns, however, the Syndikat LLC has no role in an individual housing project's daily affairs.[228] As a result, all decisions concerning house rules, maintenance, renovations or any other house-specific activities are left entirely to the discretion of the residents themselves.[229]

After the formation of the project LLC, that entity and the Syndikat LLC sign a "Cost-Sharing Agreement"[230], which is virtually identical for all projects and obligates the project LLC to pay a progressively increasing "Solidarity Transfer"[231] to the Syndikat LLC.[232] This payment begins at ten Eurocents per square meter of living space per month.[233] It rises by 5% per year from the previous year, a pace calculated to ensure continued funding for the Syndikat LLC's activities but low enough to give individual projects the time needed to pay down debts incurred at foundation, usually scheduled for a forty year period.[234] However, an absolute maximum for the Solidarity Transfer is set at 80% of the local average rent, ensuring both that established housing projects are not unduly burdened to the benefit of newer projects and that the projects can all continue to offer affordable

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in living arrangements, "this does not mean that there are no limits." *Das Syndikat in Betrieb*, MIETSHÄUSER-SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16 2014). The Members' Assembly decides on the acceptance of each individual project, whereby some may be "totally rejected," such as commercial projects, "anti-emancipatory projects of a cult or, even more extreme, that of a Neonazi group." *Id.*

227. *See* HANDBUCH, *supra* note 44, at 28, 32-34.

228. *See Die Verbundbausteine*, MIETSHÄUSER SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16, 2014); AMK Flyer, *supra* note 198 ("In all other affairs the Residents' Association generally has the sole say: Who moves in? How will we renovate? How high will the rent be? The decisions and their execution belong solely to those who live in the house.").

229. The 51% share of the local association in the project LLC provides sufficient interest to allow for local control. This simplifies the operating agreement, which provides for special voting rules on the questions described above but by default leaves all other decisions in the hands of the local association. *Die Verbundbausteine*, MIETSHÄUSER-SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16, 2014); Flyer, *supra* note 198.

230. *See* HANDBUCH, *supra* note 44, at 34-35 (German: "Vereinbarung zur Kostenbeteiligung").

231. *Id.* (German: "Solidartransfer").

232. *See id.* (copying an actual Cost-Sharing Agreement between the Syndikat LLC and the Templerhaus LLC, a project in Weinheim, Germany).

233. *See id.*

234. *See id.*; *see Presentation*, *supra* note 195, slide 20 (graphically representing a typical payment scheme, where the contributions to the "Solidarity Fund" increases as the payments for financing debt decreases); *see Solidarfonds*, MIETSHÄUSER SYNDIKAT, *available at* www.syndikat.org (last visited Nov. 16 2014).

housing.[235] As consideration for this payment, the Syndikat LLC aids the local project in its development, including acquisition of financing, community fund-raising, advertising and questions of tax and corporate law.[236]

3. The Big Picture: The Mietshäuser Syndikat e.V. & Mietshäuser Syndikat Gmbh

The Syndikat Association is governed by the Members' Assembly.[237] The Members' Assembly has two main functions: first, to appoint and oversee the officers of the Syndikat LLC; second, to decide which projects to take on and accept as members of the Syndikat Association.[238] Each member has an equal vote and while members are encouraged to invest beyond the minimum amount, additional investment does not increase voting power.[239]

The Syndikat LLC's primary function is to advise new and continuing projects on subjects as varied as finance management, repayment of debts, tax law and possible strategies for improving their buildings.[240] The LLC also administers the "Solidarity Fund," out of which the individual project LLCs are capitalized.[241] The Syndikat Association's Board of Directors, elected by the Members' Assembly, oversees the Syndikat LLC's day-to-day activities.[242]

It is worth noting that there are no paid positions in the Syndikat LLC and most consulting is conducted on a pro bono basis by members of existing projects with specialized knowledge or experience.[243]

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235. The relevant statistics, "Mietspiegel" in German, are produced by local municipal and state governments and contain comprehensive rent rate information. *See Mietspiegel*, SENATSVERWALTUNG FÜR STADTENTWICKLUNG UND UMWELT, *available at* http://www.stadtentwicklung.berlin.de/wohnen/mietspiegel/ (last visited Nov. 16, 2014).

236. *See* HANDBUCH, *supra* note 44, at 34-35.

237. *See id.* at 29-30 (the Members' Assembly operating on the basis of a democratic consensus-building).

238. *See id.* at 28-30; Skype Interview with Marcel Seehuber, Member, AMK e.V., Mietshäuser-Syndikat (Nov. 2, 2013) (membership is also open to individuals and other organizations, which helps in engaging local residents or community groups in the development process; current members must vote to confer membership, which is a prerequisite for the Syndikat's assistance); *see also* HANDBUCH, *supra* note 44, at 28-29.

239. *See* HANDBUCH, *supra* note 44, at 28-29; Interview with Marcel Seehuber, *supra* note 238.

240. *See* HANDBUCH, *supra* note 44, at 32-33.

241. *See id.* (German: "Solidarfonds").

242. *See Das Syndikat in Betrieb*, MIETSHÄUSER SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/operation/ (last visited Nov. 16, 2014) (outlining the role of the LLC in relation to the Syndikat Association).

243. *See id.* ("[T]he counseling and supervision of a house initiative be provided free of charge by committed volunteers from existing projects.").

Regular workshops and information exchanges take place at the same time as the meetings of the Members' Assembly, furthering this 'do-it-yourself' ethos.[244]

B. Applicability and Advantages of the Mietshäuser Syndikat Model

The Mietshäuser-Syndikat's model offers considerable advantages in the development of workers' cooperatives outside of Germany. The Syndikat model is not dependent upon any peculiarities of German law, but is almost fully transferable to any jurisdiction that provides for LLC-type entities.[245] Although differences exist between the operations of housing cooperatives and workers' cooperatives, these do not undermine the inherent strength and resilience of the Syndikat model, which can be adapted to the particular needs of these enterprises. Finally, this organizational format is the best for fostering workplace democracy and democratic economic development, an oft-touted ideal of the cooperative movement at large and rhetorically prominent in the self-representations of the Mondragon and Evergreen cooperatives.[246] The following discussion sketches how a Syndikat-type network of workers' cooperatives could be formed and organized in civil law (Spain) and common law (the United States) jurisdictions to promote effective and democratic economic development.

1. Applicability to Workers' Cooperatives

The Mietshäuser-Syndikat's purpose is to expand affordable, quality housing and neither it nor its member organizations engage in manufacturing or provide services.[247] Nevertheless, with slight modification this model would lend itself well to the development of

244. *See id.* (the Members' Assembly "[i]s always scheduled on a weekend, leaving room for the exchange of information, counseling, workshops, mutual help and the opportunity to meet people from other projects.").

245. *See generally* Lenhardt, *supra* note 15, at 551-52; *see* Larry E. Ribstein, *A Critique of the Uniform Limited Liability Act*, 25 STETSON L. REV. 311, 314-15 (1995) (noting the near universality of the LLC in the U.S. as of the mid-1990s); *see* THE LIMITED LIABILITY COMPANY CENTER, *available at* http://www.limitedliabilitycompanycenter.com/ (last visited Nov. 16, 2014) (providing a brief history of the development of LLCs in all 50 states).

246. *See* WHYTE & WHYTE, *supra* note 59, at 14-16, 30, 33 (relating Mondragon founder Arizmendiarrieta's commitment to democracy and insistence on worker empowerment); *see* EVERGREEN COOPERATIVES, *Evergreen Businesses*, *available at* http://evergreencooperatives.com/businesses/ (last visited Sept. 15, 2014) (including an explicit endorsement of increased democracy in the workplace).

247. In fact, beyond the initial capitalization of the individual project LLCs, the Mietshäuser-Syndikat does not provide any financing at all, even for housing projects. *See* HANDBUCH, *supra* note 44, at 28.

both individual worker-managed enterprises and a network of such entities.

The primary difference between the Mietshäuser Syndikat and a hypothetical "Worker Cooperative Network" (termed "Co-op Network" for convenience) would be one of focus: instead of acquiring capital for the purchase of real estate, the network would raise funds to found enterprises and instead of examining the feasibility of purchasing or converting a building, the network would assess the prospects and sustainability of a proposed enterprise.[248] A parallel entity to the Syndikat LLC would aid in the organization and financing of worker cooperatives.[249] The individual enterprises would be members in the Co-op Network's executive non-profit entity, where a Members' Assembly would elect the non-profit's board, appoint the Co-op Network LLC directors and oversee its activities.[250] The individual enterprises would still enjoy considerable autonomy in day-to-day operations, but the Co-op Network's LLC would possess an interest sufficient to prevent sale or conversion of the enterprise into a "conventional" business.[251]

2. Transferring the Mietshäuser Syndikat Model to Other Jurisdictions

To ease administration by the Members' Assembly, an umbrella non-profit entity with full control of the Co-op Network's LLC is essential.[252] The Co-op Network LLC would then share ownership of the individual enterprises with their worker-owners.[253] In many jurisdictions, the for-profit nature of the individual enterprises may

248. The Mietshäuser Syndikat engages in such vetting and planning in all its housing projects, often working with residents through a long process of project development. *See Das Syndikat in Betrieb*, *supra* note 242.

249. In this respect, certain comparisons could be drawn between the roles of Mondragon's Caja Laboral and the Syndikat LLC. *See* AXWORTHY, *supra* note 66, at 5; WHYTE & WHYTE, *supra* note 59, at 69; *Das Syndikat in Betrieb*, *supra* note 242.

250. *See Das Syndikat in Betrieb*, *Organigramm*, MIETSHÄUSER-SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/operation/ (last visited Nov. 16, 2014) (the *Organigramm* page flow chart is probably the clearest depiction of the constitutive nature of the Syndikat).

251. *See* HANDBUCH, *supra* note 44, at 28 (among the conditions set for the Syndikat's assistance is "the exclusion of any private property interest in the building"). It should be noted that while the Syndikat possesses a little less than a half-interest in each project LLC, the principle of voting parity on issues of sale or privatization rests in the LLC's formation agreement itself, allowing the Syndikat greater control than its proportional interest would otherwise allow. *See Die Finanzierung*, MIETSHÄUSER-SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/funding/ (last visited Nov. 16, 2014).

252. *See Das Syndikat in Betrieb*, *supra* note 242.

253. *See id.*

preclude formation of a non-profit entity that would represent the worker-owners in both the individual LLC and the Members' Assembly.[254] This is not an insurmountable hurdle, however: on the ground level, voting parity with the Co-op Network LLC can be achieved through the enterprise LLC's operating agreement[255] and the executive non-profit's by-laws can facilitate representation by the worker-owners.[256]

In the U.S., there are a few types of entities that would be compatible with the democratic decision-making process of the Mietshäuser-Syndikat.[257] One option would be the Benefit Corporation, which would permit the Co-op Network to pursue socially-driven economic development while founding essentially for-profit enterprises.[258] The Members' Assembly would consist of shareholders in the Benefit Corporation, whose articles of incorporation would govern both membership and the decision-making process, preserving the constitutive qualities of the Syndikat Association.[259] However, a central component of the Syndikat model is absolute voting parity within the Members' Assembly, which may be difficult to maintain in an entity where votes are formally tied to shares.[260] This would require

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254. *See id.*; Non-Profit Entities Law, B.O.E. n. 307 art. 3(6) (Spain), *available at* http://www.boe.es/boe/dias/2002/12/24/pdfs/A45229-45243.pdf (last visited Nov. 16, 2014).

255. *See generally* UNIF. LTD. LIAB. CO. ACT §§ 201, 405, 407 (1994) (amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Oct. 25, 2014).

256. 26 U.S.C § 503 (2014).

257. As detailed above, the highest organ in the Mietshäuser Syndikat is a registered association, a non-profit organization. *See* HANDBUCH, *supra* note 44, at 29 (reproduction of the Syndikat Association's articles of incorporation).

258. *See* Robert T. Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 697-701 (2013) (offering a good overview of the characteristics of the Benefit Corporation as compared to other American and European social enterprise entities) [hereinafter "*Social Enterprise Revolution*"]; *cf.* Anne E. Conaway, *What we can Learn from Other Statutory Schemes: Lessons to be Learned: How the Policy of Freedom to Contract in Delaware's Alternative Entity Law Might Inform Delaware's General Corporation Law*, 33 DEL. J. CORP. L. 789, 792-93 (2012) (detailing the characteristics of the "B Corporation," which is privately certified and regulated by the non-profit B Labs) [hereinafter "Conaway, *Alternative Entity Law*"]; *see also*, Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772, 773, 779 (2012) (suggesting utilizing hybrid-purpose LLCs for the pursuit of both profit and social benefit in Great Britain).

259. *See Social Enterprise Revolution*, *supra* note 258, at 697-98.

260. Each member, whether a Syndikat-sponsored project, a community organization or a natural person, receives only one vote, with no possibility for the acquisition of more. *See* Interview with Marcel Seehuber, *supra* note 238; HANDBUCH, *supra* note 44, at 14;

some mechanism by which large numbers of shares are held in reserve for distribution to new members or which proportionally reduces existing member shares with each addition.[261] Also, Benefit Corporations are very new entities whose contours and duties have not yet been tested by courts or extensive real-world practice: to date, only thirteen U.S. states have passed statutes permitting Benefit Corporations.[262]

A 'tried-and-true' entity may be preferable to experimenting with a new one and forming a 501(c) non-profit presents itself as the safer option.[263] One potential hurdle would be that the Co-op Network non-profit would, through its LLC, have an interest in profit-generating enterprises.[264] However, I.R.C. § 501(c) includes a wide array of organizations and sets as its primary requirement that any entity organized under its aegis neither seek private profit nor distribute any to private shareholders.[265] A 501(c)(6) "business league" formed in the U.S. along the lines of the Mietshäuser Syndikat would almost certainly meet these criteria.[266] Either a Benefit Corporation or a 501(c)(6), properly organized or approved by the IRS,[267] would avoid potential regulatory issues and permit democratic governance.[268]

In Spain, by contrast, the Syndikat Association could be reproduced on an almost one-to-one basis.[269] Spanish non-profit

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Social Enterprise Revolution, *supra* note 258, at 696-97 (describing the structure and legal requirements for Benefit Corporations).

261. *See Social Enterprise Revolution*, *supra* note 258, at 696-97.

262. *See id.* at 697.

263. *See* 26 U.S.C. § 501(c) (2010).

264. By comparison, all the projects of the Mietshäuser Syndikat seek no profit but instead benefits for their resident members. *See* HANDBUCH, *supra* note 44, at 28.

265. 26 U.S.C. § 501(c)(6) (2010) (permitting the organization of tax-exempt "[b]usiness leagues, chambers of commerce . . . [and] boards of trade . . . not organized for profit and no part of the net earnings of which insures to the benefit of any private shareholder or individual.").

266. The members of the Mietshäuser Syndikat e.V. receive no profits or dividends whatsoever and because the Syndikat does not finance projects but instead merely capitalizes the initial project LLCs, there is also no possibility of indirectly profiting through decisions of the Members' Assembly. *See* HANDBUCH, *supra* note 44, at 28.

267. A 501(c) organization must file IRS Form 1023 to acquire recognition as a tax-exempt entity. *See Form 1023*, INTERNAL REVENUE SERVICE, *available at* http://www.irs.gov/pub/irs-pdf/f1023.pdf (last visited Nov. 16, 2014).

268. *See* 26 U.S.C. § 503(b) (2011) (identifying "prohibited transactions" that would serve as grounds for denial of exemption); Conaway, *supra* note 258, at 792-93 (describing the "triple bottom-line" purpose of B Corporations).

269. *See* Anthony C. Infanti, *Spontaneous Tax Coordination: On Adopting a Comparative Approach to Reforming the U.S. International Tax Regime*, 35 VAND. J. TRANSNAT'L L. 1105, 1210-11 (2002) (summarizing the requirements for non-profit associations in Spain); Non-Profit Entities Law, Exposition of Motives II (B.O.E. 2002, 49)

associations are permitted to own interests in other entities, so long as they do not pass on any proceeds to private persons.[270] Spanish law would also permit the democratic organization of an association and membership criteria like those of the Mietshäuser Syndikat.[271] The second-degree cooperative groups provided for under Spanish law could in principle unify the functions of the Syndikat Association and LLC.[272] However, the Cooperative Law mandates a structure that lacks both the same democratic character that the Syndikat model offers and adequate safeguards against alienation.[273] Cooperative groups are defined as having a "head entity that exercises authority or communicates instructions that are binding on the grouped cooperatives,"[274] while having only limited means to prevent members from leaving the organization.[275] As such, to acquire the advantages of the Mietshäuser Syndikat model in civil law jurisdictions it would be best to parallel the Syndikat structure as closely as possible rather than attempt to adapt local cooperative forms.

As noted above, one of the unique aspects of the Mietshäuser Syndikat is its status as a network organized in the "cooperative spirit" which has declined to use the cooperative form in favor of democratically-structured LLCs.[276] In jurisdictions where business entities may become members of cooperatives and can acquire an interest sufficient to prevent the sale or conversion of the enterprise, one could use the cooperative form without giving up any of the advantages

(Spain), *available at* http://www.boe.es/boe/dias/2002/12/24/pdfs/A45229-45243.pdf (last visited Nov. 16, 2014) (permitting non-profit entities to "freely acquire interests in commercial enterprises" and including non-profits that "promote the social economy," respectively); Civil Code § 21-22 (Ger.).

270. Non-Profit Entities Law art. 3(6) (B.O.E. 2002, 49) (Spain) *available at* http://www.boe.es/boe/dias/2002/12/24/pdfs/A45229-45243.pdf (last visited Nov. 16, 2014) (prohibiting even the reversion of assets to a founder or their heirs in the event of the non-profit's dissolution).

271. Organizational Law art. 2(5) (B.O.E. 2002, 1) (Spain), *available at* https://www.boe.es/boe/dias/2002/03/26/pdfs/A11981-11991.pdf (last visited Nov. 16, 2014) ("The internal organization of associations . . . shall be democratic.").

272. Cooperative Law arts. 77-78 (Spain).

273. *Id.*

274. *Id.* art. 78(1).

275. *Id.* arts. 17, 77(6) (providing that member cooperatives in a second-degree cooperative enjoy all the same rights as members of a first-degree cooperative, which under Article 17 includes the right to leave the cooperative at any time, limited only by the cooperative's right to demand notice of up to one year).

276. *See Verbundbausteine — Keine Genossenschaft*, MIETSHÄUSER-SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/building_blocks/ (last visited Nov. 16, 2014).

of the Syndikat model.[277] However, where such an arrangement is not legally possible[278] or carries significant regulatory burdens,[279] aligning individual enterprises in LLCs using the Mietshäuser Syndikat model would open the way to the development of democratic enterprises of scale.[280]

In the U.S., some states limit membership and ownership interest in a cooperative to persons employed by the cooperative, precluding any permanent ownership interest by the Co-op Network.[281] Because such an ownership interest is the simplest and most effective way for our hypothetical Co-op Network to ensure that a democratic enterprise is not later sold or converted into a standard business, the use of LLCs would be required.[282] Fortunately, founders of LLCs enjoy great latitude in crafting operating agreements, such that provisions for democratic governance and safeguards against sale or conversion may be inserted easily.[283]

In Spain, by contrast, mixed membership cooperatives are possible, meaning that a Co-op Network could be a member in a cooperative alongside natural persons.[284] However, no cooperative member is permitted to control more than 30% of the votes.[285] As such, a Syndikat-style Co-op Network LLC would lack sufficient voting power to prevent the sale or conversion of individual cooperatives.[286] Spanish

277. The "second-degree cooperative" in Spain leaves open such a possibility, albeit with the issues described in this section. Cooperative Law arts. 77-78 (Spain).

278. *See* MASS. GEN. LAWS ANN. ch. 157A, § 6 (West 2014) ("No person may be accepted as a member unless employed by the employee cooperative." "An employee cooperative shall issue a class of voting stock [and] [e]ach member shall own only one such membership share, and only members may own such shares.").

279. *See Verbundbausteine – Keine Genossenschaft*, MIETSHÄUSER-SYNDIKAT, *available at* http://www.syndikat.org/en/syndikat_en/building_blocks/ (last visited Nov. 16, 2014) (another reason the Syndikat rejected the cooperative as an entity was because operations were made more difficult by the "continuous reporting requirements" of the Cooperative Auditing Association).

280. *See Chronik*, MIETSHÄUSER SYNDIKAT, *available at* http://www.syndikat.org/de/syndikat/chronik/ (last visited Nov. 16, 2014) (a timeline detailing the rapid growth of the Syndikat in the last two decades).

281. *See* MASS. GEN. LAWS ANN ch. 157A, § 6 (West 2014).

282. *Id.*

283. UNIFORM LTD. LIAB. CO. ACT § 110 (1994) (1994)(amended 2006), *available at* http://www.uniformlaws.org/shared/docs/limited%20liability%20company/ullca_final_06rev.pdf (last visited Nov. 16, 2014).

284. Cooperative Law art. 12 (Spain).

285. *Id.* art. 26.

286. *Id.* art. 64(2) (under the law a two-thirds majority is prescribed for transforming a cooperative enterprise or merging it with another cooperative enterprise and this cannot be changed in the by-laws).

LLCs, like U.S. LLCs, offer great latitude in determining the decision-making process.[287] As such, the LLC recommends itself as a format flexible enough to allow for hard-wiring democratic governance into an enterprise while still permitting the necessary degree of control on the part of the Co-op Network as parent LLC.[288]

3. Advantages over the Mondragon and Evergreen Models

The advantages of the Miethäuser Syndikat over the Mondragon Corporation and the Evergreen Cooperative Corporation are two-fold. First, the Syndikat model represents a more thoroughly democratic approach to enterprise development and management than either Mondragon or the ECC. Second, the Syndikat's development process is highly sustainable, in part due to the fact that its democratic structure is eminently suited to stable, organic growth.

While the Mondragon Corporation is regularly cited as the greatest success story in the history of cooperatives, it is not without flaws.[289] The essentially top-down management structure, with the Caja Laboral as the unofficial apex entity, casts serious doubt on the paeans praising Mondragon as a ready-made template for economic democracy.[290] As members of the Mondragon Caja themselves have often admitted, Mondragon is an otherwise conventional business that happens to consist of cooperatives.[291] Mondragon's recent history of investing in businesses that do not offer membership to employees also feeds the suspicion that, in order to generate profits, Mondragon is ready, willing and able to engage in the same practices that its proponents find so objectionable about "conventional" businesses.[292]

The Evergreen Cooperative Corporation, explicitly modeled on the Mondragon Corporation, has done nothing to address these issues.[293] Indeed, its management structure is even more technocratic than that of Mondragon and it remains uncertain at this early stage what degree of

287. *Id.* art. 125.

288. *Id.*

289. *See* Axworthy, *supra* note 66, at 11.

290. *See id.* at 7; *see generally* WHYTE & WHYTE, *supra* note 59, at 296-97.

291. *See* Axworthy, *supra* note 66, at 7.

292. *See FAQs*, MONDRAGON CORPORATION, *available at* http://www.mondragon-corporation.com/eng/co-operative-experience/faqs/ (last visited Nov. 16, 2014) (noting at least one program under which a significant number of non-members are to be enfranchised); *Contradictions in Paradise*, WORKERS' PARADISE (Jan. 31, 2011, 7:00 AM), *available at* http://www.cooperativeconsult.com/blog/?p=490 (last visited Nov. 16, 2014) (discussing a strike over low wages and poor working conditions by workers at a Mondragon-owned factory in Poland).

293. *See Evergreen Field Study*, *supra* note 9, at 3, 5.

autonomy the individual cooperatives will enjoy and how constitutive the ECC's executive organ will become.[294] As the project is still in its infancy, one could excuse the current technocratic methods as necessary expediencies on the path to a more democratic future.[295] If it persists in the same vein as present, however, the sponsoring "anchor enterprises" will dominate the ECC at the highest level, with cooperative members wielding little control over its future.[296]

The Mietshäuser Syndikat model addresses such eventualities through an absolute institutional commitment to democratic decision-making and mandatory admission of member projects in the governing Members' Assembly.[297] Although allowed significant autonomy, the individual projects would have to extend membership to all constituents, who would have representation in the Members' Assembly.[298] The operating agreements of the project LLCs would enable the Co-op Network LLC to check any effort to sell or convert a project.[299] Similarly, it is unlikely that a proposal to invest in 'conventional' enterprises, i.e. ones that would not become members, would find sufficient support in the Members' Assembly.[300] Even if it did, the by-laws of the Co-op Network non-profit can be crafted to preclude such an outcome.[301]

One could make the argument that the undemocratic aspects of both Mondragon and the ECC merely reflect the economic necessity of speedy, centralized decision-making without which these enterprises would fail.[302] This argument bears a striking resemblance to a common argument against cooperatives in general: too much democracy paralyzes decision-making and hobbles a business.[303] This latter position has been sufficiently disproved by the success of Mondragon cooperatives, which operate on a largely democratic basis in their day-to-day operations.[304] In fact, enhancing democratic structures can

294. *See id.* at 14.

295. *See generally id.*

296. *See id.* at 5, 14.

297. *See* HANDBUCH, *supra* note 44, at 29 (describing membership policies and identifying the Members' Association as the executive body).

298. *See id.* at 28.

299. *See id.* at 14 (§ 5 of the sample LLC operating agreement).

300. *See id.* at 28.

301. *See* HANDBUCH, *supra* note 44, at 29 (If the "purpose of the association is fundamentally altered, the assets [thereof] must be used for the original purpose," administered by a trustee).

302. *See* Axworthy, *supra* note 66, at 6-7.

303. *See* WHYTE & WHYTE, *supra* note 59, at 3.

304. *See id.* at 3-4.

actually stimulate and ensure sustainable growth, improving the stability of a Co-op Network as a whole.

The Mondragon Corporation has experienced severe contractions in the course of its history, when cooperatives were forced to merge or failed entirely.[305] The Caja Laboral's policy of developing cooperatives with an eye toward existing enterprises' supply and service needs has had positive synergistic effects but left Mondragon as a whole susceptible to chain reactions of bankruptcies.[306] The concentration of power in the hands of the Caja Laboral also means that business development draws not on the wide base of experience and knowledge of its members, but instead solely on that of a small number of conventionally-trained technocrats.[307]

Likewise, the central ECC non-profit is in full control of all business development.[308] While this institution's members certainly possess expertise that is essential to developing new cooperatives, this model could also foster a degree of group-think.[309] One way to avoid this outcome is to increase the knowledge and experience base of the decision makers, which can be achieved by allowing for the participation of all cooperative members.

The Members' Assembly of the Mietshäuser Syndikat makes all decisions concerning the acceptance of new projects, although the implementation of that decision is delegated to the Syndikat LLC. Far from hampering growth, the Mietshäuser Syndikat continues to accept new projects on a yearly basis. More importantly, all but one of the projects developed in cooperation with the Syndikat have been successful, a truly remarkable record of sustainability and stability.

VI. CONCLUSION

The purpose of this article is not to deny the success of the Mondragon Corporation or to deride the efforts of the Evergreen Cooperative Corporation, as each represent an inspiring success story and a welcome initiative in the history of cooperative economic development. Rather, the concerns and issues surrounding those two

305. *See id.* at 177-78, 188-89.

306. *See id.* at 47, 177-78.

307. *See* Axworthy, *supra* note 66, at 6-7.

308. *Evergreen Field Study*, *supra* note 9, at 14 (the Evergreen Cooperative Development Fund and Business Services LLC are also involved but are entirely controlled by the ECC non-profit).

309. *See id.*

enterprises are pointed out to illustrate that the goal of promoting democratic economic development may be hampered and not helped by the use of non-democratic methods. The Mietshäuser Syndikat demonstrates that it is possible to develop democratic enterprises, organize them in a network and ensure sustained growth of both enterprise and network utilizing exclusively democratic structures, without resort to the top-down organizational schemes of conventional businesses. In pursuing a more prosperous, equitable and democratic economy, the means are inseparable from the ends and the Mietshäuser Syndikat represents a model in both methods and results.

Moreover, the Mietshäuser Syndikat's structure, a constellation of LLCs under the umbrella of a non-profit governing entity, can be replicated in both civil and common-law jurisdictions. As such it should be possible to re-purpose the Mietshäuser Syndikat's model for worker-managed enterprises and to repeat its success across the globe. Indeed, the Mietshäuser Syndikat itself is beginning to venture outside the borders of Germany and develop projects in other European countries.[310] As those efforts will surely show, the day of international networks of democratic enterprises is approaching and with it a more prosperous future.

310. Interview with Marcel Seehuber, *supra* note 238; *Presentation*, *supra* note 195, Slide 17.

SHIFTING PARADIGMS: PROMOTING AN AMERICAN ADOPTION CAMPAIGN FOR AFGHAN CHILDREN

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CONTENTS

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INTRODUCTION

The United States has a long tradition of facilitating child adoption campaigns after disengaging from major war efforts.[1] As the plight of orphaned children overseas made itself more visible to Americans following World War II, a campaign emerged encouraging them to partake in intercountry child adoptions from post-conflict countries, such as Germany, Austria, Japan and Italy.[2] This inspired the globalization of the modern child adoption market.[3] Christian organizations, such as the League for Orphan Victims in Europe ("LOVE") and the American Joint Committee for Assisting Japanese American Orphans, played a vital role in promoting the post-World War II adoption campaigns.[4] Intercountry adoptions were handled under refugee and displaced persons acts and decrees, including a pivotal 1945 'Directive on Displaced Persons' by President Harry Truman allowing World War II orphans into the U.S. under the premise that they were under grave humanitarian emergency.[5]

Intercountry adoptions were once again encouraged after the Korean War (1950-53) and the Vietnam War (1954-75).[6] The adoption campaign beginning after the Korean War paved the way for the world's largest intercountry adoption program.[7] Further, as its military efforts in Vietnam dwindled, the U.S. government launched an intercountry adoption campaign that lifted 2,700 children out of

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1. *International Adoptions*, ADOPTION HIST. PROJECT, *available at* http://pages.uoregon.edu/adoption/topics/internationaladoption.htm (last visited Jan. 14, 2015).

2. *International Adoptions*, *supra* note 2; Stephanie Zeppa, Note, *"Let Me in, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161, 164-65 (1998).

3. *See International Adoptions*, *supra* note 2.

4. *Id.*

5. *See generally History of International Adoption*, INT'L ADOPTION FACTS & INFO., *available at* http://www.international-adoption-facts-and-information.com/history-of-international-adoption.html (last visited Jan. 14, 2015).

6. *See Capsule History of International Adoption*, BRANDEIS U. SCHUSTER INST. FOR INVESTIGATIVE JOURNALISM (last updated Feb. 23, 2011), *available at* http://www.brandeis.edu/investigate/adoption/history.html#2 (last visited Jan. 14, 2015); *see also* Jodi Kim, *An "Orphan" with Two Mothers: Transnational and Transracial Adoption, the Cold War, and Contemporary Asian American Cultural Politics*, 61 AM. Q. 855, 870 (2009), *available at* https://ethnicstudies.ucr.edu/publications_media/kim/TransnationalAdoption.pdf (last visited Nov. 28, 2014) (explaining that on April 2, 1975, President Ford announced that $2 million would be used to fly Vietnamese orphans to the U.S. for adoption by American families).

7. *See* Kim, *supra* note 7, at 865 (explaining how "[a] huge international relief effort began," after the Korean war ended and in 1955, "[t]ens of thousands of orphans" were sent to Europe and the U.S. for adoption).

Vietnam.[8] It appears that the post-Afghanistan war context is the exception to American tradition and modern practice.[9]

Thirteen years have passed since the start of the war in Afghanistan and even though the US is no longer waging an active military campaign,[10] there has been no campaign to adopt children from this theater.[11] It is not because there are no children that need to be adopted in Afghanistan, as there are close to two million orphans in Afghanistan.[12] The gridlock exists partially because intercountry child adoption concepts, as defined in American federal laws, come into direct conflict with Afghanistan's Child Guardianship Law, newly enacted in April 2014.[13] Furthermore, the National Assembly's (Afghanistan's Parliament)[14] stance is that its Muslim orphans[15] should

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8. *See id.* at 870; Paul J. Buser, *Habeas Corpus Litigation in Child Custody Matters: An Historical Mine Field*, 11 J. AM. ACAD. MATRIM. LAW. 1, 29 (1993).

9. The adoption of Iraqi orphans in the post-Iraq war context is also the exception to American tradition. However, only Afghanistan will be examined as a case study for the purposes of this paper. *See generally*, Alice Richards, *Bombs and Babies: The Intercountry Adoption of Afghanistan's and Iraq's War Orphans*, 25 J. AM. ACAD. MATRIM. LAW. 399, 400, 404 (2013). There are currently 4.5 million orphans in Iraq. *See Iraq: The Human Cost*, MIT CTR. FOR INT'L STUDIES, *available at* web.mit.edu/humancostiraq (last visited Jan. 14, 2015).

10. *Afghanistan Profile*, BBC (Oct. 26, 2014), *available at* http://www.bbc.com/news/world-south-asia-12024253 (last visited Jan. 14, 2015).

11. *See* Kevin Sieff, *Interview: Karzai Says 12-Year Afghanistan War has Left Him Angry at U.S. Government*, WASH. POST (Mar. 2, 2014), *available at* http://www.washingtonpost.com/world/interview-karzai-says-12-year-afghanistan-war-has-left-him-angry-at-us-government/2014/03/02/b831671c-a21a-11e3-b865-38b254d92063_story.html (last visited Jan. 14, 2015).

12. Richards, *supra* note 10, at 404. Note: U.S. responsibility in Korea and Vietnam in part came from heavy interaction between US soldiers and local women, where soldiers fathered many babies, however, in Afghanistan, there is no evidence that US soldiers interacted with Afghan women similarly. *See generally* Marilyn T. Trautfield, *America's Responsibility to Amerasian Children: Too little, Too Late*, 10 BROOK. J. INT'L L. 55 (1984); Arissa Oh, *A New Kind of Missionary Work: Christians, Christian Americanists, and the Adoption of Korean GI Babies, 1955-1961*, 33 WOMEN'S STUD. Q. 161 (2005); TRIN YARBOROUGH, SURVIVING TWICE: AMERASIAN CHILDREN OF THE VIETNAM WAR (Potomac Books, Inc., 2005); Nick Turse, *Rape was Rampant During the Vietnam War. Why Doesn't US History Remember This?*, MOTHER JONES (Mar. 19, 2013, 2:03 PM), *available at* http://www.motherjones.com/politics/2013/03/rape-wartime-vietnam (last visited Jan. 14, 2015).

13. *See infra* Part I and Part II.

14. Isaac Kfir, *Feminist Legal Theory as a Way to Explain the Lack of Progress of Women's Rights in Afghanistan: The Need for a State Strength Approach*, 21 WM. & MARY J. WOMEN & L. 87, 135 n.343 (2014) ("The Afghan Parliament is bicameral" with "a lower house—Wolesi Jirga (Council of People)— and an upper house—Meshrano Jirga (Council of Elders).").

15. Many Afghan orphans are Hazara, an ethnic minority, which has been heavily persecuted by the Taliban and with the Taliban resurgence; they are one of the main targets. *See generally* Massoud Hossaini, *Kabul's Forgotten Kids* VICE (July 1, 2007), *available at*

only be placed with "good" Afghan Muslim families, creating additional hurdles for intercountry adoptions.[16] Non-Muslim[17] children may be adopted by qualifying Non-Muslims.[18]

The gridlock also exists because the American public is unwilling to work with Islamic legal systems,[19] such as the legal system that is perceived[20] to govern Afghanistan. This may be based on the belief that acceptance of Islamic jurisprudence will lead to the renouncement of U.S. domestic laws, causing public policy concerns.[21] For example, the word "sharia" sparks emotive responses in U.S. public discourse

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http://www.vice.com/read/kabul-v14n7 (last visited Jan. 14, 2015); *Resurgent Taliban Targets Afghan Hazara as Australia Sends them Back*, GUARDIAN (Dec. 16, 2014), *available at* http://www.theguardian.com/australia-news/2014/dec/17/resurgent-taliban-targets-afghan-hazara-as-australia-sends-them-back (last visited Jan. 17, 2015) ("The Taliban are back. So Hazara are leaving. Dozens of Hazara in Kabul tell Guardian Australia they are preparing to leave Afghanistan, by legal means or otherwise.").

16. Skype Interview with Judge Homa Alizoy (Mohammad Yusuf trans., Feb. 24, 2014); Kimberly Mills, *P-I Focus: No future in sight for Afghan children*, SEATTLE PI (Dec. 22, 2001, 10:00 PM), *available at* http://www.seattlepi.com/local/opinion/article/P-I-Focus-No-future-in-sight-for-Afghan-children-1075181.php#page-2 (last visited Jan. 14, 2015) ("The even more daunting obstacle to the adoption of Afghan children is Islamic law, which doesn't sanction children born in the faith being reared by non-believers."); *see* Child Guardianship Law, No. 1130, THE OFFICIAL GAZETTE OF AFGHANISTAN, Apr. 12, 2014 (on file with author).

17. The Afghan population is divided as such: "Sunni Muslim 80%, Shia Muslim 19%, [and] other 1%." *The World Factbook*, CENT. INTELLIGENCE AGENCY (last updated June 24, 2014), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/af.html (last visited Jan. 14, 2015).

18. *See* Child Guardianship Law, *supra* note 17.

19. *Bans on Sharia and International Law*, ACLU, *available at* https://www.aclu.org/religion-belief/bans-sharia-and-international-law (last visited Jan. 14, 2015) ("[A]nti-Muslim bigotry has recently crept into state legislatures around the country. Several states have passed or attempted to pass laws designed to prevent courts from applying Islamic or 'Sharia' law, as well as 'foreign' or 'international law.'"); ACLU, Muneer Awad v. Paul Ziriax, Oklahoma State Board of Elections, et al., ACLU (Aug. 15, 2013), *available at* https://www.aclu.org/religion-belief/muneer-awad-v-paul-ziriax-oklahoma-state-board-elections-et-al (last visited Jan. 14, 2015) ("State legislators in Oklahoma placed an unprecedented, discriminatory proposal to amend the Oklahoma Constitution to target the religious practices of Muslims . . . the amendment tramples the free exercise rights of a disfavored minority faith, restricting the ability of . . . Muslims in Oklahoma to execute valid wills, assert religious liberty claims under the Oklahoma Religious Freedom Act, and enjoy equal access to the judicial system.").

20. The legal system in Afghanistan is actually a perversion of Islamic Law, especially given the presence of "contrived cultural and religious norms that surface out of misreading, misunderstandings or manipulation of the Qur'an." Kfir, *supra* note 15, at 93. However, laws regarding transfer of child guardianship strictly follow the Hanafi School of Jurisprudence in Islamic Law. *See infra* Part I.

21. *See generally Nothing to Fear*, ACLU (May 2011), *available at* https://www.aclu.org/files/assets/Nothing_To_Fear_Report_FINAL_MAY_2011.pdf (last visited Jan. 14, 2015).

because the American media often associates it with graphic news stories covering corporal and capital punishments, such as stoning for adultery and hand cutting for theft.[22] However, Islamic jurisprudence is a firmly established source of law for many legal systems in the Middle East, Central Asia and South Asia, which promotes public policies similar to those found in Western civil and common law systems.[23] For example, Islamic jurisprudence also advocates for the family law maxim considering the "child's best interests" in custody determinations through the concept *islah*, which means to "repair, heal, and make good."[24] The United Nations Convention on the Rights of Child ("CRC"), which Afghanistan has signed and ratified, also provides that the child's best interests are the primary considerations when carrying out intercountry adoption procedures.[25]

There are strong humanitarian concerns driving the need to create federal statutory wiggle room to facilitate an American intercountry adoption plan for Afghan orphans because there is a need to provide orphans of this war-torn country with safe homes and permanent guardians to nurture them with love, welfare and support.[26] First, an estimated 8,000 orphans are forced into military service by fighting factions in Afghanistan.[27] Second, a rising number of Afghan children

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22. *Whose Law Counts Most*, ECONOMIST (Oct. 14, 2010), *available at* http://www.economist.com/node/17249634 (last visited Jan. 14, 2015).

23. *See generally* Angela Tang, *Comparative Analysis of Certain Criminal Procedure Topics in Islamic, Asian, and Common Law Systems*, *available at* http://law.wm.edu/academics/intellectuallife/researchcenters/postconflictjustice/documents/AnalysisofCertainCriminal.pdf (last visited Jan. 14, 2015); *see generally* CHIBLI MALLAT, INTRODUCTION TO MIDDLE EASTERN LAW (2007).

24. *See Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, MUSLIM WOMEN'S SHURA COUNCIL 4, 11 (Aug. 2011), *available at* http://www.wisemuslimwomen.org/images/activism/Adoption_(August_2011)_Final.pdf (last visited Jan. 14, 2015); MEDIEVAL ISLAMIC CIVILIZATION: AN ENCYCLOPEDIA 667 (Joseph W. Meri ed., 2006) (defining islah). The author points out that the Sunni Hanafi school of Islamic jurisprudence (which Afghanistan adopts) grounds its decisions regarding a child's welfare in "public policy considerations of the public interest" and the child's best interest much like states do in America. Faisal Kutty, Comment, *Islamic Law and Adoptions*, *in* ROBERT L. BALLARD ET AL., THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES (Newcastle upon Tyne, UK: Cambridge Scholars Publishing, 2014) (forthcoming 2014)(manuscript at 28)(on file with author), *available at* http://ssrn.com/abstract=2457066 (last visited Jan. 18, 2015).

25. *See generally* Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. The United States has signed but has not ratified the Convention on the Rights of the Child.

26. *See* Richards, *supra* note 10, at 404. This paper focuses on Afghanistan instead of Iraq because due to the heavier influence of Islamic law, Afghanistan's system of governance is a more restrictive one.

27. Richards, *supra* note 10, at 404 ("More than 9,000 street children live in

are sexually abused due to a practice called *bacha bazi*, or 'a boy for pleasure,' a form of pederasty,[28] where wealthy Afghan men sexually exploit underage boys, ages nine to fifteen.[29] Homeless children and orphans are susceptible to this practice, because they lack protection.[30] The affected boys[31] are often festooned in women's garments to dance at male-only parties, are regarded as property, and can be sold or rented for "tens of thousands of dollars."[32] When the boys eventually begin to grow beards, a sign of adulthood, they are tossed aside and either partake in the harrowing cycle of becoming pimps themselves or turn to

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poverty . . . Often, these children work at opium farms under the supervision of drug lords. Western aid to these orphans has met very little success."); *see also* Maria Bucci, *Young, Alone, and Fleeing Terror: The Human Rights Emergency of Unaccompanied Immigrant Children Seeking Asylum in the United States*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 275, 299-300 (2004) ("Unaccompanied children are particularly vulnerable to military recruitment . . . children can be recruited in some countries when they are under the age of ten."); Malalai Farooqi, *The Collateral Imprisonment of Afghan Children: An Obstacle to Building the Afghan State*, 32 U. LA VERNE L. REV. 329-30 (2011) (Badam Bagh, a women's prison in Kabul, Afghanistan, houses roughly 90 inmates, some of whom are mothers who "due to lack of any alternatives, are forced to bring their children with them to prison.").

28. *Pederasty*, FREE DICTIONARY, *available at* http://www.thefreedictionary.com/pederasty (last visited Jan. 14, 2015) (defining pederasty as homosexual relations between men and minor boys).

29. Joel Brinkley, *Afghanistan's Dirty Little Secret*, SF GATE (Aug. 29, 2010, 4:00 AM), *available at* http://www.sfgate.com/opinion/brinkley/article/Afghanistan-s-dirty-little-secret-3176762.php (last visited Jan. 14, 2015); *see also* Ernesto Londoño, *Afghanistan Sees Rise in 'Dancing Boys' Exploitation*, WASH. POST (Apr. 4, 2012), *available at* http://www.washingtonpost.com/world/asia_pacific/afganistans-dancing-boys-are-invisible-victims/2012/04/04/gIQAyreSwS_story.html (last visited Jan. 14, 2015) (*Bacha bazi has* flourished "in Pashtun areas in the south, in several northern provinces and even in the capital."); Chris Mondloch, *Bacha Bazi: An Afghan Tragedy*, FOREIGN POL'Y (Oct. 28, 2013), *available at* http://foreignpolicy.com/2013/10/28/bacha-bazi-an-afghan-tragedy/ (last visited Jan. 14, 2015) (In the early 1990s the Taliban tried to eradicate the *bacha bazi* practice and men who engaged in it did so in secret. In 2001, former *mujahideen* commanders came into power after the Taliban's "ouster" and brought back the practice. "[T]hese empowered warlords serve in important positions, as governors, line ministers, police chiefs, and military commander." Afghan families with too many children often "provide a son to a warlord or government official – with full knowledge of the sexual ramifications – in order to gain familial prestige and monetary compensation.").

30. Barat Ali Batoor, *The Exploitation of Afghanistan's 'Dancing Boys'*, WASH. POST (Apr. 4, 2012), *available at* http://www.washingtonpost.com/world/the-exploitation-of-afghanistans-dancing-boys/2012/04/04/gIQAV8oRwS_gallery.html#photo=8 (last visited Jan. 14, 2015).

31. They are also known as *bacha bereesh*, boys without beards. Pul-E Khumri, *Afghan Boy Dancers Sexually Abused by Former Warlords*, REUTERS (Nov. 18, 2007, 11:08 PM), *available at* http://www.reuters.com/article/2007/11/19/us-afghan-dancingboys-idUSISL1848920071119 (last visited Jan. 14, 2015).

32. Londoño, *supra* note 30 ("Mohammed Fahim, a videographer who films the lavish weddings in the capital, estimated that one in every five weddings he attends in Kabul features dancing boys.").

drugs or alcohol.[33]

American Muslims who may want to adopt children do not want to violate tenants of their faith while doing so.[34] The challenges in adopting Afghan children deal with the lack of harmony between American laws and Islamic laws regarding child adoption.[35] First, traditional closed adoption[36] violates Islamic law, which emphasizes the importance of lineage and maintaining one's birth name.[37] However,

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33. *Id.* (Pederasty is a crime in Afghanistan, however considering how widespread this crime is, it is not being prosecuted enough.); *see Decisions of Courts (2009)*, AFGHANISTAN SUPREME CT., *available at* http://supremecourt.gov.af/Content/Media/Documents/jozjanE181201113192085.pdf (last visited Jan. 14, 2015); *see also* Decisions of Courts (2009), AFGHANISTAN SUPREME CT., *available at* http://supremecourt.gov.af/en/documents/category/decision-of-courts?page=2 (the Supreme Court of Afghanistan prosecuted only 13 cases in 2009) (last visited Jan. 14, 2015).

34. Mills, *supra* note 17; *see* Asra Q. Nomani, *Anti-Adoption Traditions in the Muslim World Benefit Al Qaeda Recruiters*, DAILY BEAST (Mar. 31, 2012), *available at* http://www.thedailybeast.com/articles/2012/03/31/anti-adoption-traditions-in-the-muslim-world-benefit-al-qaeda-recruiters.html (last visited Jan. 14, 2015); Rachel Zoll, *Muslim Orphans Caught Between Islam and the West*, WASH. POST (Jan. 2, 2011), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/12/31/AR2010123103723.html (last visited Jan. 14, 2015) ("The problem was a gap between Western and Islamic law. . . . Refugee children from Afghanistan, Iraq and elsewhere are being resettled here. Muslim couples who can't conceive want to adopt but don't want to violate their faith's teachings."); Ali Muhammad Latifi, *The Challenges of Adopting Afghan Children*, GENERATION PROGRESS (Aug. 11, 2010, 7:48 PM), *available at* http://genprogress.org/voices/2010/08/11/15580/the-challenges-of-adopting-afghan-children/ (last visited Jan. 14, 2015); Eugene Volokh, *Adoption of Muslim Children*, VOLOKH CONSPIRACY (Nov. 30, 2010, 5:13 PM), *available at* http://www.volokh.com/2010/11/30/adoption-of-muslim-children/ (last visited Jan. 14, 2015); *see* Kutty, *supra* note 25 (manuscript at 6)(quoting Alexander D. Gonzalez, *The Hague Intercountry Adoption Act and its Interaction with Islamic Law: Can an Imperfect Enforcement Mechanism Create Cause for Concern?*, 10 GONZ. J. INT'L L. 437, 460 (2007) ("Shari'ah is very much present in the hearts and minds of Muslims throughout the world. Even where it is not the formal legal system, Shari'ah has a powerful influence on Muslim attitudes and policies in most Muslim countries.")); *see infra* Part I.

35. Kutty, *supra* note 25 (manuscript at 4)(citing ASHLEY DAWN HARVEL, THE MYTH OF THE UNKNOWN CHILD: CREATING A NEW FACE FOR ADOPTION IN AMERICA 11 (2006) ("The legal creation of a parent-child relationship, with all the responsibilities and privileges thereof, between the child and adults who are not his or her biological parents with the . . . permanent severing all of connections and relationships with the biological parents.")); *see infra* Part I and Part II.

36. *See* Open *Adoption*; Cooperative *Adoption*, BLACK'S LAW DICTIONARY (9th ed. 2009) ("*closed adoption*. An adoption in which the biological parent relinquishes his or her parental rights and surrenders the child to an unknown person or persons; an adoption in which there is no disclosure of the identity of the birth parents, adopting parent or parents, or child. Adoptions by stepparents, blood relatives, and foster parents are exceptions to the no-disclosure requirement. — Also termed confidential *adoption*.").

37. *See* Shabnam Ishaque, *Islamic Principles on Adoption: Examining the Impact of Illegitimacy and Inheritance Related Concerns in Context of Child's Right to an Identity*, INT'L J. L. POL'Y & FAM. 22, 393-420 (2008); Kutty, *supra* note 25 (manuscript at 17)(citing

the Immigration and Nationality Act ("INA") provides that a child's bloodline is relinquished upon adoption.[38] Second, many U.S. state intestacy laws dictate that a child's right to inherit from the birth family must be severed upon adoption.[39] These laws directly contradict Islamic law, where a child must maintain that right.[40]

Third, the legal structure governing Afghanistan's child guardianship procedures[41] provides an alternative model for children needing care, called a *kafala* system, or guardianship system, that most resembles permanent foster care.[42] An analogous system does not exist in the U.S. yet, although there is an increasing trend toward permitting "open" adoption and there is a firmly established intrastate foster care system in most states in the U.S.[43] Moreover, "guardianship," according to the U.S. Citizenship and Immigration Services ("USCIS"), is "deemed insufficient" for accomplishing a child's entry by immigration into the U.S.[44] Fourth, the international adoption process, difficult to navigate in any foreign country, was even murkier in Afghanistan.[45] Previously, the Afghanistan Children's Court handled child guardianship transfers on a case-by-case basis, utilizing a number of criterions, providing no codified law on the subject matter. Since the Child Guardianship Law (2014) has passed and promotes more transparent procedures, a higher placement rate of Afghan orphans should take place.[46]

Even against this backdrop it is not a quixotic and starry-eyed

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Qur'an 33:4-5 ("a child's pedigree must be traced-back to the biological father") and providing according to *fiqh*, "the creation of fictive kinships is strictly forbidden as it disturbs filial continuity.")).

38. Mills, *supra* note 17.

39. *See generally* William E. Taibl, *Inheritance "By, Through and From" an Adopted Person Under the New Wisconsin Statute*, 56 MARQ. L. REV. 119 (1972); *see infra* Part I and Part II.

40. Zoll, *supra* note 35.

41. Although many interpretations of Islamic Law and Jurisprudence are perverted in Afghanistan, particularly those pertaining to women's rights, laws regarding orphans' rights by and large follow the Hanafi School. *See infra* Part I.

42. *Id.*; Kutty, *supra* note 25 (manuscript at 29-30)(Kafala is essentially "'legal fostering'. . . . It tries to achieve a balance between raising the child as your own all the while ensuring the adopted child's identity is not absorbed into the identity of the adoptive family. Negation of the biological identity would be considered *haram* or forbidden.").

43. *See infra* Part I; *see also* Alison Fleisher, *The Decline of Domestic Adoption: Intercountry Adoption As A Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171, 181-84 (2003).

44. Latifi, *supra* note 35; *see* Richards, *supra* note 10, at 399, 409-11.

45. *See* Latifi, *supra* note 35.

46. *See* Skype Interview with Qazi Rahima Rezae (Mohammad Yusuf trans., Feb. 21, 2014) (regarding Child Guardianship Procedure in Afghanistan).

notion that a successful Afghan adoption campaign is possible if Islamic law and U.S. public policy is recognized and followed. It is possible with the execution of the following changes. First, amendments must be made to current federal legislation on intercountry adoptions, namely, the INA and the Intercountry Adoption Act ("IAA"), to allow for a *kafala* scheme. Second, the U.S. and Afghanistan should enter into an intercountry adoption treaty, outlining the procedure for American Muslims seeking to adopt a child from Afghanistan. Although Afghanistan's Constitution declares that Islam is the state's religion, requiring that Islamic law be followed to effectuate the first stage of guardianship procedure, this does not violate the U.S. Constitution's Establishment Clause.[47] Amendments to the INA and IAA and the creation of an intercountry permanent guardianship treaty would simply craft a special relationship with Afghanistan based on its domestic laws on child guardianship.

The U.S. has entered into intercountry adoption plans with several countries with legal systems different than its own.[48] The U.S. Department of State's website provides that Vietnam's Central Adoption Authority will accept a limited number of applications from U.S. Hague-accredited adoption service providers only for children with special needs, as defined by Vietnamese law.[49] The United States, with the execution of this paper's proposed permanent guardianship plan, is not endorsing Islam any more than it endorses Vietnam's system of governance. Finally, American Muslim guardians and birth families should enter into legally binding agreements enforcing Islamic legal rights, afforded to children by their birth families, despite transfer of guardianship.[50] This paper will demonstrate that accepting children from Afghanistan will not violate public policy; rather, the program would be in line with American history and tradition in promoting post-war adoption schemes.[51]

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47. CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, arts. 2-3 (2004).

48. *See generally Intercountry Adoption*, U.S. DEP'T ST., *available at* http://travel.state.gov/content/adoptionsabroad/en.country-information.html (last visited Jan. 14, 2015).

49. *See Vietnam*, U.S. DEP'T ST., *available at* http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/vietnam.html (last visited Jan. 14, 2015).

50. *See* Mills, *supra* note 17.

51. Moreover, the U.S. and Afghanistan have the same stance when it comes to children's cases, namely, that the child's best interests are paramount. *See generally* Child Welfare Information Gateway, *Determining the Best Interests of the Child*, U.S. DEP'T HEALTH & HUMAN SERVS. (Nov. 2012), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (last

Part I is devoted to a discussion of Islamic Law concerning child guardianship in Afghanistan, focusing on the public policy rationales behind it. It also examines children's rights under the Hanafi School of Sunni Islamic jurisprudence, which the Afghanistan Children's Court applies in its opinions, and Afghanistan's Child Guardianship Law (2014). Part II examines U.S. federal legislation that directly governs intercountry child adoptions, pointing to relevant language in the INA and the IAA to highlight the obstacles in adopting orphans from Afghanistan. Part III focuses on U.S. policies promoting intercountry child adoption in post-conflict countries, post-World War II. It sheds light on negative implications that arose from these policies and explains why federal legislation in adoption law was reformed. Part IV provides an overview of state laws that govern issues arising under child custody. Part V provides a background of how other countries model their intercountry child adoption policies and laws, making room for Islamic *kafala* models to flourish. It also offers an overview of relevant international conventions concerning intercountry child adoptions. Part VI suggests amendments to current U.S. federal legislation to facilitate the creation of the proposed adoption campaign. It provides recommendations for the construction of certain provisions in a legal agreement between birth parents and potential permanent guardians to ensure that permanent guardians promote Islamic children's rights.

I. AFGHANISTAN'S SOURCE FOR CHILD GUARDIANSHIP LAW

Afghanistan[52] follows the Hanafi[53] *madhhab*, or school of law,[54] in

visited Jan. 14, 2015) (detailing a list of countries the U.S. has intercountry adoption plans with); Skype Interview with Judge Homa Alizoy (Mohammad Yusuf trans., Mar. 3, 2014).

52. Kfir, *supra* note 15, at 111 n.167 (citing Lawrence Ziring, *From Islamic Republic to Islamic State in Pakistan*, 24 ASIAN SURVEY 931 (1984) ("An Islamic State is understood as a state that places Islam at its epicenter." An Islamic Republic (Muslim State) and an Islamic State differ where the former "separates religion from politics and government as it stresses the need for a secular, constitutional government and society, while an Islamic State governs along Islamic precepts, rejecting the values that the Islamic Republic espouses.")).

53. Kfir, *supra* note 15, at 136 n.350 (stating the Hanafi School "started in Iraq" and "[i]ts influence expanded eastward" making it "the dominant school in Central Asia and the Subcontinent."); *id.* at 135-36 (citing Ashraf Ghani, *Islam and State-building in a Tribal Society of Afghanistan: 1880-1901*, 12 MODERN ASIAN STUD. 269 (1978)) ("Islam and culture are intertwined in contemporary Afghanistan, making it difficult to identify where culture begins and religion ends. Years of conflict, external interventions and a faith in religious solutions have linked Afghan cultural norms with militant interpretations of Islam.").

54. After the death of the Prophet Muhammad (PBUH), many schools of Islamic

Islamic Law.[55] Therefore, a Hanafi analysis of legal principles on child adoption is necessary.[56] Adoption under Islamic law is different from the American concept in that it does not sever the blood relationship between a child and biological parents.[57] Under Islamic law, the relationship with adopting parents is seen as a guardianship rather than parenthood.[58] This is based on the belief that a child's lineage and heritage cannot be erased or replaced with adoption.[59] Afghanistan's Civil Code (1977) includes statutory provisions for family laws and has its foundation in the Hanafi School of Sunni Islamic jurisprudence.[60] Followers of the Hanafi School comprise almost eighty percent of the population.[61] Policy imperatives under the Hanafi School provide that a child should retain his or her birth name and should maintain inheritance rights from the birth family, even if guardianship is transferred.[62]

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jurisprudence developed. Islamic philosopher and legal scholar Muhammad Iqbal provides: "From about the middle of the first century up to the beginning of the fourth, not less than nineteen schools of law and legal opinion appeared in Islam. This fact alone is sufficient to show how incessantly our early doctors of law worked in order to meet the necessities of a growing civilization." MUHAMMAD IQBAL, THE RECONSTRUCTION OF RELIGIOUS THOUGHT IN ISLAM 165 (Lahore: Sh. Muhammad Ashraf ed., 1977) (1930).

55. "No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan." CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 3 (2004).

56. *See* Orzala Ashraf Nemat, *Comparative Analysis of Family Law in the Context of* Islam, AFGHAN INDEP. HUM. RTS. COMMISSION 44-45 (Aug. 15-17, 2006), *available at* http://af.boell.org/downloads/English_Family_Law.pdf (last visited Jan. 14, 2015); Kutty, *supra* note 25 (manuscript at 15)(citing David Powers, *The Abolition of Adoption in Islam, Reconsidered*, 4 DROIT ET RELIGIONS ANNUAIRE 97, 98 (2009-10) ("Notwithstanding the diversity and legal pluralism in Islamic law, it appears that when it came to adoption, classical *Sunni* jurists consensually posited that adoption as commonly understood today in the West (and practiced in pre-Islamic Arabia and known as al-tabanni) is prohibited or *haram*.")).

57. Richards, *supra* note 10, at 399, 409-10.

58. *Id.*

59. *Id.*

60. *Id.* at 399, 408 (quoting *Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, MAX PLANCK INST. FOR FOREIGN PRIVATE L. & PRIVATE INT'L L., at 10, *available at* http://www.mpipriv.de/files/pdf3/mpi-report_on_family_structures_and_family_law_in_afghanistan.pdf (last visited Jan. 14, 2015)); *see also Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, *supra* ("According to the deputy of the head of the high court of the province of Badakhshan, in practice uncodified classical hanafi law is considered the main source of law, superior to any statutory law.").

61. *Family Structures and Family Law in Afghanistan, A Report of the Fact-Finding Mission to Afghanistan January-March 2005*, *supra* note 61, at 8.

62. *See* Christie S. Warren, *The Hanafi School*, OXFORD BIBLIOGRAPHIES, *available at* http://www.oxfordbibliographics.com/view/document/obo-9780195390155/obo-9780195390155-0082.xml (last visited Jan. 14, 2015) ("The Hanafi School is one of the four

More than just a religion, Islam "is an all-encompassing way of life."[63] The Qur'an is the first and most important source of Islamic law, which is "comprised of the verbatim words of Allah (God)" and is regarded as "the most authoritative guide to how Muslims should conduct themselves."[64] While the Qur'an contains 6235 *ayat*, or verses, "only approximately 600 *ayat* are legal rules."[65] Thus, the *Sunnah*, which contains the Prophet Muhammad's (PBUH)[66] conversations, monologues and practices, codified in *hadith,* or reports, is the secondary source to look for guidance on Islamic law.[67] Next, one must look to:

> ijma (consensus of opinion), which is based on rational proof and reasoning that come from divine revelation; the qiyas, which use analogical reasoning to extend the application of sharia to new situations and ideas; and urf (custom), the collective practice of a group of people, which complements rules that the Qur'an does not fully explain. . . . Islam's strong emphasis on communitarian values adds further complexity.[68]

Islamic jurisprudence promotes child fosterage, however certain legal guidelines need to be met to facilitate legal transfer of guardianship.[69] These guidelines stem from policy criteria of

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major schools of Sunni Islamic legal reasoning and repositories of positive law. It was built upon the teachings of Abu Hanifa (d. 767) . . . Abu Hanifa himself relied extensively on *ra'y* (personal opinion) . . . Hanafi doctrines have always been considered among the most flexible and liberal in Islamic law, including in the areas of . . . marriage and guardianship . . . . The Constitution of Afghanistan privileges Hanafi jurisprudence as a residual source of law in the absence of explicit legislation or other constitutional provisions.").

63. Kfir, *supra* note 15, at 113 (citing JOHN L. ESPOSITO, WHAT EVERYONE NEEDS TO KNOW ABOUT ISLAM 3, 16-17, 158-59 (2nd ed. 1990)).

64. *Id.* at 114 (citing Leila P. Sayeh & Adriaen M. Morse, Jr., *Islam and the Treatment of Women: An Incomplete Understanding of Gradualism*, 30 TEX. INT'L L. J. 311, 312 (1995)).

65. *Id.* at 114 (citing Sayeh & Morse, Jr., *supra* note 65, at 312).

66. PBUH denotes "Peace and Blessings Be Upon Him." This is something Muslims are required to say after mentioning Prophet Muhammad's (PBUH) name.

67. Kfir, *supra* note 15, at 114.

68. *Id.* at 114-15 (citing Adrien Katherine Wing, *Custom, Religion, and Rights: The Future Legal Status of Palestinian Women*, 35 HARV. INT'L L.J. 149, 152-53 (1994) and WAEL B. HALLAQ, AN INTRODUCTION TO ISLAMIC LAW 26-28 (2009); Helena Malikyar, *Development of Family Law in Afghanistan: The Roles of the Hanafi Madhab, Customary Practices and Power Politics*, 16 CENT. ASIAN SURV. 389, 390 (1997); Christie S. Warren, *Lifting the Veil: Women and Islamic Law*, 15 CARDOZO J.L. & GENDER 33, 38 (2008); and M. M. Slaughter, *The Salman Rushdie Affair: Apostasy, Honor, and Freedom of Speech*, 79 VA. L. REV. 153, 165 (1993)).

69. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 4; *see id.* at 12 ("Taking care of orphans is an act of piety in Islamic

compassion, transparency and justice.[70] Taking care of orphans is encouraged in Islam, however the Islamic concept of adoption most resembles permanent foster parenting.[71] Unlike "closed" adoption practices commonly exercised in the U.S., where the biological parents' identity is hidden by adoptive parents, under Islamic law, a child's bloodline cannot be changed and neither should his or her birth name.[72] Where the lineage and familial ties of an orphan are known, a few Islamic legal elements need to be satisfied during adoption procedures.[73]

A. Lineage and Naming Rights Under Islamic Law

Lineage and naming rights are two sides of the same coin. Islamic law provides that a child's genealogical line shall never be severed, nor can an artificial line be created with another family.[74] Naming rights, under Islamic law, deal with a child's right to maintain his or her birth name, or identity, which represents his or her father's genealogy.[75] A father's family name attaches to his child upon birth, to attach parental responsibility to him, so he is accountable to provide for the child financially and to provide inheritance shares.[76] In "closed" adoptions, children are not informed of their adoption and have no way of tracing biological kin, which violates a basic tenant of Islamic law.[77] Under Islamic law, a person is entitled to his or her lineage, birth name, and family background because identity is a sacred notion needing protection.[78] The complete 'erasure of natal identity' is contrary to the teachings of the Qur'an and *Sunnah*.[79]

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thought. The Quran, the primary source of guidance for Muslims worldwide, repeatedly emphasizes the importance of taking care of orphans . . . with equity (4:127) and a sin to wrong them (93:9).").

70. *See Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 4.

71. *See* Mills, *supra* note 17. The Prophet Muhammad (PBUH) was an orphan himself.

72. *See id; see infra* Part I.

73. *See Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 16.

74. *See id.*

75. *See id.*

76. *See id.*

77. *See id.* at 5, 16.

78. *See Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 16.

79. Kutty, *supra* note 25 (manuscript at 21)(citing JAMILA BARGACH, ORPHANS OF ISLAM: FAMILY, ABANDONMENT, AND SECRET ADOPTION IN MOROCCO 27 (Rowman & Littlefield, 2002)); Ishaque, *supra* note 38, at 393.

B. Guardianship Scheme Under Islamic Law

Islamic jurisprudence does not mirror adoption in the Western sense but it permits a system of *kafala*, or guardianship, which most resembles permanent foster-parenting.[80] *Kafala* is the vow to voluntarily take care of a minor's welfare and education, in the same way a parent should for a natural child.[81] It constitutes 'a gift of care' for a child, and is not a way to relinquish a child's lineal descent.[82] Unlike foster-parenting in the U.S., *kafala* serves as a permanent arrangement for a minor.[83] Like foster parenting and adoption, *kafala* is regulated by the state.[84] This particular practice arose to act on "the particular care and concern for the maintenance and upbringing of orphans and foundlings inherent in Islamic teachings."[85]

Maslaha, or public policy, is a driving factor in Islamic law, which heavily influences *fiqh*[86] rules governing an orphan and *Al-laqit*, or the foundling, an abandoned child.[87] Early Hanafi scholars recognized that a complete parental relationship is in the child's best interest and society at large, in the case of foundlings and orphans.[88] The Hanafi *fiqh* manual *al-Hidaya* states, "'[r]emoving a foundling from the street is strongly recommended because saving its [i.e. the child's] life is involved" and when the child's life is in danger, the removal becomes obligatory.[89] Anyone who finds an abandoned child and takes him into their care is considered the child's parent, "'but only to the extent that

80. Ishaque, *supra* note 38, at 394.

81. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 6.

82. *Id.*

83. *Id.*

84. *Id.*

85. Kutty, *supra* note 25 (manuscript at 30)(citing Imad-ad-Dean Ahmad, *'The Islamic View of Adoption and Caring for Homeless Children' in* ADOPTION FACT BOOK III (Washington: National Council for Adoption 1999); *Qur'an* 5:32 ("Whoever saves a human life, it is as though he has saved humanity in its entirety."); *Qur'an* 4:127 ("[A]nd concerning the children who are week and oppressed: that you stand firm for justice to orphans. . ."); *Qur'an* 4:127 ("Serve God . . . do good- to parents, kinfolk, orphans, those in need, neighbors who are near, neighbors who are strangers, the companion by your side, the wayfarer (ye meet), and what your right hands possess.")).

86. *Fiqh*, or "understanding" is Islamic jurisprudence and juristic law. It is interpretation of Islamic law. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 6.

87. *Id.* at 9-10 (A foundling is a child whose lineage is unknown due to parents' death, disappearance, or abandonment).

88. *Id.*

89. *Id.* (quoting BURHAN AL-DIN AL-FARGHANI AL-MARGHINANI; AL-HIDAYA, vol. 2, at 466-67 (Lebanon Dar al-Arqam, n.d.)).

such a claim benefits the foundling.'"[90]

Children raised under the *kafala* system also maintain[91] inheritance rights from their biological parents.[92] Qur'anic verses explain orphans' financial rights, providing, "And give the orphans their property. . . . And consume not their property with your own property. Truly this has been criminal, a hateful sin."[93] However, Islamic law does not prohibit *kafala* guardians from giving their assets to orphans.[94] According to Sunni *fiqh*, a person can bequeath a maximum one-third of his or her property to anyone who is not a blood relative.[95]

C. Historical Policy Concerns Behind Islamic Law on Children

Historical policy concerns led to the formulation of Islamic children's rights, deriving from the Qur'an and *Sunnah*.[96] Like U.S. legislation, Islamic law also bases its laws on public policy.[97] The policy reason behind treating adoptions as permanent guardianships, instead of parenthood in the Western sense, is also based on historical events.[98] However, while American history is fairly recent, Islamic history dates back to 610 A.D.[99] Drawing similarities between Western

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90. *Id.* at 10 (quoting M.S. Sujimon, *The Treatment of the Foundling (al-Laqit) According to the Hanafis*, 9 ISLAMIC L. & SOC'Y 358 (2002)); *see also* Kutty, *supra* note 25 (manuscript at 26)(citing Ella Landau-Tasseron, *Adoption, Acknowledgement of Paternity and False Genealogical Claims in Arabian and Islamic Societies*, 66 BULL. SCH. ORIENTAL & AFR. STUD. 169 (2003)("a. that the acknowledged person have no known father [*majul al-nasab*]; b. that there be no obvious reason to disbelieve the statement [*an yulad mithluhu li-mithlihi*] so, for example, a person cannot acknowledge as his son another person who is older than himself.")).

91. There is a caveat here. Although Islamic inheritance rights are extended to both boys and girls, in practice, girls' rights are lost in translation. *See generally* Amrita Pande, *The Paper that You Have in Your Hand is My Freedom: Migrant Domestic Work and the Sponsorship (Kafala) System in Lebanon*, 47 INT'L MIGRATION REV. 414 (2013); Shipra Saxena, *Young Migrant Women from South Asia in the UAE: Negotiating Identities Under the Kafala System* (Nov. 2012)(unpublished M.A. thesis, Inst. Social Studies).

92. *See Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 17.

93. *Qur'an* 4:2; *Qur'an* 4:2-10.

94. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 17.

95. *Id.*

96. *See* ASAF A. A. FYZEE, OUTLINES OF MUHAMMADAN LAW 1 (4th ed. 1974) ("Islamic law is not a systematic code, but a living and growing organism . . . this system cannot be studied without a proper regard to its historical development.").

97. *See generally* Kutty, *supra* note 25.

98. *Id.*

99. *Timeline of Islam*, PBS, *available at* http://www.pbs.org/wgbh/pages/frontline/teach/muslims/timeline.html (last visited Jan. 14, 2015).

policy objectives and Islamic ones is important. Since the driving forces behind American policy and Islamic policy are essentially the same, namely, that the child's best interest is paramount, both countries can make the proposed campaign work.

In pre-Islamic Arabia, adopted children were usually male because they were a great source of wealth and prestige.[100] They were given most, if not all inheritance rights by their biological parents.[101] People mainly adopted to secure an heir, add additional warriors to their tribe and/or usurp an orphan's inheritance share.[102] If the adopted child did not have a large inheritance share, there was still incentive to adopt him because he could grow to accumulate wealth for his adoptive family.[103] Many times adoptions were also linked to enslavement, where individuals would gain custody of children, under the pretense of giving them care, while actually stripping them of their birth identities.[104] This was done to appropriate children into their families only to service them.[105] Islamic legal norms specifically condemned this practice and restricted the practice of dissimulation through naming.[106] The Qur'an speaks specifically about orphans: "Call to them by the names of their fathers. That is more equitable to God."[107] This verse was revealed after the Prophet Muhammad (PBUH) adopted a freed slave named Zayd Ibn

100. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7; Amira al-Azhary Sonbol, *Adoption in Islamic Society: A Historical Survey*, *in* CHILDREN IN THE MUSLIM MIDDLE EAST 45, 46 (Elizabeth Warnock Fernea ed., 1995); *see also* Shaheen Sardar Ali, *Rights of the Child Under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC ST. PRAC. INT'L L. 1, 8 (2006).

101. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7.

102. *Id.*; Zoll, *supra* note 35 (stating adoption looked more like slavery in pre-Islamic Arabia. "Men would take in a boy, then erase any ties between the child and his biological family. The goal was to gather fighters as protection for the tribe. Orphans' property was often stolen in the process. As a result, Muslims were barred from treating adopted and biological children as identical in naming or inheritance, unless the adoptee was breast-fed as a baby by the adoptive mother, creating a familial bond recognized under Islamic law.").

103. *See* Sonbol, *supra* note 101, at 46.

104. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 7.

105. *Id.*

106. *Id.* at 7-8 (Prophet Muhammad (PBUH) adopted a boy named Zayd Ibn Haritha, safeguarding his best interests as in a conventional case of adoption today); *see also* Richards, *supra* note 10, at 399, 409-11; Shaheen Sardar Ali, *Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC STATES PRAC. INT'L LAW 2 (2006) (Pre-Islamic Adoption practices were outlawed to "contain and in certain cases root out social evils.").

107. *Adoption and the Care of Orphan Children: Islam and the Best Interests of the Child*, *supra* note 25, at 8 (quoting *Qur'an* 33:4-5).

Haritha and renamed him Zayd Ibn Muhammad.[108] When these verses were revealed, Zayd's name was changed back to his given name.[109] The Pre-Islamic practice also perpetuated a system of gender discrimination where only males were adopted.[110] Given that the advent of Islam brought forth a movement to eradicate Pre-Islamic gender discrimination and violent practices, such as female infanticide, one may—and very well should—deduce, that banning Pre-Islamic adoption practices was aimed to lessen gender inequality over time.[111]

D. Afghanistan's Child Guardianship Law

The U.S. Department of State incorrectly provides, "U.S. citizens considering adoption of an Afghan child must obtain guardianship for the purpose of emigration and adoption in the U.S. from the Afghan Family Court that has jurisdiction over the prospective adoptive child's place of residence."[112] The head judge of Afghanistan's only Family Court, Qazi Rahima Rezae, stated, "We (Afghanistan) deal a lot with children's guardianship cases but the Family Court doesn't have the authority to deal with guardianship. The Supreme Court has written that it is the [Afghanistan] Children's Court that has guardianship authority."[113] No other traditional courts or religious courts have the jurisdiction to handle child guardianship cases.[114]

The Afghanistan Children's Court's Head Judge, Homa Alizoy, shed some light on a "Child Guardianship Law Draft" proposed to the National Assembly, which passed as good law in April 2014 with most articles intact.[115] The Child Guardianship Law was passed by the National Assembly, signed by the President, and published in Afghanistan's Official Gazette.[116] This law allows Afghan Muslims

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108. MUHAMMAD B. AHMAD AL-QURTUBI, AL-JAMI LI-AHMKAM AL-QUR'AN 118-19 (1967).

109. *See* Kutty, *supra* note 25 (manuscript at 17).

110. *Id.* at 20.

111. *Id.* at 20-21 (citing Shaheen Sardar Ali, *Rights of the Child under Islamic Law and Laws of Pakistan: A Thematic Overview*, 2 J. ISLAMIC ST. PRACTICE IN INT'L LAW 2 (2006); *Qur'an* 17:31 ("When the female (infant) buried alive, is questioned— For what crime she was killed" *Qur'an* 81:8-9; " Do not kill your children for fear of poverty; it is We Who provide for them as well as for you. Killing them is surely a grave sin.").

112. *Afghanistan*, U.S. DEP'T ST. (Jul. 1, 2013), *available at* http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/afghanistan.html (last visited Jan. 14, 2015).

113. Skype Interview with Qazi Rahima Rezae, *supra* note 47.

114. *Id.*

115. *See* Skype Interview with Judge Homa Alizoy, *supra* note 52.

116. Child Guardianship Law, *supra* note 17.

living abroad to adopt abandoned, orphaned or abused Afghan children.[117] The National Assembly believes that Afghan children must only be placed with Afghan guardians.[118] Judge Alizoy conversely provided that she would like to see more Muslims taking children under their care, regardless of their ethnicity, but Afghanistan's Parliament is not open to the idea.[119]

The National Assembly's hesitation may be due to reported cases of children "taken out of Afghanistan and sold into human trafficking in [the United Arab Emirates] and Kuwait."[120] If the National Assembly is assured that only American Muslims with good intentions will have child guardianship, the law may be amended to allow American Muslims in general to apply. Nevertheless, this law should make it easier to effectuate the proposed adoption campaign. The law lays out who may apply and which children are eligible.[121] It provides the procedure for gaining permanent guardianship, thus promoting transparency.[122] This ensures that legal determinations will be based on statutory law and not solely by a judge's discretion.[123] This will encourage more individuals to engage in the permanent guardianship process in Afghanistan.

For example, the Child Guardianship Law provides that a permanent guardian must: be at least 30 years old; have no convictions of trafficking crimes, drugs, begging, terrorism and crimes against children; not suffer from incurable diseases; be able to perform administrative tasks and; not use drugs or alcohol.[124] Further, a child is eligible for transfer of guardianship if he or she is under age eighteen and is an orphan where none of the parents are alive, available or where the parents are absent or abandoned the child by submitting him or her to a charity or another institution where at least one year has lapsed since the parents have visited or the child has parents who cannot financially provide for him or her.[125]

Guardianship priority is first given to blood relatives, then to couples with no children and last to guardians who have experience

117. *Id.*

118. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17.

119. *Id.*

120. Latifi, *supra* note 35.

121. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17; *see also* Skype Interview with Judge Homa Alizoy, *supra* note 52; Child Guardianship Law, *supra* note 17.

122. *Id.*

123. *Id.*

124. Child Guardianship Law, *supra* note 17, art. 4.

125. *Id.* art. 5.

providing *kafala* care to children.[126] The law also provides that "[i]n any case, benefit and best interests of the child take precedence over other matters to be considered."[127] Article 17 provides, the Children's Court can authorize the child's withdrawal from Afghanistan if it is in the child's best interests.[128] The court may terminate guardianship if the guardian subjects the child to physical and mental abuse, bars the child from education or job training, exposes the child to drugs or alcohol, forces the child to beg or subjects the child to sexual exploitation or child pornography.[129]

The law cites to *Sunnah* that encourages taking care of orphans,[130] providing there are great public policy reasons necessitating this law, including a need to "eradicate corruption, reduc[e] the rate of juvenile delinquency, and improv[e] access to education for children" and urgent care for children who lost their parents during the war.[131] It provides that the family is "the most natural and most suitable environment for the growth and development of children. Therefore, as far as possible, children should not be deprived of this right."[132]

Many times children are abandoned in hospitals and doctors informally transfer guardianship to desiring guardians.[133] The Child Guardianship Law outlaws this practice.[134] Transfer of guardianship must go through a formal process even if birth families agree to transfer guardianship outside of court.[135] This is problematic for women who want to anonymously relinquish their parental rights. For example, rape victims who have children out of wedlock are under the threat of adultery laws, which imprison women for extramarital affairs, unless proven that the aggressor committed *zinna bil jabr*, or sex by force. The burden is on the victim to produce three male witnesses to corroborate the defense.[136]

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126. *Id.* art. 6.

127. *Id.* art. 9.

128. *Id.* art. 10.

129. Child Guardianship Law, *supra* note 17, art. 17.

130. *Id.* at conclusion (citing Muhammad al-Bukhari, *Sahih Bukhari Volume 007, Book 063, Hadith Number 224*, HADITH COLLECTION, *available at* http://hadithcollection.com/sahihbukhari/96-Sahih%20Bukhari%20Book%2063.%20Divorce/5868-sahih-bukhari-volume-007-book-063-hadith-number-224.html (last visited Jan. 14, 2015)).

131. Child Guardianship Law, *supra* note 17, at conclusion.

132. *Id.*

133. Skype Interview with Judge Homa Alizoy, *supra* note 17.

134. *Id.*

135. *Id.*

136. Jeremy Kelly, *Afghan Woman to be Freed from Jail After Agreeing to Marry*

The law took several years to pass because the draft contained a contentious article, providing that if a male guardian raises a girl, he may not marry her.[137] The Civil Society of Afghanistan supports this article; however, the National Assembly argues that if the daughter grows up and gives her consent to marry the male guardian, there should be no obstacle.[138] The judges and lawyers who drafted the proposed legislation refused to remove this article.[139] However, the law passed without this provision instead providing in Article 8 that guardians cannot take any formal decision on who the female child will marry until the child reaches the age of majority, age eighteen, and gives full consent about her engagement and marriage.[140] The term *maqasid al shariah*, or objectives of Islamic law, should be used to criticize this provision's omission.[141] The law must be amended to promote Qur'anic verses prioritizing child welfare rather than excluding rules to maintain *status quo* of men at the expense of child safety and mental well-being.[142]

Subsequent to adopting Zayd, the Prophet Muhammad (PBUH) arranged to marry Zayd's ex-wife and Qur'anic verses confirmed this was permissible. However, there is no example in *Sunnah* permitting marriage to an adopted daughter and this particular issue was never discussed in *hadith*. Since the *Sunnah* is silent on the matter one must look to principles contained in the Qur'an. There are pitfalls to removing this article because, although a "formal decision" shall not be made before the female child turns eighteen, the male guardian may coerce the child into making informal decisions. This heightens the risk of exploitation. Qur'anic verses on child welfare should be cited as

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Rapist, GUARDIAN (Dec. 1, 2011), *available at* http://www.theguardian.com/world/2011/dec/01/afghan-woman-freed-marry-rapist (last visited Jan. 14, 2015).

137. Skype Interview with Judge Homa Alizoy, *supra* note 17.

138. *Id*; Kfir, *supra* note 15, at 87, 94, 140-41 (providing "in Afghanistan misogynistic and discriminatory practices stems from contrived cultural and religious norms," "a misogynistic orthopraxy linked to Islamism, a perversion of Islamic law" and the Ministry of Women's Affairs' ("MoWA") "ineffectiveness can also be attributed to the difficult conditions under which it operates. MoWA has to contend with a fickle president and political system that does not value MoWA's efforts to empower women, treating it instead as a tool to appease the international community. Although President Karzai publicly supports the empowerment of women, he works with conservatives who oppose women's empowerment to ensure his political survival.").

139. Skype Interview with Judge Homa Alizoy, *supra* note 17.

140. Child Guardianship Law, *supra* note 17, art. 8.

141. *See* Kutty, *supra* note 25 (manuscript at 39).

142. *Id.* at 36-39.

basis to include the omitted provision.[143] Any practices that promote exploitation of women and children are unacceptable under Islamic law.[144] This begs the question, if Afghanistan stresses the importance of applying Islamic law, why was the contentious article omitted? Note:

> When the state is incapable or unwilling to represent the interests of members of society, the importance of family and kinship relations is inflated. Consequently, any challenges to patriarchal authority in the domestic sphere—including but not limited to challenges to the use of violence—can be construed as threatening to the family as an institution. This, in turn, lends itself to the idea that increasing the rights of women would corrode and menace the family, and, by extension, the social order. . . . Islam is not the reason why women in Afghanistan endure discriminatory practices. Rather, discrimination stems from contrived cultural and religious norms that surface out of misreading, misunderstandings or manipulation of the Qur'an. Accordingly, in claiming the existence of contrived cultural and religious practices, it is argued that these norms are synthetic and their purpose is to uphold traditional authority and/or support an anachronistic power system. By devising norms and exhibiting them as cultural or religious, the proponents do so in reference to idyllic community, allowing them to further defend these indefensible social restrictions.[145]

"[T]he Afghan constitution and shari'a, both of which have the means to end discriminatory practices," should be examined to make amendments to the law to include provisions ensuring that girls are not exploited.[146] Article 22 of the Constitution "emphasizes that every Afghan citizen—man and woman—has equal rights before the law" and since Afghanistan social structure is already permeated with inequality and oppression against women, the omitted provision is necessary to include in the Child Guardianship Law.[147] This is to ensure female children are treated equally as well as their male counterparts.

Afghanistan ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), the CRC

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143. *See generally* Nusrat Choudhury, *Constrained Spaces for Islamic Feminism: Women's Rights and the 2004 Constitution of Afghanistan*, 19 YALE J.L. & FEMINISM 155, 175-76 (2007).

144. *See generally id.*

145. Kfir, *supra* note 15, at 92-94 (quoting Lisa Hajjar, *Religion, State Power, and Domestic Violence in Muslim Societies: A Framework for Comparative Analysis*, 29 LAW & SOC. INQUIRY 1, 31 (2004)).

146. Kfir, *supra* note 15, at 96.

147. Kfir, *supra* note 15, at 98 n.72 (citing CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 22 (2004)).

(ratified Apr. 27, 1994) and its optional protocols on the Sale of Children, Child Prostitution, and Child Pornography, among sixteen international human rights conventions.[148] In August 2009, Afghanistan adopted the Law on Elimination of Violence against Women (EVAW), codifying protections for women and girls to help ensure Afghanistan meets its obligations under CEDAW.[149] The law, in particular, criminalizes child marriages and forced marriages, however, application of the law is sparse[150] highlighting "the continued pervasiveness of misogyny and contrived cultural values."[151] To ensure proper application of the law, EVAW needs supporting legislation like the Child Guardianship Law to ensure equal protection for girls.

In Afghanistan, there are two ways guardianship rights are transferred.[152] First, the Child Guardianship Law lays out the procedure, which provides that if children are abused by their parents, guardianship may be transferred to a family that will better care for them.[153] One must prove either that the child was abandoned or abused by the parents.[154] The other legal procedure involves the voluntary transfer of guardianship.[155] When child guardianship is willingly transferred, the birth family must first appear before the Children's Court and confess their wish to transfer guardianship.[156] Second, the court makes a *wasiqah*, or a legal document that notes transfer of custody and provides stipulations protecting Muslim children's rights,

148. Kfir, *supra* note 15, at 143; *Ch. IV: Human Rights*, UNITED NATIONS: TREATY COLLECTION, *available at* http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en (last visited Jan. 14, 2015)).

149. Kfir, *supra* note 15, at 143; CONST. OF THE ISLAMIC REP. OF AFGHANISTAN art. 22 & 27 (2004) (providing Afghanistan must ensure its international obligations are met).

150. *UN Officials in Afghanistan Urge Ratification of Law to Eliminate Violence Against Women*, UN NEWS CTR. (May 20, 2013), *available at* http://www.un.org/apps/news/story.asp?NewsID=44950#.VH5hwWRdWi0 (last visited Jan. 14, 2015); *see also* Marisa Taylor, *Afghan Law Barring Violence Against Women Stalls, UN Says*, ALJAZEERA: AM. (Dec. 8, 2013, 10:58 PM), *available at* http://america.aljazeera.com/articles/2013/12/8/afghan-law-barringviolenceagainstwomenstallsunsays.html (last visited Jan. 14, 2015) ("The report showed that 650 incidents of violence against women and girls were reported to authorities across 18 different Afghan provinces between October 2012 and September 2013." However, EVAW was only applied to "109 of those reported incidents . . . representing a meager 2 percent increase from the 15 percent of reported cases to which EVAW was applied the year before.").

151. Kfir, *supra* note 15, at 144.

152. Child Guardianship Law, *supra* note 17.

153. *Id.*

154. *Id.*

155. *Id.*

156. Skype Interview with Judge Homa Alizoy, *supra* note 52.

including naming rights and inheritance rights from the birth parents.[157]

Potential guardians must follow preliminary procedures to gain guardianship rights. They must appear before the Afghanistan Children's Court to apply for permanent guardianship.[158] Approximately one to five children are adopted and emigrated to the U.S. every year.[159] If the legislation was amended, allowing American Muslims to apply generally, the number of children adopted and emigrated could increase. The Children's Court heard two cases on child guardianship recently, dealing with foreign potential guardians.[160]

Judge Alizoy shared a case regarding an Afghan-American woman who petitioned the court for guardianship of two abandoned children found by hospital staff and placed in a temporary guardian's care.[161] Judge Alizoy first had to ensure that the children were in fact foundlings.[162] She ordered the General Attorney's Office to conduct further investigation on the children's background.[163] The Office then followed up with the Ministry of Social and Public Works to ensure that the petitioner exercised proper legal procedures to obtain the children and their social worker consented to the transfer.[164] Further, Judge Alizoy ordered the social worker to provide her with a letter confirming that the children were foundlings and that she transferred guardianship to the petitioner.[165] Subsequently, Judge Alizoy began processing the legal work for the case.[166]

The Court requires potential guardians to show competency to raise a child and that they are: of Afghan descent; "good" Muslims; able to financially support the child and; able to provide for the child's welfare.[167] Judge Alizoy further explained that the guardian must be of good character, "a respectable person," and has to care deeply about the child."[168] The guardian must show the Court that he or she was raised according to Islamic ideals to demonstrate the ability to take care of the

157. *See id.*

158. *See id.*

159. *See Afghanistan Country Profile*, U.S. DEP'T ST., *available at* http://travel.state.gov/content/adoptionsabroad/en/country-information/learn-about-a-country/afghanistan.html (last visited Jan. 14, 2015).

160. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17.

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Skype Interview with Judge Homa Alizoy, *supra* note 52.

166. *See id.*

167. *See* Skype Interview with Judge Homa Alizoy, *supra* note 17.

168. *See id.*

child with Islamic values in mind.[169]

When a permanent guardian wishes to move the child abroad there are additional procedural steps.[170] First, the Children's Court must send its decision to the Supreme Court for review.[171] Next, the Supreme Court reviews the case, files and confirms the authenticity of the court documents.[172] Third, the Supreme Court translates the documents into English to send to the Foreign Ministry.[173] The Foreign Ministry registers the documents, stamps them and provides the permanent guardian(s) with written permission to take the child abroad.[174]

The 1977 Civil Code codifies inheritance laws according to the Hanafi School of Islamic jurisprudence.[175] Article 1993 of the Civil Code provides that a deceased person's personal property and real property shall be transferred to his heirs in accordance with Islamic rules on inheritance.[176] Although there are laws on inheritance, Afghanistan lacks a sufficient legal system due to several decades of conflict causing lack of resources to address inheritance issues.[177] Since Afghanistan's court system is projected to improve in the future, the adopted child may claim inheritance shares upon reaching age eighteen, by providing the Children's Court records which evidence the child's lineage.[178] This is important to consider in ensuring the adopted child's inheritance shares are maintained despite transfer of guardianship.[179]

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169. *Id.*

170. *See* Skype Interview with Judge Homa Alizoy, *supra* note 52.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Bruce Etling, *Legal Authorities in the Afghan Legal System*, HARVARD L. SCHOOL, *available at* http://www.law.harvard.edu/programs/ilsp/research/etling.pdf (last visited Jan. 14, 2015); *Land Rights in Crisis*, ELDIS (2014), *available at* http://www.eldis.org/assets/Docs/13485.html (last visited Jan. 14, 2015); *Afghanistan: Food Security and Land Governance Fact Sheet*, LAND GOVERNANCE FOR EQUITABLE & SUSTAINABLE DEV. 1, 2 (Apr. 2011), *available at* http://www.landgovernance.org/system/files/Afghanistan%20Factsheet%20landac%20april%202011.pdf (last visited Jan. 14, 2015).

176. Colin Deschamps & Alan Roe, *Land Conflict in Afghanistan*, AREU 18 (Apr. 2009), *available at* http://www.areu.org.af/Uploads/EditionPdfs/918E-Land%20Conflict-IP-web.pdf (last visited Jan. 14, 2015).

177. *Id.*

178. *See Inheritance Form*, AFG. EMBASSY, WASH., D.C. (2007), *available at* http://www.embassyofafghanistan.org/sites/default/files/forms/02.07.2007Inheritance.pdf (last visited Jan. 14, 2015).

179. *See infra* Part III and Part V.

II. UNITED STATES FEDERAL LAW ON INTERCOUNTRY CHILD ADOPTIONS

In 1961, the INA incorporated provisions regulating the intercountry adoption process to improve its screening.[180] The 1978 amendment to the INA declares, when a child is released for immigration and intercountry adoption to the U.S., the prior parent shall not be accorded any right, privilege or status, with respect to the child.[181] In 2000, the U.S. enacted the Intercountry Adoption Act ("IAA").[182] The INA and the IAA define key terms such as "parent," "child," and "orphan."[183] The USCIS, the Department of Homeland Security and the Board of Immigration Appeals declared that obtaining guardianship status alone is insufficient to facilitate the immigration of an adopted child into the U.S. under the INA, requiring parenthood status instead.[184] Under the INA, a birth parent is not considered a parent if he or she has irrevocably released the child for emigration and adoption.[185]

The IAA allows American parents to adopt children from non-Convention[186] countries, as long as the child qualifies as an adopted child or an orphan under the INA.[187] According to the INA, a child is an unmarried individual under the age of twenty-one.[188] Under the INA, the adopting parent(s) must personally observe the child during adoption proceedings in the sending country.[189] The U.S. cannot recognize adoptions unless the adoptive relationship is authorized by

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180. Stephanie Zeppa, *"Let Me in, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161, 164-65 (1998) (amendments were made to the INA to "create a permanent provision for the immigration of adoptable children" which laid out a regulatory framework for intercountry adoption. Prior to that, Congress enacted the Displaced Persons Act (DPA) in 1948 [after World War II] that included in it a provision "to admit, regardless of their country's immigration quota, 3,000 displaced orphans" from Germany, Austria and Italy. Congress only intended for the DPA to serve as a "temporary solution to the immediate welfare problems in Europe after the war.").

181. Immigration and Nationality Act, Pub. L. 95-417, 8 U.S.C. § 1153 (1978).

182. Richards, *supra* note 10, at 413.

183. 8 U.S.C. § 1101 (1952); 42 U.S.C.A. § 14901 (2000).

184. Richards, *supra* note 10, at 411.

185. 8 U.S.C. § 1101 (1952); *see Definition of Child and Parent in INA*, AM. IMMIGR. L. CENTER, *available at* http://www.ailc.com/services/INADEFS.pdf (last visited Jan. 14, 2015).

186. Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167.

187. 42 U.S.C. § 14901 (2000).

188. 8 U.S.C. § 1101 (1952); *see Definition of Child and Parent in INA*, *supra* note 186.

189. 8 U.S.C. § 1101 (1952).

local custom or religious practice, which is recognized by a court of law there.[190] Additionally, the relationship must hold all the usual attributes of child adoption, according irrevocable rights to adoptive parents with respect to the child.[191]

The INA lays out the groundwork for criteria that needs to be met to facilitate intercountry adoption. If adopting parents cannot fulfill the requirements under INA 101(b)(1)(E), which provides that an adopted child must qualify as an "orphan" under INA 101(b)(1)(F) in order to emigrate to the U.S., they must have legal child custody and reside with the child for at least two years before U.S. immigration can occur.[192] An "orphan," under the INA, is a child that lacks parent(s) because of their death or disappearance, abandonment, or separation from him or her.[193] A child is also an orphan if the sole or surviving parent cannot provide him or her with proper care.[194] The IAA also requires proof that a child's natural parent(s) are deceased to qualify as an "orphan," by obtaining proper paperwork from the sending country.[195] The sole or surviving parent must also, in writing, irrevocably release the child for purposes of U.S. emigration and adoption.[196] To reiterate, the INA does not consider someone a parent if he or she has, in writing, irrevocably released the child for emigration and adoption.[197] The USCIS assesses and approves prospective adoptive parents and determines whether the child qualifies as an "orphan" under the INA.[198]

In order to facilitate adoptions between the two countries, the U.S. will need to make amendments to the INA and the IAA. While this may seem like plenty to change, only a few phrases need to be updated in order to allow a *kafala*, or "permanent guardianship," scheme to work in the U.S. The changes would not upset the policy rationale underlying

190. *U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes*, U.S. DEP'T ST. 9 (2013), *available at* http://www.state.gov/documents/organization/87531.pdf (last visited Jan. 14, 2015). Adoption is "[t]he creation of a parent–child relationship by judicial order between two parties who usu[ally] are unrelated; the relation of parent and child created by law between persons who are not in fact parent and child." *Adoption*, BLACK'S LAW DICTIONARY 55 (9th ed. 2009).

191. *U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes*, *supra* note 191, at 9-10.

192. *Id.* at 10.

193. 8 U.S.C. § 1101 (1952).

194. *Id.*

195. Richards, *supra* note 10, at 399, 414-16.

196. *U.S. Department of State Foreign Affairs Manual Volume 9 Visas-9 FAM 42.21 Notes*, *supra* note 191, at 15.

197. 8 U.S.C. § 1101 (1952).

198. William Giacofci, *Curbing Intercountry Adoption Abuses Through the Alien Tort Statute*, 18 ROGER WILLIAMS U. L. REV. 110, 115 n.34 (2013).

intercountry adoption laws, because permanent guardians would have full and permanent custody of the children, barring the birth families from reclaiming their custody rights in the future.[199]

III. POLICY REASONS FOR SWEEPING INTERCOUNTRY ADOPTION LAW REFORM

Today, child adoptions within the U.S. are more standardized than the pre-1950s.[200] State systems have social workers that conduct a home study of the adopting parents during a probationary period before adoptions are finalized, even if the child was adopted abroad.[201] This process involves background checks, reference checks, and follow-up visits.[202] However, intercountry child adoption laws were not always so stringent.[203] Beginning in the late 1950s, there was a massive federal policy shift toward increasing regulations governing intercountry adoption procedures in the U.S. for several reasons.[204] The main reasons behind the shift were negative effects resulting from intercountry adoption procedures during the end of the Korean War and the Vietnam War as discussed below.[205]

A. America's Intercountry Adoption Scheme Post-World War II

First, individuals successfully adopted children from Japan, Germany and Korea post World War II through a process called "proxy adoptions," allowing U.S. citizens to hire a proxy agent to adopt a child on their behalf and transport him or her to the U.S.[206] Domestic adoptions were subject to state regulations, which assessed the prospective parents' competency to provide for the adopted child's welfare, by way of investigation and supervision.[207] However, the

199. *See* discussion *Infra* Part VI.

200. *See History of International Adoption*, *supra* note 6.

201. *See id.*

202. *See id.*

203. *See id.*

204. *See id.*; *Proxy Adoption of Foreign Children has Many Abuses*, MILWAUKEE J. at 13 (Aug. 27, 1958), *available at* http://news.google.com/newspapers?id=UQIqAAAAIBAJ&sjid=miYEAAAAIBAJ&pg=4367%2C3295730 (last visited Jan. 14, 2015).

205. Pam Connell, *"Proxy Adoptions" from Other Countries*, FAMILIES, *available at* http://www.families.com/blog/proxy-adoptions-from-other-countries (last visited Jan. 17, 2015).

206. *History of International Adoption*, *supra* note 6; *Proxy Adoption of Foreign Children Has Many Abuses*, *supra* note 204.

207. Connell, *supra* note 206.

domestic regulatory scheme exempted international adoptions due to the "proxy adoption" loophole.[208] This loosely regulated process had negative implications because it thwarted state and federal regulations, allowing adoptive parents to neglect, sexually abuse, and physically abuse adopted children, because they were not screened for competency to parent.[209]

A public outcry ensued after child agencies made public the Child Welfare League of American and International Social Service's study of "proxy adoptions."[210] Public policy sentiments of the time regarding "proxy adoptions" is best exemplified by a Milwaukee Journal article written in 1958 which stated:

> Corrective action clearly needs to be taken. Unfortunately, it cannot be done by state or local governments; they only bear the burden when proxy adoptions "go bad." The federal government must act either through tightening immigration procedures or perhaps by special treaty arrangements with countries in which proxy adoptions are most easily arranged.[211]

"Proxy adoptions" revealed the inadequacy of federal policy in dealing with intercountry child adoptions. The public's outrage encouraged the onset of regulations to reform intercountry adoption procedures to avoid human rights abuses.[212] The 1961 amendment to the INA finally incorporated international adoption.[213]

B. America's Intercountry Adoption Practices Post-Vietnam War

A second series of events, prompting tighter intercountry adoption regulations, occurred at the end of the Vietnam War. While the Vietnam War was winding down, the U.S. government launched a campaign called "Operation Babylift" to "save the children" in Vietnam, airlifting more than 2,000 "orphans" out of Vietnam.[214] Unbeknownst to adoptive parents, many children were not orphans, allowing their Vietnamese parents to reclaim approximately 200 of them.[215] The initiative carried children out of Vietnam, under the false

208. *Id.*

209. *See Proxy Adoption of Foreign Children Has Many Abuses*, *supra* note 204.

210. *See id.*

211. *Id.*

212. *History of International Adoption*, *supra* note 6.

213. *Proxy Adoptions*, ADOPTION HIST. PROJECT, *available at* http://pages.uoregon.edu/adoption/topics/proxy.htm (last visited Jan. 14, 2015).

214. Kim, *supra* note 8, at 870.

215. *Id.*

pretense that they were orphans needing the care of adoptive parents.[216] The Babylift campaign was particularly controversial because many children's documents were often forged or inaccurate.[217] Many critics defamed this program using the pejorative "Operation Babysteal."[218]

Cross-national problems resulted from the corrupt processes carried out in "Operation Babylift" because many Vietnamese parents and guardians never fully and knowingly relinquished their rights to their children.[219] For example, the U.S. Court of Appeals for the Ninth Circuit, in *Nguyen Da Yen v. Kissinger*, heard an action brought on behalf of three Vietnamese children in the U.S., who were never legally released for adoption, with living parents desiring their return in Vietnam.[220] The Court ordered an investigation of the children's records to identify and locate their natural family to facilitate repatriation with their parents.[221]

Given the historical context, it makes sense that the U.S. would tighten the grip on immigration and intercountry adoption laws and procedures. Reforms were necessary to prevent children from ending up in the hands of unfit parents. Federal legislation was changed to provide that a potential parent must personally observe the child in the sending country so that its government can assess whether the child is in good hands.[222] There is also a pertinent legal objective to avoid emigrating children illegally to the U.S., constituting child trafficking. Another policy concern raised in Vietnam's case is the lack of finite relinquishment of the birth family's custody rights. Though some children in Vietnam were orphans under the U.S.' standard, namely, they were missing one or both parents, many of the extended families in Vietnam wanted to care for these children, as their cultural norms dictated, and did not "recognize the Western concept of being an

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216. *Id.*; Buser, *supra* note 9, at 29-31.

217. *Operation Babylift*, PBS, *available at* http://www.pbs.org/itvs/preciouscargo/babylift.html (last visited Nov. 9, 2014); Allison Martin, *The Legacy of Operation Babylift*, ADOPT VIETNAM, *available at* http://www.adoptvietnam.org/adoption/babylift.htm (last visited Jan. 14, 2015).

218. Kim, *supra* note 8, at 870; *see generally* Christine Lai, *The Orphans of Vietnam*, DARTMOUTH (Nov. 19, 2013, 4:21 PM), *available at* http://www.dartmouth.edu/~hist32/History/S30%20-%20The%20Orphans%20of%20Vietnam.htm (last visited Jan. 14, 2015).

219. *Operation Babylift*, *supra* note 218.

220. Nguyen Da Yen v. Kissenger, 528 F.2d 1194, 1197 (9th Cir. 1975); Buser, *supra* note 9, at 29-31.

221. Buser, *supra* note 9, at 29-31; Nguyen Da Yen, et al. v. Kissinger, CTR. FOR CONST. RTS, *available at* https://ccrjustice.org/ourcases/past-cases/nguyen-da-yen,-et-al.-v.-kissinger (last visited Jan. 14, 2015).

222. *See* 8 U.S.C. § 1101(b)(1)(F) (1952).

orphan."[223]

Current federal legislation is more comprehensive and stringent because the U.S. cannot allow any new adoption campaign to resemble the failed campaigns in Korea and Vietnam. However, amending current legislation will not undermine public policy. This campaign will be successful if the U.S. engages in policies sensitive to Afghanistan's traditions and public policy concerns. The U.S. can avoid a host of litany, similar to the ones stemming from "Operation Babylift," even if it amends the INA and IAA to afford a religious exception. If the U.S. allows for a *kafala* scheme, severing the birth family's custody ties permanently to facilitate the intercountry adoption of Afghan children, this will ensure that the birth family cannot regain custody of the child. Additionally, the amendments would only provide legroom for a *kafala* scheme, and would not affect American intercountry adoption procedures with other countries. This means that the amendments will only apply to countries adhering to Islamic law.

IV. STATE LAWS ON CHILD CUSTODY AND CHILD ADOPTION

To carry out a successful intercountry adoption campaign with Afghanistan, American Muslims must be willing to enter into a guardianship contract including provisions requiring them to maintain the child's given name. Contractual stipulations in written child adoption agreements are generally upheld by approximately twenty-six states, even where they require specific performance.[224] These are upheld as long as the court finds they are in "the child's best interests and are designed to protect the safety of the child and the rights of all the parties to the agreement."[225] For example, in open adoption cases, the birth family may require the adopting family to: deliver birthday cards from them to the child and mail pictures of the child until the child turns eighteen.[226] The written contract between the families "can

223. Nguyen Da Yen, et al. v. Kissinger, *supra* note 222.

224. *See Open Adoption and Post-Adoption Contact Agreements*, FCA ADOPTIONS, *available at* http://www.fcadoptions.org/adoption-options/open-adoption-and-post-adoption-contact-agreements.php (last visited Nov. 10, 2014); *see generally Sample Open Adoption Agreement*, FCA ADOPTIONS, *available at* http://www.fcadoptions.org/files/Sample_Open_Adoption_Agreement.pdf (last visited Jan. 14, 2015); *Postadoption Contact Agreements Between Birth and Adoptive Families*, CHILD WELFARE (May 2011), *available at* https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf (last visited Jan. 14, 2015).

225. *Postadoption Contact Agreements Between Birth and Adoptive Families*, *supra* note 225, at 3.

226. *See id.*

clarify the type and frequency of the contact or communication and can provide a way for the agreement to be legally enforced."[227] However, the agreements are only enforceable if they are "approved by the court that has jurisdiction over the adoption."[228]

Parties can make an adoption agreement that enforces Islamic legal principles about naming and delegate disputes arising under that agreement through religious arbitration in the U.S.[229] This contract can be upheld under general contract law.[230] A majority of state courts uphold specific performance arising under open adoption contracts.[231] Thus, states can also uphold an intercountry adoption agreement between American Muslim guardians and Afghan birth families or guardians, stipulating that the child must retain his or her birth name in accordance with Islamic law. Further, since the birth name shall be agreed upon at the start of the child's life with the permanent guardian's consent, it will not repeatedly interfere with the permanent guardian's ability to raise the child.

American state laws govern a child's inheritance rights.[232] For example, Maryland's Estates and Trusts Code eliminates the adopted child's right to inherit from natural parents or their genealogical line.[233] Maryland's law is reflective of some states laws regarding this issue.[234] Maryland case law provides, child adoption does not provide a child with more rights, namely, inheritance from two separate genealogical lines, or "double inheritance."[235] However, some other states allow an adopted child to inherit from adoptive parents, natural parents and their families.[236] For example, Pennsylvania embraces a flexible approach

227. *Id.* at 2.

228. *Id.* at 4.

229. *See* discussion *infra* Part VI.

230. *Id.*

231. *See generally Postadoption Contact Agreements Between Birth and Adoptive Families*, *supra* note 225.

232. Matthew Izzi, *The Law of Inheritance*, LEGAL MATCH, *available at* http://www.legalmatch.com/law-library/article/the-law-of-inheritance.html (last visited Jan. 14, 2015).

233. *See* MD. CODE ANN., EST. & TRUSTS §1-207(a) (LexisNexis 2014); Hall v. Vallandingham, 540 A.2d 1162, 1163 (Md. 1988).

234. *See generally* Unsel v. Meier, 972 S.W.2d 466, 472 (Mo. 1998) ("To grant dual inheritance, the child adopted would be given the inheritance of a natural child and allowed an additional one. The law intended to give the child adopted the same rights and advantages of a natural child as far as possible. It was never intended to give the child of adoption more."); *see generally* JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES (8th ed. 2009).

235. *Hall*, 540 A.2d at 1164.

236. *See* DUKEMINIER, SITKOFF & LINDGREN, *supra* note 235, at 94-95.

where an adopted child may inherit from the birth family if a relationship is maintained with the birth family.[237] State laws on "double inheritance" deal with property transfers only within the U.S. Questions about the child's Islamic inheritance rights can be deferred to Afghanistan's government, since the inheritance shares afforded to the child are in Afghanistan.[238] Inheritance can be transferred to the child at the age of majority, should the child decide to claim it in Afghanistan.[239]

V. MODELS FOR REFORM

International law promotes the idea of Western legal systems respecting the Islamic *kafala* model. The Hague Convention on parental responsibility and protection of children provides if a child is placed in *kafala* care by his or her State of origin and the guardian wishes to take the child abroad, the State will first consult the latter State's central authority and provide it with a report on the child and reasons for the *kafala* placement. The latter State must consent to the placement, in light of the child's best interests before the child may be brought abroad.[240] The U.S. signed this convention but has not ratified it and Afghanistan has not signed it.[241] To ensure the success of the proposed campaign, the U.S. and Afghanistan must ratify the convention to create a working *kafala* scheme. If there is international recognition that both countries are accountable in promoting the *kafala* scheme the campaign will be more successful.

Moreover, Article 20 of the CRC recommends states to take into consideration the adopted child's religion when looking for compatible adoptive families.[242] The U.S. signed but has not ratified this convention, while Afghanistan has signed and ratified it.[243] The U.S. must ratify this convention to ensure Afghanistan's policies are respected. This will encourage Afghanistan's government to enter into an intercountry adoption treaty with the U.S., facilitating a successful

237. 20 PA. CONS. STAT. ANN. § 2108 (West 2014).

238. *See* discussion *infra* Part IV; Deschamps & Roe, *supra* note 177.

239. *See* discussion *infra* Section IV.

240. Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, art. 33(1), Oct. 19, 1996, 2204 U.N.T.S. 503.

241. *Id.*

242. U.N. DEP'T ECON. & SOC. AFFAIRS, CHILD ADOPTION: TRENDS AND POLICIES, at 45, U.N. Doc. ST/ESA/SER.A/292, U.N. Sales No. E.10.XIII.4 (2009), *available at* http://www.un.org/esa/population/publications/adoption2010/child_adoption.pdf (last visited Jan. 14, 2015).

243. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

campaign for American Muslim guardians and Afghan children. First, the treaty will outline the procedures guardians must follow in Afghanistan to effectuate guardianship transfer. Second, it will outline American procedures guardians must follow to effectuate the child's U.S. emigration. Third, it will provide that the guardians must comply with local U.S. state procedures on adoption to ensure the adopted child is placed in a safe and stable home.[244]

Western countries that encourage Muslim families to adopt children in accordance with Islamic law are the best models to examine to reform American intercountry adoption laws and facilitate the proposed adoption campaign. For example, the New South Wales province of Australia promotes a campaign encouraging Muslim individuals to adopt Muslim children.[245] Australia's common law legal system, similar to the American legal system, allows children to retain their birth family's last name and inheritance rights from their birth family by way of a will.[246] This is legally enforceable under a mutually agreed upon 'Adoption plan.'[247]

Many Muslim-majority countries, such as Jordan and Morocco, permit foreign adoption that allows the transfer of *kafala* to Muslim guardians in other Western countries on a case-by-case basis.[248] Turkey is an interesting model to examine because it allows for full legal adoptions, where biological parents can transfer guardianship permanently, while providing safeguards in its legal code, preventing the violation of Islamic law.[249] In Turkey, "[a]doption gives full inheritance rights to the child from the adoptive family. In addition, the adopted child can also inherit from the biological family. However the adoptive parents cannot inherit from the adopted child."[250] This ensures the applicability of Islamic Law, in the sphere of children's rights, preventing adoptive parents from usurping the child's inheritance

244. *See Afghanistan Country Profile*, *supra* note 160.

245. *See Adoption in NSW: Information for the Muslim Community*, NSW DEP'T COMMUNITY SERVICES (2007), *available at* http://www.community.nsw.gov.au/docswr/_assets/main/documents/adoption_muslim_broch.pdf (last visited Jan. 14, 2015).

246. *Id.* at 4.

247. *Id.*

248. *See Adoption and the Care of Orphan Children*, *supra* note 25, at 10-11 (citing FAQ: *Adoption of Children from Countries in which Islamic Shari'a Law is Observed*, US DEP'T ST., *available at* http://adoption.state.gov/adoption_process/faqs/adoption_of_children_countries_islamic_sharia_observed.php (last visited Jan. 14, 2015)).

249. *See Adoption and the Care of Orphan Children*, *supra* note 25, at 11 (citing *Adoption*, ADALET HUKUK, *available at* http://www.adalet-hukuk.com/yeni_sayfa_7.htm (last visited Jan. 14, 2015)).

250. *Id.*

shares.

The European Court of Human Rights ("ECHR"), in *Harroudj v. France*, heard a child adoption dispute illustrating how an equitable remedy can be achieved where two legal systems, France under a Western civil system and Algeria under an Islamic legal system are in conflict.[251] There, Zina Hind was born in Algeria and abandoned immediately by her biological mother; her biological father was unknown.[252] Zina became a ward of the Algerian State and the Court of Boumerdès granted a 42-year-old unmarried applicant the right to have permanent *kafala* of the child. He also authorized Zina Hind to leave Algeria and settle in France."[253] After arriving with the child in France, the applicant applied for full adoption, arguing it was in the 'best interests of the child,' invoking Article 3 § 1 of the CRC and the Hague Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption.[254]

However, the Lyons Tribunal De Grande Instance dismissed her application, noting that *kafala* gave her sufficient parental authority to make decisions in the child's best interest.[255] The court held, *kafala* gave the child all the protections she was entitled to under international conventions.[256] The court reasoned that, under Article 370-3 of the French Civil Code, a child could not be adopted if the sending country's law prohibited adoption, which Algeria did.[257] The ECHR upheld France's decision, holding the child "was already under her care and control, pursuant to the Islamic *kafalah* guardianship system," fully enabling the applicant to make decisions in the child's best interest.[258] The court provided, under the CRC "the *kafalah* model is accepted and defined as 'alternative care,' which it deemed on par with adoption."[259] The court noted, *kafala* is recognized under international law and was

251. *See* Harroudj v. France, App. No. 43631/09, para. 1 (Eur. Ct. H.R. 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113819 (last visited Jan. 14, 2015).

252. *See id.* para. 5.

253. *Id.* para. 7.

254. *Id.* para 10.

255. *Id.* para. 11.

256. *See* Harroudj v. France, App. No. 43631/09, para. 11 (Eur. Ct. H.R. 2012), *available at* http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113819 (last visited Jan. 14, 2015).

257. *See id.*

258. *Id.*

259. Faisal Kutty, *Islamic Law, Adoptions and Kafalah*, JURIST (Nov. 6, 2012, 4:40 PM), *available at* http://jurist.org/forum/2012/11/faisal-kutty-adoption-kafalah.php (last visited Jan. 14, 2015).

fully accepted in French law and States must accommodate *kafala* in its domestic law where applicable.[260] This ECHR decision promotes positive groundwork for accommodating Islamic adoptions in Western countries.[261]

European States are starting to embrace *kafala* and the U.S. can too. Spanish family law has provisions that accept *kafala*, allowing guardians to have custody of a child without "creating a relationship of filiation as would be the case with adoption, which the Koran forbids."[262] English law also provides a similar legal scheme. The Adoption and Children Act 2002 makes room for a special guardianship court order, which accommodates minority groups who wish to transfer guardianship to a permanent family but "have religious or cultural difficulties with adoption as it is set out in law."[263] The U.S., like its Western counterparts, can build in its legislation, room for a *kafala* scheme to flourish.

VI. RECOMMENDATIONS FOR A SUCCESSFUL AFGHAN ADOPTION CAMPAIGN

The INA and IAA must be amended to state that a birth parent's parental rights are not fully relinquished upon adoption if they are from countries adhering to Islamic law. The INA and IAA should provide a religious exception clause, creating wiggle room for a *kafala* scheme for "permanent guardians" adopting from Islamic countries. Currently, the USCIS, the Department of Homeland Security and the Board of Immigration Appeals have declared that guardianship status alone is "insufficient" for the purposes of immigration under the INA.[264] This is partially because there is a need to ensure that parental rights are relinquished, leaving no room for birth families to regain custody of their natural child.

However, parental rights need to be relinquished only to the extent that the child cannot be returned to the biological parent. "Permanent guardianship" status should be sufficient to facilitate immigration of adopted children from Islamic countries, because the INA and IAA

260. *Id.*

261. *Id.*

262. Andrea Büchler, *Islamic Family Law in Europe? From Dichotomies to Discourse - or: Beyond Cultural and Religious Identity in Family Law*, 8 INT. J.L. CONTEXT 196, 202 (2012).

263. *Id.*

264. Richards, *supra* note 10, at 411.

amendment would define "permanent guardians" as individuals with full and permanent custody rights to the child. This will ensure that the child's sole and primary caretakers are the "permanent guardians," to avoid repeating the failures of "Operation Babylift."[265] To successfully adopt a child and for permanent guardianship to follow suit in the Afghanistan Children's Court, the child must be accorded certain rights under Islamic Law, namely the child's ability to retain his or her lineage and naming rights.[266] This can be ensured if the adopting parents and the biological parents, enter into a contract honoring Islamic lineal and naming rights, by providing a clause that states that the child shall retain his or her birth name.[267]

The adoption agreement should also provide that if permanent guardians break a clause in the adoption contract by changing the child's birth name, the remedy to explore is private Islamic arbitration in the U.S.[268] A religious arbitration agreement between the Muslim families may "refer to a religious venue or use religious language to explain the terms of the arbitration proceedings."[269] Further, "parties must mutually agree on the arbitrator in order for the arbitration to be successful."[270] Religious arbitration is a way for parties to submit a dispute to a religious tribunal and seek enforcement of the tribunal's decision in state or federal court.[271] The Federal Arbitration Act ("FAA") only minimally regulates arbitration proceedings, stating that a court may vacate an award where there is a finding of fraud during the proceedings and/or misbehavior by one of the parties leading to the other party being prejudiced.[272]

To ensure that the settlement of a dispute arising from changing the child's birth name is settled through Islamic arbitration, the adopting family and the birth parent(s) must include a provision in the written agreement providing for this protection. The provision must provide

265. Kim, *supra* note 8, at 870.

266. Skype Interview with Judge Homa Alizoy, *supra* note 17.

267. *See generally* Richard Craswell, *Offer, Acceptance, and Efficient Reliance*, 48 STAN. L. REV. 481 (1996).

268. It is worth noting that after conducting extensive research on the Westlaw database, there was no Australian case law on disputes arising between Muslim birth families and guardians over a birth name change.

269. Amanda M. Baker, *A Higher Authority: Judicial Review of Religious Arbitration*, VERMONT L. REV. 157, 165 (2012).

270. Charles P. Trumbull, *Islamic Arbitration: A New Path for Interpreting Islamic Legal Contracts*, 59 VAND. L. REV. 609, 645 (2006).

271. *See* Baker, *supra* note 270, at 157-59.

272. *See id.* at 160, 163, 171 (an example: "The Parties agree to arbitrate all existing issues among them . . . according to the Islamic rules of law by Texas Islamic Court.").

that disputes arising from the agreement shall be settled through Islamic arbitration, ensuring that civil courts lack jurisdiction to hear issues arising from the adoption contract.[273] If the adopting family changes the child's surname, the birth family may petition the court to enforce the agreement through arbitration. The court must find that there was a "valid arbitration agreement to order the parties to arbitrate the dispute based on the terms of the agreement."[274]

However, to ensure the arbitration clause is enforced and an arbitrator's specific performance order is upheld, there needs to be an assurance to public courts that the arbitration remedy is not contrary to "public policy," which provides that the child's best interest is paramount.[275] State courts give great deference to parents when determining the child's best interests.[276] However, it is important to note that public policy in the U.S. is ever changing. Recently, leading behaviorists and psychologists have promulgated the view that "open adoption" is in the child's best interests.[277] American courts may find these experts' views persuasive in determining what is in the child's best interest, coupled with the importance of upholding private contracts, especially those involving clauses based on religion, to avoid any constitutional issues.[278] The U.S. Constitution's First Amendment provides constraints for public courts, "referred to as the 'church autonomy doctrine,' [that] has gained traction in debates over religious arbitration and dramatically limits the extent to which courts will review the decisions of religious tribunals."[279] Civil courts circumvent dealing with religious arbitration to avoid entanglement in religious affairs, since "agreement to arbitrate before a religious tribunal will often use religious language or terms that do not have clear secular analogies."[280]

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273. *See generally id.*

274. *See id.* at 160.

275. Baker, *supra* note 270, at 163; *see generally Hall*, 540 A.2d at 1162-65.

276. *See generally* Troxel v. Granville, 530 U.S. 57, 67 (2000).

277. *Research about the Impact of Openness on Adoptees*, INDEP. ADOPTION CENTER, *available at* http://www.adoptionhelp.org/open-adoption/research (last visited Jan. 14, 2015); Kutty, *supra* note 25 (manuscript at 4) (providing an acceptable definition of adoption from an Islamic perspective where "[t]he legal creation of a family relationship analogous to that of parents and child between a child and adults who are not the biological parents while not severing or negating the child's biological connection.").

278. Baker, *supra* note 270, at 197; *see generally* ARTHUR D. SOROSKY, ANNETTE BARAN & REUBEN PANNOR, THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD AN ADOPTEES, BIRTH PARENTS, AND ADOPTIVE PARENTS (1978); *see generally* Kevin Noble Maillard, *Rethinking Children as Property: The Transitive Property*, 32 CARDOZO L. REV. 225 (2010).

279. Baker, *supra* note 270, at 172.

280. *Id.* at 176.

In order to avoid a constitutional problem, namely entanglement with religion, the court could defer

> the determination of Islamic law to a mutually agreed arbitrator . . . . Furthermore, the court would not unconstitutionally endorse one school's interpretation of Islamic law over another school's interpretation. The court, in fact, would not endorse any particular view because the parties choose the arbitrator, and in effect, the school of thought.[281]

Since Afghanistan's government endorses Hanafi jurisprudence, parties can delegate a learned individual in that school of thought to be the arbitrator of a decision based on that law.[282] Thus, private Islamic arbitration can pass constitutional muster. A religious clause in a contract can only be securely upheld if the language is clear and if Islamic law specifically backs the rule, leaving no room for ambiguity.[283] If a Qur'anic verse states a rule clearly, there is little room to dispute the meaning of the rule presented in the adoption agreement.[284] The Qur'an clearly states that a child must retain his or her biological father's name; if the adoption agreement provides that this Islamic law should be enforced through Islamic arbitration, the adoption contract should be upheld.[285] If permanent guardians and birth families provide an Islamic arbitration tribunal with jurisdiction to uphold the contract, it can be upheld without violating American public policies or legal principles. If disputes between the contract parties were settled through private arbitration, applying principles of Hanafi Islamic Law, Afghanistan's legal mechanisms may ensure more openness to facilitating intercountry adoptions.

CONCLUSION

There are numerous hurdles involved in facilitating a successful campaign to provide Afghan children with safe and loving homes. First, Afghanistan's Parliament does not wish to extend guardianship criteria to Muslims in general. Further, the omitted article forbidding permanent guardians from marrying their adoptive daughters needs to be reinstated to ensure that Afghan children are placed in safe and stable homes. This legislation gives hope that more individuals will adopt

281. Trumbull, *supra* note 271, at 642-43.
282. *See id.*
283. *See id.*
284. *See id.*
285. *See id.*

because the guidelines are codified, making the procedure clearer and the process less strenuous in the future. The second hurdle involves convincing the American public and legislators to amend federal legislation on intercountry adoption laws in order to incorporate room for a *kafala* scheme from Islamic sending countries.

An even bigger obstacle is to convince the Afghan government, its people, and American Muslims that a U.S. campaign facilitating the adoption of Afghan children will not thwart Islamic legal principles and laws. If Afghan children are raised by American Muslims in accordance with Islamic values and their Islamic children's rights are upheld, the Afghan government may be persuaded to embrace this campaign. An intercountry adoption treaty between the U.S. and Afghanistan will serve well in ensuring this because it will provide that American Muslims must follow Afghanistan's laws before considering bringing the child abroad.

Just as Christian organizations promoted intercountry adoption campaigns after World War II, it is important that Muslim organizations lead the one proposed in this paper. Currently Islamic Relief USA, a 501(c)(3) tax-exempt charitable organization, is involved in providing American Muslims with the opportunity to make donations towards Afghan orphans' healthcare and education. It would be beneficial to receive this organization's endorsement for the proposed campaign, because of its well-established dedication to the care of Afghan children.[286]

Afghanistan's government has a great interest in the well-being of its people, especially its children. The importance of taking care of orphans is well established in Islamic law and the notion that the "child's best interest is paramount" is discussed extensively in Western legal matters and Islamic ones. The intercountry adoption of Afghan children is possible[287] with the utilization of these parallel public policy concerns as inspiration to make a positive change.

286. *See Afghanistan: About the Situation*, ISLAMIC RELIEF USA, *available at* http://www.irusa.org/countries/afghanistan/ (last visited Jan. 14, 2015); *see also Orphans FAQS*, ISLAMIC RELIEF USA, *available at* http://www.irusa.org/islamic-relief-usa/answers/orphans-faqs/ (last visited Jan. 14, 2015).

287. If the right to receive permanent guardianship of Afghan children extends to American Muslims generally, they must ensure that the children learn about their Afghan heritage, history and language. *See generally Transracial Parenting in Foster Care and Adoption*, IOWA FOSTER & ADOPTIVE PARENTS ASS'N, *available at* http://www.ifapa.org/pdf_docs/TransracialParenting.pdf (last visited Jan. 14, 2015).