Choice of Law in International Human Rights Fact-Finding Missions

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INTRODUCTION

> There is no agreement between the secular and the theological, or between traditional and modern perspectives, on man and the Universe. One cannot prove, or even persuade, whether a substantially free economy or substantial planning is more conducive to the good of society or the good of individual man. But there is now a working consensus that every man and woman, between birth and death, counts, and has a claim to an irreducible core of integrity and dignity. In that consensus, in the world we have and are shaping, the idea of human rights is the essential idea.[1]

Louis Henkin concludes *The Age of Rights* with the powerful statement that human rights and humanity co-constitute each other. Today, there is no human without rights, and no rights without humans to fight for them.

This idea animates international human rights work and lawyering. A quick read through human rights organizations' websites reveals that this idea motivates policy change, justice, campaigns, and leadership across the globe.[2] Such rhetoric reflects that of the Universal Declaration of Human Rights, the preamble of which begins by acknowledging that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the

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1. LOUIS HENKIN, THE AGE OF RIGHTS 193 (1990).

2. *See, e.g.*, *What We Do*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/what-we-do/ [https://perma.cc/73QK-V9W5] (last visited Apr. 26, 2021) ("Through our detailed research and determined campaigning, we help fight abuses of human rights worldwide. We bring torturers to justice. Change oppressive laws. And free people jailed just for voicing their opinion."); *About Us*, HUMAN RIGHTS WATCH, https://www.hrw.org/about/about-us [https://perma.cc/RVA9-FSHV] (last visited Apr. 26, 2021) ("We meet with governments, the United Nations, rebel groups, corporations, and others to see that policy is changed, laws are enforced, and justice is served."); *Who We Are: An Overview*, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, https://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx [https://perma.cc/59CK-72ZT] (last visited Apr. 26, 2021) ("Both the High Commissioner and the Office have a unique role to: . . . Inject a human rights perspective into all UN programmes . . . to ensure that peace and security, development, and human rights—the three pillars of the UN—are interlinked and mutually reinforced.").

foundation of freedom, justice and peace in the world."[3] Just as impassioned are the denunciations of offenses against the idea of human rights:

> [D]isregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people.[4]

Attacks on healthcare,[5] child labor,[6] arbitrary detentions and family separations[7]—violations against human rights demand immediate action.

Before addressing human rights abuses, nongovernmental organizations (NGOs) and others often begin with fact-finding.[8] International human rights fact-finding missions intend to uncover significant facts and stories that could aid in future advocacy—including legal action—and classification of human rights abuses.[9] Lawyers working on such missions can play an important role: with knowledge of municipal and international legal frameworks, they can assist researchers with the discovery and recognition of legally significant facts. Evidencing this role is the existence of several human rights clinics and organizations at United States law schools.[10]

As a practice area, international human rights fact-finding lawyering is peculiar: it incorporates principles of transnational practice and movement lawyering

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3. G.A. Res. 217 (III) A, Universal Declaration of Human Rights pmbl. (Dec. 10, 1948).

4. *Id.*

5. *See, e.g.*, *Where We Work | Syria*, PHYSICIANS FOR HUMAN RIGHTS, https://phr.org/countries/syria/ [https://perma.cc/DJ6T-AHCB] (last visited Apr. 26, 2021).

6. *See, e.g.*, *Child Labour*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/global/topics/child-labour/lang–en/index.htm [https://perma.cc/KW39-FZJ5] (last visited Apr. 26, 2021).

7. *See, e.g.*, *USA: "You Don't Have Any Rights Here,"* AMNESTY INTERNATIONAL, https://www.amnesty.org/en/latest/research/2018/10/usa-treatment-of-asylum-seekers-southern-border/ [https://perma.cc/2Q2R-FFGR] (last visited Apr. 26, 2021).

8. Human rights fact-finding is defined in the *Lund-London Guidelines* as "a mission, visit or activity mandated by an NGO to ascertain the relevant facts relating to and elucidating a situation of human rights concern, whether allegedly committed by State or non-State actors. In many instances this activity will result in a report." Raoul Wallenberg Inst. Hum. Rts. & Humanitarian L. & Int'l Bar Assoc., *Guidelines on International Human Rights Fact-Finding Visits and Reports by Non-Governmental Organisations* 2 (2015) [hereinafter *Lund-London Guidelines*]. In this Note, a slightly broader definition is adopted which excludes "mandated by an NGO."

9. *See, e.g.*, U.N. Off. High Comm'r for Hum. Rts., *Basic Principles of Human Rights Monitoring*, *in Manual on Human Rights Monitoring* 4 (2011); *Our Research Methodology*, HUMAN RIGHTS WATCH, https://www.hrw.org/our-research-methodology [https://perma.cc/W9XE-Y3DH] (last visited Apr. 26, 2021).

10. *See, e.g.*, *Human Rights Institute Fact-Finding Project*, GEORGETOWN LAW, https://www.law.georgetown.edu/human-rights-institute/our-work/fact-finding-project/ [https://perma.cc/5XS4-W4A5] (last visited Apr. 26, 2021); *International Human Rights Clinic*, STANFORD LAW SCHOOL, https://law.stanford.edu/international-human-rights-and-conflict-resolution-clinic/ [https://perma.cc/E6JE-H2FC] (last visited Apr. 26, 2021); *Lowenstein International Human Rights Law Clinic*, YALE LAW SCHOOL, https://law.yale.edu/schell/lowenstein-international-human-rights-law-clinic [https://perma.cc/3VGM-GPHW] (last visited Apr. 26, 2021). I participated in the Georgetown University Law Center's Human Rights Institute Fact-Finding Project between 2020 and 2021.

but is not always directed toward litigation. It is academic but practice oriented. It involves work with vulnerable populations but does not tend to offer those populations any tangible service. In short, international human rights fact-finding lawyering does not clearly "fit" into any one category of legal practice.

Perhaps unsurprisingly, then, international human rights fact-finding lawyering could be governed by several ethics regimes. Among these are the requirements of United States bar associations, institutional review boards (IRBs), domestic and foreign agencies, and international tribunals. Facing lawyers engaged in such conduct, consequently, is a choice of law problem.

In the *Model Rules of Professional Conduct*, Rule 8.5(b) governs choice-of-law in disciplinary matters. More specifically, Rule 8.5(b)(2) establishes a procedure for determining the applicable ethics rules to apply to conduct not "in connection with a matter pending before a tribunal."[11] This Note will demonstrate that the Rule 8.5(b)(2) framework for analyzing choice-of-law problems is unsatisfactory for international human rights fact-finding because it harms both lawyers and fact-finding subjects. This framework fails to serve the stated purpose of the *Model Rules*, which is to provide clarity on the relationship of lawyers to the legal system and society.[12] Although applying the *Model Rules* to fact-finding may stretch their intended application, this Note will show how an effective choice-of-law analysis would support the *Model Rules*' definition of the relationship between lawyers and legal systems.[13]

The Note begins with an overview of the human rights fact-finding investigation in which I participated between 2020 and 2021. Part I outlines the process of conducting such an investigation to provide a common ground for evaluating the ethical challenges in human rights fact-finding and illustrates the stakes.

The Note then reviews the ethical challenges that may arise for lawyers in the context of fact-finding investigations. Part II illustrates four issues: (1) defining the client(s) of a fact-finding lawyer; (2) obtaining informed consent; (3) determining the fact-finding lawyer's situation in the international legal and human rights systems; and (4) identifying the fact-finding lawyer's obligations to minimize risk to research subjects. These four issues are, in fact, ethical challenges because the standards for addressing them vary based on which ethics regime is applied.

Keeping these ethical challenges in mind, Part III applies Rule 8.5(b)(2) to determine which rules apply. Ultimately, Rule 8.5(b)(2) offers vague guidance and permits the fact-finding lawyer to choose the applicable rules. As described in Part IV, this outcome is unfair both to lawyers and fact-finding subjects. Rule

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11. MODEL RULES OF PROF'L CONDUCT R. 8.5(b)(1) (2018) [hereinafter MODEL RULES]. *See also* MODEL RULES R. 8.5(b)(2) (applying to "any other conduct" than that covered by Rule 8.5(b)(1)).

12. *See* MODEL RULES pmbl.

13. *See* MODEL RULES pmbl. ("Lawyers play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship to our legal system. The Rules of Professional Conduct, when properly applied, serve to define that relationship.").

8.5(b)(2) creates more uncertainty for fact-finding lawyers and ignores the real and pressing needs of frequently vulnerable fact-finding subjects. These shortcomings violate the purpose of the *Model Rules*.

Part V offers three suggestions for reform. First, the Rule 8.5(b)(2) analysis should balance the needs of fact-finding subjects with the interests of various jurisdictions. Second, bar associations, NGOs, and governments should draft and sign international agreements to hold lawyers accountable to basic ethical standards. Third, there should be a transnational body charged with the regulation of international human rights fact-finding missions.

I. HUMAN RIGHTS FACT-FINDING WITH THE HUMAN RIGHTS INSTITUTE OF THE GEORGETOWN UNIVERSITY LAW CENTER

Between 2020 and 2021, I participated in a human rights fact-finding investigation as a law student with Georgetown University's Human Rights Institute. The investigation, completed as part of a practicum, evaluated whether there was any connection between deprivations of healthcare access and displacement during the Syrian conflict. Because the analysis beginning in Part II is best understood through practical examples, this Note begins by outlining the major steps in the conduct of a fact-finding investigation. This part will begin by providing a brief overview of the human rights situation in Syria and will then continue to discuss (1) the "delegation" completing the investigation; (2) the investigation's "terms of reference;" (3) pre-mission preparations; (4) the mission, itself; (5) the verification of data; (6) the process of applying law to the facts; and (7) the preparation, publication, and dissemination of a report.

A. HEALTHCARE AND DISPLACEMENT IN SYRIA: A SITUATION OF HUMAN RIGHTS CONCERN

Human rights fact-finding is concerned with situations of potential human rights violations.[14] The situation in Syria is one such context, as has been made clear by numerous reports by NGOs.[15] The history of the Syrian conflict is beyond the scope of this Note;[16] what is relevant, however, is the simultaneous occurrence of two potential categories of human rights violations: regime interferences with healthcare systems and displacement of civilians.

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14. *See, e.g.*, *Lund-London Guidelines*, *supra* note 8, at 2.

15. *E.g.*, Syrian Network for Hum. Rts., *Tenth Annual Report: The Most Notable Human Rights Violations in Syria in 2020: The Bleeding Decade* (2021), https://sn4hr.org/blog/2021/01/26/55886/ [https://perma.cc/4NQU-F2QR]; Amnesty Int'l, *"Nowhere is Safe for Us": Unlawful Attacks and Mass Displacement in North-West Syria*, AI Index MDE 24/2089/2020 (2020), https://perma.cc/5X8E-69A3; Hum. Rts. Watch, *Rigging the System: Government Policies Co-Opt Aid and Reconstruction Funding in Syria* (2019), https://www.hrw.org/sites/default/files/report_pdf/syria0619_web4.pdf [https://perma.cc/88XJ-BAZQ].

16. For a useful history, however, see Mona Yacoubian, *Syria Timeline: Since the Uprising Against Assad*, U.S. INST. PEACE (Sept. 18, 2020), https://www.usip.org/syria-timeline-uprising-against-assad [https://perma.cc/GA46-VJ26].

The Syrian regime has disrupted civilians' access to healthcare since the start of the conflict.[17] According to Physicians for Human Rights, the Syrian regime, together with Russian forces, has committed 537 attacks against medical facilities since the start of the conflict in 2011.[18] "These attacks have effectively transformed medical facilities into deadly spaces, both for medical professionals and their patients, and left the Syrian medical sector in tatters."[19] These attacks, however, extend beyond airstrikes or even chemical weapons attacks to killing and torture of medical professionals[20] and disruption of humanitarian aid delivery.[21] These acts, among others, may constitute violations of the right to the highest attainable standard of health.[22]

The Syrian conflict has also provoked displacement. There are over 5.5 million refugees from Syria *residing just in the surrounding countries*.[23] If that displacement is forced, it may violate Syrians' rights under international criminal[24] or humanitarian law.[25]

Aware of potential human rights violations in Syria, the Human Rights Institute decided to focus the 2020–21 fact-finding investigation on access to healthcare and displacement in the context of the Syrian conflict.

B. A DELEGATION OF LAWYERS AND LAW STUDENTS

Conducting this investigation would be a delegation of eight: two lawyers and six law students. Every year, the Human Rights Institute at Georgetown Law

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17. This fact has been documented extensively by NGOs like Physicians for Human Rights, which maintains a map of physical attacks against healthcare infrastructure. *Illegal Attacks on Health Care in Syria*, PHYSICIANS FOR HUM. RTS., http://syriamap.phr.org/ [https://perma.cc/TVU5-DMRZ] (last visited Apr. 26, 2021).

18. *See* Illegal Attacks on Health Care in Syria, PHYSICIANS FOR HUM. RTS., http://syriamap.phr.org/ [https://perma.cc/TVU5-DMRZ] (last visited Apr. 26, 2021). *See also* Physicians for Hum. Rts., *The Destruction of Hospitals—A Strategic Component in Regime Military Offensives* (2019), http://syriamap.phr.org/#/en/case-studies/5 [https://perma.cc/9VQQ-9G2F].

19. Physicians for Hum. Rts., *At Syria's Cave Hospital, Conducting Surgery Under Bombardment and Siege* (2020), http://syriamap.phr.org/#/en/case-studies/8 [https://perma.cc/MC7G-6BZV].

20. *See, e.g.*, Syrian Network for Hum. Rts., *supra* note 15, at 76–77.

21. *See, e.g.*, Hum. Rts. Watch, *supra* note 15, at 22.

22. The right to the highest attainable standard of health is guaranteed in the International Covenant on Economic, Social, and Cultural Rights art. 12, Dec. 16, 1966, 993 U.N.T.S. 3. The Committee on Economic, Social, and Cultural Rights has explained that states are obligated to respect, protect, and fulfill that right. *See* Comm. on Econ., Soc. & Cultural Rts., General Comment No. 14: The Right to the Highest Attainable Standard of Health (article 12 of the International Covenant on Economic, Social and Cultural Rights) ¶ 33, U.N. Doc. E/C.12/2000/4 (2000). "The obligation to *respect* requires States to refrain from interfering directly or indirectly with the enjoyment of the right to health." *Id.*

23. *See Syria Regional Refugee Response*, UNITED NATIONS HIGH COMM'R FOR REFUGEES, https://data.unhcr.org/en/situations/syria [https://perma.cc/55BJ-ZL5A] (last visited Apr. 26, 2021).

24. *See* Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 3.

25. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts art. 17, June 8, 1977, 1125 U.N.T.S. 609.

conducts a fact-finding investigation into a different topic.[26] The two lawyers involved are the Dash-Muse Teaching Fellow and an Adjunct Professor at the law school.[27] Student participants are selected through an application process during the previous year.[28]

Typically, the team will travel domestically or internationally to complete the investigation during one week in January.[29] Because of the coronavirus pandemic, however, the 2020–21 team conducted the investigation entirely "virtually" using video conferencing software to meet weekly as a group as well as to interview participants.

C. DEFINING TERMS OF REFERENCE

The *Lund-London Guidelines* require that the fact-finding organization determine terms of reference before the mission:

> 5. The terms of reference must be determined prior to the mission. While these may vary depending on the type of mission to be undertaken, they should relate to the specific situations under investigation bearing in mind the NGO's mandate and the objectives of the mission. They should not relate merely to methodology.
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> 6. The terms of reference must not reflect any predetermined conclusions about the situation under investigation.
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> 7. The terms of reference should be clear, concise and relevant. However, they should be sufficiently flexible to permit the investigation of and reporting on any other related relevant circumstances.[30]

For international NGOs or international governmental entities (like organs of the United Nations), written terms of reference are important to induce state participation, introduce the mission to involved governments, and aid in resolving disputes about the scope of the mission's activities.[31]

For the Human Rights Institute's fact-finding project, deciding these terms constituted part of the practicum's pedagogical goals. Though the group never produced a single written document laying out the terms of reference, the situation under investigation, mission objective, and methodology evolved and were frequently discussed during the months leading up to the mission. The final understanding of the terms of reference were:

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26. *See generally Human Rights Institute Fact-Finding Project*, GEORGETOWN LAW, https://www.law.georgetown.edu/human-rights-institute/our-work/fact-finding-project/ [https://perma.cc/PJ5S-DGWH] (last visited Apr. 26, 2021).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Lund-London Guidelines*, *supra* note 8, at 2.

31. *See* David Weissbrodt & James McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1, 44 (1981).

(1) The mission would investigate the following factual patterns:

(a) The extent to which the Syrian regime had weaponized healthcare during the conflict; (b) The extent to which weaponization of healthcare caused a widespread lack of access to healthcare; and (c) Whether lack of access to healthcare during the conflict contributed to displacement.

(2) The mission's objective would be to determine whether international human rights, humanitarian, and criminal law may be applied to hold the Syrian regime accountable for the acts described in term (1).

(3) The mission would use semi-structured interviewing of the following groups to collect data on the factual patterns described in term (1):

(a) Syrian medical professionals who practiced during the conflict; (b) Syrian civilians who left Syria during the conflict; and (c) Representatives of international and Syrian NGOs.

D. PRE-MISSION PREPARATIONS

In the months leading up to the mission, the group had several tasks to complete: (1) background contextual and legal research, including consultations with subject-matter experts; (2) institutional review board (IRB) approval; (3) interview outreach and scheduling; and (4) interview preparation.[32] Of these, IRB approval and interview outreach and scheduling are the most relevant here, as they directly engage with the ethics of human rights fact-finding.

Georgetown University's IRB requires review of research with human subjects, meaning "living individual[s] about whom an investigator . . . [obtains] information . . . through intervention or interaction with the individual[s] and uses, studies, or analyzes the information."[33] Conducting interviews satisfied this standard, meaning that IRB review and approval was necessary. First, all members of the group were required to complete an online ethics training.[34] Then, the group was required to prepare and submit a research protocol including the mission's objectives, methodology, plan for data management, informed consent process and script, and other information indicating steps to protect interviewees' anonymity, privacy, and confidentiality.[35] After several rounds of review and revision, the protocol was approved.

The group also began reaching out to organizations and potential interviewees. This outreach was the first contact with the fact-finding mission's subjects.

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32. Had the mission been to conduct interviews in-person, further pre-mission preparations would have been necessary, including risk assessment and travel logistics.

33. 45 C.F.R. § 46.102(e)(1) (2020). *See also* INST. REV. BD., POLICIES & PROCEDURES MANUAL 3–4, 5 (2020), https://ora.georgetown.edu/policiesmanual/ [https://perma.cc/7GTF-CSTS].

34. *See* INST. REV. BD., INVESTIGATOR MANUAL 3–4 (2018).

35. *See* INST. REV. BD., TEMPLATE PROTOCOL, HRP-503 (2018). *See also* INST. REV. BD., INFORMED CONSENT FORM TEMPLATE, HRP-502 (2020).

Typically, a group member would email or call a representative from an NGO working with Syrians and arrange a virtual meeting to discuss the project. Then, if the organization were willing, it would help identify potential interviewees. Once interviews began, the outreach continued—as a standard conclusion to the interviews, the group would ask if the interviewee knew of anyone else who might be interested in participating. Given that the mission was entirely virtual, interviewees were not limited by geographic region (or time zone).

E. MISSION

With the preparations complete, the mission began in January 2021. The process of conducting an interview involved five responsibilities, divided among two or three people: (1) beginning with the informed consent process;[36] (2) interpreting interviews with Arabic speakers; (3) monitoring for distress or harm; (4) leading the interview; and (5) taking notes. Each interview involved at least two members of the group: one leading the interview and the other primarily taking notes. For interviews with Arabic speakers, the group worked with an interpreter to help connect with the interviewees and provide consecutive translation of questions and answers. All interviews were conducted using encrypted software like Zoom or WhatsApp, and all group members were trained in trauma-informed interviewing.[37]

After completing an interview, two tasks were immediately required: (1) transfer of the interview notes to a secure file-storage and sharing system; and (2) finalizing the interview notes. The notetaker would upload a copy of the notes to a folder on Box, a file-storage and sharing system used by Georgetown University. That folder was accessible by members of the group and Human Rights Institute. At that time, the notetaker would delete or destroy any other files or handwritten notes. After the notes were uploaded, the lead interviewer would review them for accuracy. This process was repeated for every person interviewed.

F. FACT VERIFICATION AND LEGAL ANALYSIS

After interviews had concluded, the team began to review the interview notes for three purposes: (1) preparing initial findings; (2) verifying facts found; and (3) identifying gaps in the information gathered. These findings reflected the patterns in terms of reference, discussion *supra* Part I.C., but also provided greater nuance. For example, in finding that weaponization of healthcare contributed to widespread lack of access to healthcare, the group was able to illustrate specific circumstances in which healthcare was not available (*i.e.*, for chronic health conditions). The group also began to verify specific facts from the interview notes by

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36. *See* discussion *infra* Part II.B.

37. For a discussion of trauma-informed interviewing, see U.N. Off. High Comm'r for Hum. Rts., *Trauma and Self-Care*, *in Manual on Human Rights Monitoring* 4–19 (2011).

consulting databases of attacks on medical facilities,[38] prior fact-finding reports, and periodicals. Finally, the group evaluated the facts for any gaps: for example, did an interviewee suggest a certain procedure for authorizing surgeries that was not fully described in the interview notes? In the case of gaps, the group would review secondary sources and other interview notes to attempt to verify and develop the fact.

Simultaneous with the preparation of factual findings, the group began to make conclusions as to the applicability of international human rights, humanitarian, and criminal law.

G. REPORT WRITING, PUBLICATION, AND DISSEMINATION

The final steps were to write, publish, and disseminate the fact-finding report. The group presented its findings on April 5, 2021 at the annual Samuel Dash Conference on Human Rights.[39] By late spring, the group published its report after working with a designer to prepare the document's layout. The report can be accessed on the Human Rights Institute's website.[40] This publication concluded the international human rights fact-finding project.

II. ETHICAL CHALLENGES FACING LAWYERS ON INTERNATIONAL HUMAN RIGHTS FACT-FINDING MISSIONS

As the previous discussion illustrates, the process of international human rights fact-finding is involved and includes contact with the subjects of the investigation only for a relatively short period. That contact, however, may be subject to several ethical challenges. Lawyers working on fact-finding missions must consider (1) who their clients are; (2) what requirements for informed consent they face; (3) what role they occupy within international legal and human rights systems; and (4) what obligations they have to minimize risk. In addressing each of these issues, lawyers must navigate a number of laws and ethical codes.

A. WHO IS THE CLIENT?

For the lawyer engaged in international human rights fact-finding missions, even the basic question of defining who the client is may be prone to ethical

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38. *E.g.*, *Illegal Attacks on Health Care in Syria*, PHYSICIANS FOR HUM. RTS., http://syriamap.phr.org/ [https://perma.cc/ER74-PL3E] (last visited Apr. 26, 2021).

39. *See Justice and Accountability for Atrocity Crimes*, HUM. RTS. INST., https://www.law.georgetown.edu/human-rights-institute/events/samuel-dash-conference-on-human-rights/justice-and-accountability-for-atrocity-crimes/ [https://perma.cc/YQ6C-WRZ8] (last visited Apr. 26, 2021); Georgetown Law Human Rights Institute, *2021 Samuel Dash Conference on Human Rights - Attacks on Health & Forced Displacement in Syria*, YOUTUBE (Apr. 15, 2021), https://www.youtube.com/watch?v=RmPtq0ZelNY [https://perma.cc/M42F-BBWZ].

40. *Human Rights Institute Fact-Finding Project*, GEORGETOWN LAW, https://www.law.georgetown.edu/human-rights-institute/our-work/fact-finding-project/ [https://perma.cc/PJ5S-DGWH] (last visited Apr. 26, 2021).

challenges.[41] As Morial Shah asks in a recent article, "Do international human rights activists and lawyers serve a client, the victims, or the cause more generally? Or do they serve a client who represents the cause and the victims?"[42] Rephrased, is the fact-finding lawyer's client a subset of the mission's subjects, all victims of a particular human rights violation, all victims of human rights violations writ large, or the organization carrying out the mission? The growth of the class of potential clients has paralleled the growing breadth of human rights lawyers' work—now ranging from traditional poverty lawyering to state accountability—and places of work—now including offices of public defenders, governments, NGOs, and law school clinics.[43]

Whether a person is a client is important: the *Model Rules* enumerate various duties owed by the lawyer to current, prospective, and former clients.[44] If someone is a current client, they are owed competent[45] and diligent[46] representation, in addition to confidentiality[47] and other duties specified in the *Model Rules*. For prospective and former clients, lawyers must fulfil limited duties of confidentiality[48] and loyalty.[49] This means, for the fact-finding lawyer, that the formation of any stage of the client-lawyer relationship could have consequences. Imagine if, while conducting interviews, the Human Rights Institute research team managed to establish an accidental current client-lawyer relationship with one of the participants. Rule 1.6(a) could theoretically prohibit the unauthorized disclosure of information without the participant's informed consent,[50] potentially making the process of preparing a report unethical. Even if participants do not become current clients, what if they become prospective clients? Then, the lawyer could be prohibited from using or revealing information learned during the interviews in a report.[51]

The *Model Rules* provide some guidance on the question of whether an entity with which the fact-finding lawyer works might be a client: organizations and specific subjects with whom the lawyer works may be clients, though broader

41. *See* Dina Francesca Haynes, *Client-Centered Human Rights Advocacy*, 13 CLINICAL L. REV. 379, 395–96 (2006); Morial Shah, *Ethical Standards for International Human Rights Lawyers*, 32 GEO. J. LEGAL ETHICS 213, 227–30 (2019).

42. Shah, *supra* note 41, at 227.

43. *See, e.g.*, Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT'L L. 505, 513 (2003).

44. *See* MODEL RULES R. 1.9 (describing duties to former clients); MODEL RULES R. 1.18 (describing duties to prospective clients).

45. MODEL RULES R. 1.1.

46. MODEL RULES R. 1.3.

47. MODEL RULES R. 1.6.

48. MODEL RULES R. 1.18(b); MODEL RULES R. 1.9(c).

49. MODEL RULES R. 1.18(c); MODEL RULES R. 1.9(a)–(b).

50. MODEL RULES R. 1.6(a).

51. *See* MODEL RULES R. 1.18(b).

classes of victims are probably not clients.[52] Subjects and organizations with whom a fact-finding lawyer works, within the framework of the *Model Rules*, may be (1) prospective, (2) current, or (3) former clients.[53]

Subjects of a fact-finding mission with whom the lawyer works directly may be considered prospective clients if they discuss forming a client-lawyer relationship with the fact-finding lawyer.[54] If so, then the lawyer owes them a duty of confidentiality.[55] If this discussion does not occur, however, the subjects of the fact-finding mission may not be prospective clients under the *Model Rules*. Notably, a larger class of victims—whether of the specific abuse investigated or of human rights abuses, more generally—cannot be potential clients under the *Model Rules* because they lack the ability to discuss representation with the lawyer.[56]

The organization with which a lawyer works on a fact-finding mission and the specific subjects with whom the lawyer interacts may be current clients. Current clients are those entities which seek, receive, and rely on legal advice from the lawyer.[57] The classic case in which an inadvertent client-lawyer relationship was established is *Togstad v. Vesely, Otto, Miller & Keefe*.[58] In *Togstad*, the Minnesota Supreme Court found that a person's consultation with a lawyer for legal advice, combined with the lawyers' statement that there "wasn't a case" and reliance on that advice, established a current client-lawyer relationship.[59] In the context of human rights fact-finding, both the organization and specific subjects with whom the lawyer works may become current clients under this rule because both could seek, receive, and rely on the lawyer's legal advice. To avoid inadvertent client-lawyer relationships, fact-finding lawyers may be trained to clearly specify the relationship by discussing the lack of any legal benefits or representation during the informed consent process.[60] Although the lawyer would certainly evaluate legal matters surrounding other victims not interviewed, evaluation alone is not sufficient to make them current clients.[61]

If the lawyer had established a client-lawyer relationship with either the organization or the mission's subjects, then either type of entity might become a former client. The ethical rules here, however, are again unclear. The *Model Rules*

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52. *See, e.g.*, MODEL RULES pmbl. (discussing the relationship between lawyers and clients); MODEL RULES R. 1.3 cmt. 4 (discussing the termination of the client-lawyer relationship); MODEL RULES R. 1.18(a) (defining "prospective client").

53. *See* MODEL RULES pmbl.; MODEL RULES R. 1.3 cmt. 4; MODEL RULES R. 1.18(a).

54. *See* MODEL RULES R. 1.18(a).

55. *See* MODEL RULES R. 1.18(b). *See also* MODEL RULES R. 1.9.

56. *See* MODEL RULES R. 1.18(a).

57. *See* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980).

58. *Id.*

59. *Id. See also* MODEL RULES R. 2.3 cmt. 2 (suggesting that the mere fact of a lawyer's evaluation of a legal matter does not, itself, establish a client-lawyer relationship).

60. *See* INST. REV. BD., INFORMED CONSENT FORM TEMPLATE, HRP-502 2 (2020).

61. *See* MODEL RULES R. 2.3 cmt. 2.

suggest a client-lawyer relationship is terminated at the end of the lawyer's employment or after the lawyer "carr[ies] through to conclusion all matters undertaken for a client."[62] When, however, is the matter of finding facts about a human rights abuse concluded? Because there is likely no retainer between the lawyer and fact-finding subjects, the conclusion of the matter would seem to be the publication of the fact-finding report. If the relationship is deemed to be concluded, however, deciding "whether the lawyer was so involved in the matter that the subsequent representation [of a new client] can be justly regarded as a changing of sides in the matter in question" with respect to the representation of the former client may remain a difficult task.[63] Therefore, deciding whether current clients have become former clients of the human rights fact-finding lawyer is, itself, a difficult inquiry.

Although organizations and certain subjects of fact-finding missions may be clients under the framework proposed by the *Model Rules*, the fact-finding lawyer will almost certainly face competing understandings of clientship. The American Medical Association's Code of Medical Ethics, for example, mandates that medical researchers conducting international research consider the impact of research on participating communities.[64] That code suggests, then, that the fact-finding lawyer may owe duties to other victims of human rights abuses or the communities of those interviewed. Though the extent of those duties seems less than those owed a client under the *Model Rules*, minding the impact of research on communities is not insignificant. Relatedly, the World Association of Non-Governmental Organizations (WANGO) suggests that NGOs conduct activities "for the sake of others, whether for the public at large or a particular segment of the public."[65] Depending on the organization with which a fact-finding lawyer works, the lawyer may be faced with varying responsibilities to what the *Model Rules* might consider third parties. The question of who the client is, consequently, remains complicated.

B. WHAT ARE THE REQUIREMENTS OF INFORMED CONSENT?

Informed consent is integral both to research conducted with human subjects[66] and, in many cases, the work of human rights organizations.[67] Even if fact-finding subjects are not clients, discussing traumatic experiences and sharing personal stories of human rights abuses should be done only with the free consent of all

62. MODEL RULES R. 1.3 cmt. 4.

63. MODEL RULES R. 1.9 cmt. 2.

64. AM. MED. ASSOC., *Opinions on Research & Innovation*, *in* CODE OF MEDICAL ETHICS § 7.3.3, https://www.ama-assn.org/system/files/2019-01/code-of-medical-ethics-chapter-7.pdf [https://perma.cc/9R9G-X8F5] (last visited Apr. 26, 2021).

65. World Assoc. of Non-Governmental Orgs., *Code of Ethics and Conduct for NGOs* 8 (2004).

66. *See, e.g.*, 45 C.F.R. § 46.116(a)(1) (2020) (generally requiring informed consent "[b]efore involving a human subject in research").

67. *See, e.g.*, U.N. Off. High Comm'r for Hum. Rts., *Interviewing*, *in Manual on Human Rights Monitoring* 15–16 (2011).

parties. Ensuring that all parties understand the scope of the relationship, too, can avoid the unanticipated creation of a client-lawyer relationship.[68]

For researchers conducting an investigation with human subjects reviewed by an IRB, informed consent is required in most circumstances.[69] This consent must include, at a minimum:

> (1) "A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental;"
>
> (2) "A description of any reasonably foreseeable risks or discomforts to the subject;"
>
> (3) "A description of any benefits to the subject or to others that may reasonably be expected from the research;"
>
> (4) "A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;"
>
> (5) "A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;"
>
> (6) "For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;"
>
> (7) "An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject;"
>
> (8) "A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled; and"
>
> (9) If the "research . . . involves the collection of identifiable private information or identifiable biospecimens," a statement regarding treatment of the information or biospecimens.[70]

Human rights organizations not subject to IRB approval (including human rights clinics in the United States[71]) may still require informed consent. Both the

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68. *See* discussion *supra* Part II.A. In the Human Rights Institute investigation, for example, beginning with a brief informed consent process was necessary to show that the research team had procedures for protecting confidentiality and that the interview participants could stop at any time, for any reason.

69. *See* 45 C.F.R. § 46.116(a)(1) (2020).

70. *Id.* §§ 46.116(b)(1)–(9). *Cf.* AM. MED. ASSOC., *supra* note 64, at § 7.1.2 (describing similar requirements for informed consent in medical investigations).

71. *See* Nell Moley, Confronting the Challenges of Ethical Accountability in International Human Rights Lawyering, 50 STAN. J. INT'L L. 359, 373–74 (2014).

United Nations' *Manual for Human Rights Monitoring*[72] and Human Rights Watch's research methodology[73] include provisions requiring informed consent from the subjects of human rights fact-finding missions.[74] Each organization also requires the researchers to independently monitor risks—including psychological and emotional risks—to the fact-finding subjects, requiring termination of an interaction if that risk becomes too great.[75] These standards, however, have been critiqued as vague in practice.[76]

Similarly vague are the *Model Rules*' requirements for informed consent,[77] even though the client's consent is definitely required to share information relating to that client's representation,[78] as would likely occur in the process of a human rights fact-finding mission. "Informed consent" is defined as "the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct."[79] Such consent may be required to be "confirmed in writing;" however, the content of that writing is unclear.[80]

Within an international fact-finding context, then, the human rights lawyer must navigate between potentially inconsistent or vague informed consent regimes. If the lawyer works with an NGO or law school clinic facing IRB review or a clear internal ethics code, what are the lawyer's responsibilities in obtaining informed consent?

C. WHAT IS THE LAWYER'S ROLE WITHIN INTERNATIONAL LEGAL AND HUMAN RIGHTS SYSTEMS?

Although the *Model Rules*' characterization of the lawyer as "a representative of clients, an officer of the legal system and a public citizen" seems simple

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72. U.N. Off. High Comm'r for Hum. Rts., *supra* note 67, at 15–16.

73. *Our Research Methodology*, HUMAN RIGHTS WATCH, https://www.hrw.org/our-research-methodology [https://perma.cc/KY5R-ZZ8D] (last visited Apr. 26, 2021).

74. *But see* World Assoc. of Non-Governmental Orgs., *supra* note 65 (*not* requiring that NGOs acquire informed consent from the populations with whom they work).

75. *See* U.N. Off. High Comm'r for Hum. Rts., *supra* note 67, at 17; Hum. Rts. Watch, *supra* note 73 ("If the researcher feels that a witness or victim is not emotionally ready to be interviewed, the interview will be cancelled or rescheduled.").

76. *See*, Moley, *supra* note 71, at 377–78.

77. *See* Laura Notess, Note, *Preserving the Human in Human Rights: Incorporating Informed Consent into the Work of International Human Rights NGOs*, 27 GEO. J. LEGAL ETHICS 765, 775–76 (2014).

78. MODEL RULES R. 1.6(a).

79. MODEL RULES R. 1.0(e).

80. Model Rule 1.0(b) focuses more on the confirmation of informed consent, rather than on the form of the writing:

> "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

MODEL RULES R. 1.0(b).

enough—indeed, these roles should "usually [be] harmonious"[81]—the role of a lawyer within international legal and human rights systems is much more complex. Beyond the previously discussed ethical quagmire associated with the definition of a client in human rights fact-finding missions, the international fact-finding lawyer occupies at least two complicated roles: (1) as a provider of law-related services in non-United States jurisdictions, and (2) as a representative of the international human rights apparatus.

As a provider of law-related services in non-United States jurisdictions, the fact-finding lawyer must navigate competing understandings of what obligations are owed by a lawyer providing law-related services. The *Model Rules* seem clear: law-related services means "services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer."[82] A lawyer providing law-related services becomes subject to the *Model Rules* when the lawyer seems to be providing legal services to a client[83] or when an entity controlled by the lawyer fails to warn that the services do not establish a client-lawyer relationship.[84] For a fact-finding mission, therefore, the lawyer might reasonably argue that the *Model Rules* do not apply because the lawyer was only providing law-related services.[85]

The analysis, however, is not always this clear. In many cases, lawyers may be seen as particularly able to provide assistance;[86] arguing in good faith that the fact-finding lawyer is *not* providing legal services to clients, at least from the perspective of the subjects of fact-finding missions, may be more difficult. Regardless, lawyers working in foreign contexts may face different ethical responsibilities, forcing them to modify "American-style legal and business practices."[87] Internationally, as well, lawyers working with NGOs may help advise entities like the United Nation's Economic, Social, and Cultural Council (ECOSOC), as permitted by the Charter of the United Nations.[88] In providing

81. MODEL RULES pmbl.

82. MODEL RULES R. 5.7(b).

83. MODEL RULES R. 5.7(a)(1).

84. MODEL RULES R. 5.7(a)(2).

85. This argument would, however, still invite questions about what sort of informed consent is required and what duties the lawyer might owe fact-finding subjects to mitigate risk.

86. *See* Moley, *supra* note 71, at 364.

87. Lauren R. Frank, Note, *Ethical Responsibilities and the International Lawyer: Mind the Gaps*, 2000 UNIV. ILL. L. REV. 957, 964 (2000). *See also id.* at 967 (discussing the potential differences between common-law and civil-law domestic legal systems); Melissa E. Crow, *From Dyad to Triad: Reconceptualizing the Lawyer-Client Relationship for Litigation in Regional Human Rights Commission*, 26 MICH. J. INT'L L. 1097, 1128 (2005).

88. U.N. Charter art. 71. *See also* Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 BUFF. HUM. RTS. L. REV. 261, 278 (2004) (arguing that, under the Charter, human rights NGOs can provide expert information to ECOSOC, which in turn provides human rights NGOs with a platform).

law-related services, then, the fact-finding lawyer may occupy roles beyond those contemplated by the *Model Rules*.

As a representative of the international human rights apparatus, the fact-finding lawyer bears the risk of perpetuating imperialist or colonialist relationships. Early human rights fact-finding, like early anthropology, was typically propagandistic, frequently reinforcing stereotypes about "non-Western" peoples or military opponents.[89] Today, fact-finding still faces critiques for imperialist or colonialist tendencies,[90] as well as for dehumanizing victims through "disaster pornography."[91] Coupled with the frequently unstable legal systems in which human rights fact-finding is conducted, this troubled history and present can unsurprisingly generate suspicion of international lawyers and others waving the banner of universal human rights.[92]

The role occupied by a fact-finding lawyer, as such, is itself fraught with ethical dilemmas.

D. WHAT OBLIGATIONS DOES THE LAWYER HAVE TO MITIGATE RISK?

The final ethical challenge to be discussed here concerns the lawyer's obligations to mitigate risk to fact-finding subjects. Specifically, the lawyer faces two ethical regimes: the *Model Rules* and the humanitarian principle of "do no harm." Within the scope of representation, the *Model Rules* require lawyers not to disadvantage a client by breaching the duty of confidentiality unless necessary to prevent reasonably certain death or substantial harm.[93] This requirement applies to former clients as well.[94] Notably, however, these portions from the *Model Rules* apply only within the scope of representation. Although the lawyer does owe some duties to third parties, these duties are limited by what information is held because of the lawyer's representation of another client[95] and do not include protection of confidential information.[96]

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89. *See* Geoffrey Robertson, *Human Rights Fact Finding: Some Legal and Ethical Dilemmas*, HUM. RTS. INST. 5–6 (May 2010).

90. *See* Haynes, *supra* note 41, at 385; Notess, *supra* note 77, at 773. Such critiques are shared by other fields that involve outsiders entering a different context and drawing conclusions on what is "wrong" or "needed," including humanitarianism and anthropology. *See generally, e.g.*, Diane Lewis, *Anthropology and Colonialism*, 14 CURRENT ANTHROPOLOGY 581 (1973); Peter Redfield, *Sacrifice, Triage, and Global Humanitarianism*, *in* HUMANITARIANISM IN QUESTION: POLITICS, POWER ETHICS (Michael Barnett & Thomas G. Weiss, eds. 2008). Like human rights fact-finding lawyers, practitioners in these fields risk overemphasizing and concretizing differences between the Global North (*i.e.*, human rights-respecting powers) and the Global South (*i.e.*, human rights abusers). *See* Lewis, at 585.

91. *See, e.g.*, Wafula Okumu, *Humanitarian International NGOs and African Conflicts*, 10 INT'L PEACEKEEPING 120, 133 (2003); Shah, *supra* note 41, at 230.

92. *See* Hurwitz, *supra* note 43, at 519; Shannon M. Roesler, *The Ethics of Global Justice Lawyering*, 13 YALE HUM. RTS. & DEV. L.J. 185, 213 (2010).

93. MODEL RULES R. 1.6(b); MODEL RULES R. 1.9(c)(1).

94. MODEL RULES R. 1.9(c)(1).

95. *See* MODEL RULES R. 1.6(b).

96. *See* MODEL RULES R. 4.1–4.4.

The humanitarian principle of "do no harm" imposes a greater obligation, requiring fact-finders to minimize "potentially harmful social and economic impacts of assistance."[97] This principle, however, ranges from the International Federation of Red Cross and Red Crescent Societies' mandate to minimize *any* potentially harmful impacts[98] to IRBs' requirement that "[r]isks to subjects [be] reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result."[99] Although the latter requirement is less rigorous, it still applies more broadly than the *Model Rules*, extending to all research subjects, regardless of whether they are clients. The former requirement goes farther, potentially extending to parties in the community completely beyond the ambit of the *Model Rules*.[100]

III. RULE 8.5(B)(2) AND CHOICE OF LAW

In navigating the various ethical challenges, fact-finding lawyers must consider what ethical rules apply. Applying Model Rule 8.5(b)(2) broadly, the fact-finding lawyer is most likely to be subject to the ethical rules of the jurisdictions in which the fact-finding mission is conducted or in which the lawyer works daily. Model Rule 8.5(b)(2) provides a three-part inquiry to address choice-of-law questions: (1) for conduct not in connection with a matter pending before a tribunal, (2) the law of the jurisdiction in which the conduct occurred or the jurisdiction experiencing the predominant effect of the conduct applies (3) unless international law or agreements say otherwise.[101]

A. CONDUCT NOT IN CONNECTION WITH A MATTER PENDING BEFORE A TRIBUNAL

Rule 8.5(b)(2) applies to virtually all human rights fact-finding. It covers any conduct not in connection with a matter pending before a tribunal.[102] This includes conduct "in anticipation of a proceeding not yet pending before a tribunal."[103] In a 2008 opinion, the Philadelphia Bar Association's Professional Guidance Committee found that the formation of a client-lawyer relationship with individuals who were witnesses in a suit against defendant "H" for the purpose of starting a new action against H was conduct covered by Rule 8.5(b)(2).[104] Such conduct, though certainly related to a matter in progress (serving as witnesses in an existing action against H), was in connection with a new proceeding

97. Int'l Fed'n Red Cross & Red Crescent Soc'ys, Principles and Rules for Red Cross and Red Crescent Humanitarian Assistance 13 (2013).

98. *Id. See also* U.N. Off. High Comm'r for Hum. Rts., *Protection of Victims, Witnesses, and Other Cooperating Persons*, *in Manual on Human Rights Monitoring* (2011).

99. 45 C.F.R. § 46.111(a)(2) (2020). *See also* AM. MED. ASSOC., *supra* note 64, at § 7.1.3.

100. *See* discussion *supra* Part II.A.

101. MODEL RULES R. 8.5(b)(2).

102. MODEL RULES R. 8.5(b)(2).

103. MODEL RULES R. 8.5(b)(2) cmt. 4.

104. Phila. Bar Prof'l Guidance Comm., Op. 2008-3 (2003).

(a new action against H).[105] Conduct occurring after the conclusion of litigation (such as fee collection[106]) and entirely outside of interactions with a tribunal (such as offering non-litigation legal advice,[107] disclosing information to a state regulatory agency outside of an adjudication,[108] or joining an out-of-jurisdiction law firm[109]) is covered by Rule 8.5(b)(2) as well.

Conduct completed to advance a matter before a tribunal, however, is covered by Rule 8.5(b)(1) and *not* Rule 8.5(b)(2).[110] This can include fact-finding during the discovery stage of litigation, as the Massachusetts Bar Association's Commission on Professional Ethics identified in 2002.[111] The commission found that the jurisdiction in which litigation is to occur has the greatest interest in a lawyer's pre-trial conduct; therefore, fact-finding relating to that jurisdiction should be regulated by the litigation jurisdiction.[112]

Human rights fact-finding is often conducted entirely outside of interactions with a tribunal: with the goal frequently being to raise awareness of and document abuses and not to file a case before a court or agency, such missions are likely covered by Rule 8.5(b)(2). While evidence collected and theories proposed during the mission may ultimately contribute to accountability or other measures, human rights fact-finding would seem more like the formation of a client-lawyer relationship analyzed by the Philadelphia Bar Association's Professional Guidance Committee[113] than the investigation during discovery analyzed by the Massachusetts Bar Association's Commission on Professional Ethics.[114]

Suppose, however, that a human rights fact-finding mission was conducted for the purpose of gathering preliminary evidence to file a complaint. International Rights Advocates, for example, is an organization based in the United States that sues multinational corporations for human rights abuses after collecting evidence on fact-finding missions.[115] Such an investigation remains, however, "in anticipation of a proceeding not yet pending before a tribunal" and, as such, is still covered by Rule 8.5(b)(2).[116]

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105. *Id*. The committee did find, however, that the action was "likely" to be soon pending.

106. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 12-02 (2012).

107. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 2014-1 (2014).

108. *See* R.I. Sup. Ct. Ethics Advisory Panel, Op. 2007-10 (2007).

109. *See* N.Y. Bar Comm. Prof'l Ethics, Op. 1042 (2014).

110. *See* MODEL RULES R. 8.5(b)(1).

111. Mass. Bar Comm. on Prof'l Ethics, Op. 02-4 (2002).

112. *Id.*

113. *See* Phila. Bar Prof'l Guidance Comm., Op. 2008-3 (2003); *supra* text accompanying notes 104–105.

114. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 02-4 (2002); *supra* text accompanying notes 111–112.

115. *See, e.g.*, First Amended Complaint at ¶¶ 13–15, Doe 1 v. Apple Inc., No. 1:19-cv-03737 (D.D.C. June 26, 2020).

116. MODEL RULES R. 8.5(b)(2) cmt. 4.

B. PREDOMINANT-EFFECT TEST

The predominant effect of a fact-finding lawyer's conduct is likely to be experienced in either the jurisdiction in which the fact-finding occurs or the jurisdiction of the organization with which the lawyer works. Under Rule 8.5(b)(2), a lawyer's conduct is governed by either the rules of the jurisdiction in which the conduct actually occurred or the rules of the jurisdiction experiencing the "predominant effect" of that conduct.[117] The so-called predominant-effect test evaluates the relative interests of different jurisdictions in regulating lawyer conduct, ultimately applying the rules of the jurisdiction most able or likely to regulate the conduct in question.[118] State bar ethics committees have framed this test in at least two ways: (1) in which jurisdiction did the *relevant* conduct occur?; and (2) which jurisdiction's tribunals or legal entities would have a greater interest in the conduct?

When lawyer conduct occurs in several jurisdictions, the predominant-effect test may evaluate the location of the conduct at issue: the jurisdiction experiencing the predominant effect is that in which conduct relevant to the ethical question occurred. When evaluating the structure of a law firm, for example, the Philadelphia Bar Association's Professional Guidance Committee applied the ethics rules of the jurisdiction in which there was the principle place of business and the majority of senior administrative staff, even though the firm may have had an office in another jurisdiction.[119] The relevant conduct was the administration and organization of a law firm, *not* the existence of a physical office.[120] In evaluating Massachusetts-licensed lawyers' work for the United States Navy, the Massachusetts Bar Association's Committee on Professional Ethics found that Massachusetts' ethical rules did not apply because the relevant conduct did not occur in that jurisdiction, even if the jurisdiction had licensed the lawyers.[121]

The predominant-effect test may also compare the interests of different jurisdictions' tribunals or other legal entities. Over-simplified, this analysis asks which jurisdiction's court would have jurisdiction over the conduct. For instance, the collection of legal fees is typically regulated by the court of the jurisdiction in

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117. MODEL RULES R. 8.5(b)(2).

118. *See* MODEL RULES R. 8.5(b)(2) cmt. 3 ("Paragraph (b) . . . takes the approach of . . . making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions."). *Cf.* MODEL RULES R. 8.5(b)(2) ("A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.") In the predominant-effect test, the *Model Rules* prioritize clarity and straightforwardness for, as suggested by comment 3, the protection of lawyers acting "reasonably in the face of uncertainty." MODEL RULES R. 8.5(b)(2) cmt. 3. For a critique of this orientation, *see* discussion *infra* Part IV.

119. Phila. Bar Prof'l Guidance Comm., Op. 2014-8 (2015).

120. *Id.*

121. Mass. Bar Comm. on Prof'l Ethics, Op. 2014-1 (2014). *See also* Phila. Bar Prof'l Guidance Comm., Op. 2008-3 (2008) (finding the establishment of a client-lawyer relationship to be the relevant conduct, despite the licensing of the lawyer in a different jurisdiction).

which a trial occurs; consequently, the predominant effect of an agreement regarding legal fees is felt in the jurisdiction in which the litigation occurred.[122] For interactions with regulatory agencies, the jurisdiction in which that agency sits may be the jurisdiction experiencing the predominant effect of representation to that agency, as suggested by Rhode Island's Supreme Court Ethics Advisory Panel in 2007.[123]

Lawyers participating in international human rights fact-finding by default engage in multi-jurisdictional conduct. First, assuming they are licensed to practice in a United States jurisdiction, they may engage in conduct in that licensing jurisdiction. Second, if they are working with a government or NGO during the mission, they might engage in conduct in the jurisdiction(s) where that entity does business. Third, they may engage in conduct in the foreign jurisdiction(s) where the mission travels.[124] Fourth, they may ultimately engage in conduct before a domestic or international tribunal, with their investigation contributing to factual allegations or legal theories. For the purposes of this analysis, each is assumed to be a separate jurisdiction.

The licensing jurisdiction, alone, will probably not experience the predominant effect of human rights fact-finding. Of the four ethical challenges discussed above,[125] none necessarily involves the licensing jurisdiction. Under the first interpretation of the predominant-effect test, the relevant conduct likely does not occur in the jurisdiction where the lawyer is licensed to practice. Under the second interpretation, the licensing jurisdiction may have an interest in regulating its lawyers' conduct; however, opinions such as the Massachusetts Bar Association's Committee on Professional Ethics' opinion on Massachusetts lawyers working with the Navy suggest such an interest is not strong enough: like the lawyers working outside Massachusetts for an entity in a different jurisdiction, international human rights fact-finding lawyers can work outside of their licensing jurisdiction for entities in different—even foreign and international—jurisdictions.[126]

The jurisdictions of the entities with whom a fact-finding lawyer works may experience the predominant effect of human rights fact-finding. Such jurisdictions may have an interest in regulating lawyers' activities that will be used by an entity within that jurisdiction. Identifying an interest here would be akin to identifying a

122. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 12-02 (2012).

123. R.I. Sup. Ct. Ethics Advisory Panel, Op. 2007-10 (2007).

124. Rule 8.5(b)(2) applies to lawyers in transnational practice. *See* MODEL RULES R. 8.5(b)(2) cmt. 7. Rule 8.5 has applied to transnational practice since the 2002 amendments to the *Model Rules*; before then, the rule explicitly did *not* apply. *Compare* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 6 (1993) ("The choice of law provision is not intended to apply to transnational practice.") *with* MODEL RULES OF PROF'L CONDUCT R. 8.5 cmt. 7 (2002) ("The choice of law provision applies to lawyers engaged in transnational practice . . . .").

125. *See* discussion *supra* Part II.

126. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 2014-1 (2014).

court's interest in regulating the award of reasonable attorney's fees.[127] More compellingly, the ethics rules of the "jurisdiction" reviewing the fact-finding investigation—if any—would likely apply. The interests of oversight entities like IRBs in ensuring compliance with ethics regulations seem like the interest of the agency in Rhode Island's Supreme Court Ethics Advisory Panel's 2007 opinion:[128] like the agency regulated the conduct of lawyers appearing before it, IRBs regulate the conduct of lawyers "practicing" research "before" them. Therefore, the jurisdictions (broadly understood) of the entities employing or working with the fact-finding lawyer may experience the fact-finding's predominant effect.

The foreign jurisdiction in which a fact-finding lawyer investigates may also experience the predominant effect. Under the first interpretation of the predominant-effect test, the foreign jurisdiction may experience the predominant effect if the relevant conduct is the mission, itself.[129] Under the second interpretation, which evaluates the interests of different tribunals, the foreign jurisdiction may also pass the predominant-effect test. It seems unlikely that courts of that jurisdiction would have an interest in regulating fact-finding that may fuel potential future cases in other jurisdictions—as in the collection of legal fees in jurisdiction X after a trial held in jurisdiction Y, the interests of jurisdiction Y, which held (here, may hold) the relevant trial, outweigh the interests of the other jurisdiction.[130] If, however, that foreign jurisdiction has a regulatory body charged with evaluating fact-finding missions with which the fact-finding lawyer is working, the foreign jurisdiction's interest may be sufficiently strong.[131] Therefore, the foreign jurisdiction in which the mission occurs may pass the predominant-effect test, meaning its ethics rules should be applied to evaluate fact-finding lawyer conduct.

Finally, the tribunal before which a fact-finding lawyer may ultimately present a case will probably not experience the predominant effect. In this analysis, the location-based interpretation of the predominant-effect test is inadequate: while the United States' hierarchy of courts typically reflects an assumption of some meaningful link between the place of adjudication and the court's legal situs,[132] the legal situs of foreign and international tribunals may not be the same as where the tribunal sits.[133] As a result, the second interpretation may be more applicable. Because fact-finding is already conduct not pending before a

127. *See, e.g.*, Mass. Bar Comm. on Prof'l Ethics, Op. 12-02 (2012). *See also supra* text accompanying note 122.

128. *See* R.I. Sup. Ct. Ethics Advisory Panel, Op. 2007-10 (2007).

129. *See, e.g.*, Phila. Bar Prof'l Guidance Comm., Op. 2008-3 (2008) (finding the establishment of a client-lawyer relationship to be the relevant conduct, despite the licensing of the lawyer in a different jurisdiction). The relationships between a lawyer and the subjects of a fact-finding mission, though not necessarily client-lawyer relationships, *cf.* discussion *supra* Part II.A., seem similar.

130. *See* Mass. Bar Comm. on Prof'l Ethics, Op. 12-02 (2012).

131. *See* R.I. Sup. Ct. Ethics Advisory Panel, Op. 2007-10 (2007).

132. For example, one would (correctly) expect the state Superior Court located in Trenton, New Jersey, to exercise jurisdiction over cases arising in New Jersey.

133. *See* Catherine A. Rogers, *Lawyers Without Borders*, 30 UNIV. PA. J. INT'L L. 1035, 1046–47 (2009).

tribunal,[134] however, a tribunal would probably be precluded from experiencing the predominant effect. Therefore, it is unlikely that the jurisdiction of a tribunal would pass the predominant-effect test.

The fact-finding lawyer, consequently, is more likely to be subject to one of two jurisdictions' ethical rules: (1) the jurisdiction of the organization with which the lawyer works, and which will presumably use the products of the mission; and (2) the foreign jurisdiction in which the fact-finding mission occurs. Therefore, Rule 8.5(b)(2) leads to *two* sets of potential ethical obligations, rather than completely resolving the question.[135]

C. PREEMPTION BY INTERNATIONAL LAW OR AGREEMENTS

Although choice-of-law provisions in international law or agreements made by or between competent regulatory authorities could theoretically preempt the above analysis, [136] no such preemption is likely here. While there do exist international laws and agreements that regulate fact-finding, these do not often include choice-of-law provisions that would override the above analysis. For example, the United Nations' *Manual on Human Rights Monitoring*, though establishing standards "applicable to the work of international, regional and national bodies, mechanisms and institutions that carry out human rights monitoring," is only a "useful resource" and not a document universally binding on human rights fact-finding.[137]

Other agreements do suggest that they are universal but are not applicable to legal work in fact-finding missions. For example, the ethical principles set out in the *International Ethical Guidelines for Health-Related Research Involving Humans* "are regarded as universal" but refer only "to activities designed to develop or contribute to generalizable *health* knowledge."[138] Additionally, Accountable Now applies standards to signatory NGOs and includes an enforcement mechanism but regulates governance more than ethical investigations.[139]

Other agreements apply universally to relevant organizations but are not self-executing or enforced. For example, *The Code of Ethics and Conduct for NGOs* "is designed to be broadly applicable to the worldwide NGO community" but is only intended to "help inform and guide the work of NGOs," without an enforcement mechanism.[140]

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134. *Cf.* discussion *supra* Part III.A.

135. As Part IV, *infra*, demonstrates, the fact-finding lawyer is made to decide which ethical rules apply.

136. MODEL RULES R. 8.5(b)(2) cmt. 7.

137. U.N. Off. High Comm'r for Hum. Rts., *Foreword*, *in Manual on Human Rights Monitoring* iv (2011).

138. Council for Int'l Orgs. Med. Scis., International Ethical Guidelines for Health-Related Research Involving Humans, at xii (2016) (emphasis added).

139. *See* ACCOUNTABLE NOW, https://accountablenow.org [https://perma.cc/H984-VL7K] (last visited Apr. 26, 2021).

140. World Assoc. of Non-Governmental Orgs., *supra* note 65, at 7.

As such, the second part of the Rule 8.5(b)(2) analysis stands: depending on the type of conduct, the rules of either the jurisdiction of the lawyer's organization or the jurisdiction in which the fact-finding occurs may apply.

IV. RULE 8.5(B)(2) FAILS FACT-FINDING LAWYERS AND SUBJECTS

A. REASONABLE BELIEF

The earlier sections have illuminated the ethical challenges facing lawyers on international human rights fact-finding missions and the prescribed analysis for determining which jurisdiction's ethical rules apply. Before continuing to critique Rule 8.5(b)(2), however, it is important to step back and consider that the choice-of-law analysis leaves two potential jurisdictions, not one. Interactions with fact-finding subjects, though occurring outside of the United States, may be regulated by IRBs within the United States.[141] The same is true for obtaining informed consent.[142] The lawyer's role within international legal and human rights systems is governed by the two relevant jurisdictions,[143] as are the lawyer's obligations to mitigate risk.[144] Any challenges arising out of conflicting ethical norms, then, are not resolved by the above analysis.

Ultimately, deciding the ethical code to apply is the lawyer's decision. Rule 8.5(b)(2) provides one further tool for identifying the jurisdiction experiencing the predominant effect: "A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer *reasonably believes* the predominant effect of the lawyer's conduct will occur."[145] Though phrased as an exception to the analysis, this single sentence allows the fact-finding lawyer to choose the ethical code to be applied, with little guidance for disciplinary bodies evaluating the reasonableness of the lawyer's belief.[146]

The next section will show that leaving choice of law in the hands of the fact-finding lawyer is unfair, both to lawyers and to fact-finding subjects.

B. FAIR FOR LAWYERS? FAIR FOR SUBJECTS?

Rule 8.5(b)(2)'s choice-of-law regime is unfair to lawyers and fact-finding subjects because it contravenes the purpose of the *Model Rules*. The stated purpose of the *Model Rules* is to define the relationship between lawyers and the legal system to aid in lawyers' "vital role in the preservation of society."[147] Rule 8.5(b)(2)

141. *See* discussion *supra* Section II.A.

142. *See* discussion *supra* Section II.B.

143. *See* discussion *supra* Section II.C.

144. *See* discussion *supra* Section II.D.

145. MODEL RULES R. 8.5(b)(2) (emphasis added).

146. In a comment, the only example of evidence of a reasonable belief is a written agreement between the lawyer and client "that reasonably specifies a particular jurisdiction as within the scope of that paragraph . . . if the agreement was obtained with the client's informed consent confirmed in the agreement," to be considered when evaluating conflicts of interest. MODEL RULES R. 8.5(b)(2) cmt. 5.

147. MODEL RULES pmbl.

is supposed to help achieve this goal: "Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession)."[148]

In practice, however, the Rule fails in two respects. First, by permitting lawyers to decide which jurisdiction will experience the predominant effect, it harms lawyers by fragmenting the ethics applicable to international human rights fact-finding lawyering. Although Rule 8.5(b)(2) may minimize uncertainty about which rules are applicable for a *single* lawyer, the *community* of lawyers faces much uncertainty. Second, by focusing on the *predominant* effect, Rule 8.5(b)(2) threatens to ignore the effect of human rights fact-finding on individual research subjects.

1. RULE 8.5(B)(2) FRAGMENTS THE ETHICS RULES APPLICABLE TO HUMAN RIGHTS FACT-FINDING LAWYERS

In failing to indicate a single set of rules applicable to human rights fact-finding lawyers, Rule 8.5(b)(2) leads to confusion over a lawyer's responsibilities to fact-finding subjects. A general rule embodied in the *Model Rules* is that the jurisdiction in which one is admitted to practice has the authority to pursue disciplinary actions.[149] In multijurisdictional practice, however, multiple jurisdictions may have a compelling interest in regulating a lawyer's conduct. Rule 8.5(b)(2), as expanded to address transnational conduct,[150] thus supplements that general rule in multijurisdictional practice by providing a mechanism for determining which ethics rules should be applied. Specifically, the Model Rule "takes the approach of . . . providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct."[151]

In practice, however, Rule 8.5(b)(2) permits the fact-finding lawyer to choose which law should be applied. This permission is not benign: as Section I demonstrated, obligations under different ethical codes do vary. Two lawyers—one reasonably believing that the United States IRB's rules should apply and the other reasonably believing that community expectations of a lawyer's role should apply—may face distinct ethical obligations, even if they are completing similar work.

Some variation in ethical obligations is to be expected in international practice due to, for example, the differences between common and civil law systems[152] and the wide range of venues, subjects, and strategies.[153] From an administrative

148. MODEL RULES R. 8.5(b)(2) cmt. 3.

149. *See* Ronald A. Brand, *Professional Responsibility in Transnational Transactions Practice*, 17 J.L. & COM. 301, 305 (1998).

150. *See* Rogers, *supra* note 133, at 1037.

151. MODEL RULES R. 8.5(b)(2) cmt. 3.

152. *See* Frank, *supra* note 87, at 967.

153. *See* Hurwitz, *supra* note 43, at 513.

standpoint, however, there must be a difference between varying ethical obligations because of externally imposed rules and varying ethical obligations because of individually chosen rules. The former requires analysis only of compliance. The latter requires analysis of compliance only after analysis of reasonableness, thereby generating a preliminary question of fact before the relationship between a lawyer and the legal system can be evaluated. Permitting each fact-finding lawyer to decide which ethical rules apply fragments the community of fact-finding lawyers and thereby fails to accomplish a central purpose of the *Model Rules*: to regulate the relationship between lawyers and the legal system.[154]

Consider, for example, the Human Rights Institute's fact-finding mission on Syria. The group used an oral informed consent process required by Georgetown University's IRB. During that process, participants were assured that personally identifying information, including their names, would be excluded from the report. A fact-finding lawyer not working with a research institution may decide to follow state rules similar to the *Model Rules*' guidelines for informed consent—namely, that participants *qua* clients would be required to give consent confirmed in writing to the sharing of information collected.[155] Hypothetically, another fact-finding lawyer investigating human rights violations could elect to follow the ethical rules governing lawyer conduct in another country while still not violating Rule 8.5(b)(2). Three fact-finding reports, then, could be prepared on the same topic but involve distinct understandings of the fact-finding lawyer's duty to provide an informed consent process.

Such an outcome is illogical: determining the requirements for informed consent should not be arbitrary. Fact-finding lawyers should be able to easily collaborate when resolving ethical dilemmas (such as how much informed consent is necessary).[156] By permitting fact-finding lawyers to choose which requirements apply to their practice, Rule 8.5(b)(2) harms the community of lawyers.

2. RULE 8.5(B)(2) IGNORES FACT-FINDING SUBJECTS

Rule 8.5(b)(2) also harms fact-finding subjects by ignoring the effect a lawyer's conduct might have on them. The predominant-effect test considers which *jurisdiction* may have the greatest interest in regulating lawyer conduct[157]—absent from the test are the potential effects of the conduct on fact-finding subjects or the public. Given more general critiques of the *Model Rules* for being too focused on protecting lawyers,[158] the lack of protection afforded to fact-finding subjects should not be surprising.

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154. *See* MODEL RULES pmbl.

155. *See* discussion *supra* Part II.B.

156. *See* MODEL RULES pmbl. ("A lawyer should also aid in securing . . . observance [of the Rules of Professional Conduct] by other lawyers.").

157. *Cf.* discussion *supra* Part III.B.

158. *See, e.g.*, Leslie C. Levin, Lynn Mather & Leny de Groot-van Leeuwen, *The Impact of International Lawyer Organizations on Lawyer Regulation*, 42 FORDHAM INT'L L.J. 407, 468 (2018).

In human rights lawyering, however, the interests of fact-finding subjects and the public should be of paramount importance. Victims of human rights abuses collaborating with fact-finding missions risk both physical and psychological harm.[159] NGOs risk victimizing fact-finding subjects and furthering imperialist narratives of, as Makau Mutua writes, savages, victims, and saviors.[160] Human rights work may engage in "disaster pornography," prioritizing images of suffering to further a message.[161] In the Human Rights Institute team's preparation for the mission and publication of a report, for example, efforts were taken to ensure that interviewees were not put at risk of physical harm for participating: most interviewees no longer lived in Syria, and those in Syria had previously spoken out against the regime and lived in non-regime-held areas. When preparing the report, additionally, the team discussed at length the message to be portrayed: would the report try to draw pity, or would it suggest that accountability was possible? The former method would reduce the participants to their suffering, while the latter would honor their stories by commanding action. Rule 8.5(b)(2), however, does not require analysis of any such considerations.

Even if the needs of fact-finding subjects were considered in the predominant-effect analysis, Rule 8.5(b)(2) might still produce unfair results. Currently, choosing between United States and foreign ethical rules can completely ignore fact-finding subjects: in the United States, such rules "are generally ill-equipped to address the particular ethical dilemmas created by international human rights work," and in foreign countries, they may not exist or may be largely unenforced.[162] Could it ever make sense to conduct a fact-finding mission into human rights abuses without discussing the potential risks, benefits, and relationship?[163]

Beyond Rule 8.5(b)(2), fact-finding subjects lack any effective means of redress against fact-finding lawyers, should the mission cause harm. Although fact-finding subjects may use statutes like the Alien Tort Statute (ATS) to seek redress for violations of the law of nations, they would face incredible hurdles, given the continuing jurisprudence limiting the scope of the ATS.[164]

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159. *See, e.g.*, Moley, *supra* note 71, at 363.

160. *See* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 HARV. INT'L L. J. 201, 201 (2001) ("The human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other.") (footnotes omitted). Mutua writes that states from the Global South become savages, *id.* at 202–03, those experiencing human rights violations as victims, *id.* at 203–04, and the NGOs and other human rights actors as saviors, *id.* at 204. This framework can be harmful, in part by reinforcing colonialist hierarchies in the name of universalism while ignoring particular lived experiences. *Id.* at 204–05. *See also* Haynes, *supra* note 41, at 385; Notess, *supra* note 77, at 774.

161. *See* Okumu, *supra* note 91, at 133.

162. Moley, *supra* note 71, at 374.

163. *See* discussion *supra* Part IV.B.1.

164. *See* Moley, *supra* note 71, at 375 n.77. *See generally* Jonathan Todres, *Can Research Subjects of Clinical Trials in Developing Countries Sue Physician-Investigators for Human Rights Violations?*. 16 N.Y.L. SCH. J. HUM. RTS. 737 (2000) (describing several issues that may arise in an ATS suit brought by clinical research subjects).

Rule 8.5(b)(2), beyond fragmenting the ethical rules applicable to lawyers, consequently, ignores the real and important needs of fact-finding subjects. It clearly fails, then, in achieving the *Model Rules*' stated purpose of assisting lawyers in their "vital role in the preservation of society."[165]

V. FITTING CHOICE-OF-LAW TO INTERNATIONAL HUMAN RIGHTS FACT-FINDING

Rule 8.5(b)(2) is inadequate in dealing with international human rights fact-finding missions. As has been demonstrated, much of international human rights fact-finding lawyering is self-regulated,[166] harming both lawyers and fact-finding subjects. Still, choice-of-law is essential to the practice of law and lawyer discipline.

Three efforts could make choice-of-law not only fair but a powerful tool for advancing human rights goals in the context of fact-finding missions. First, United States bar associations should specify a new predominant-effect test that prioritizes the needs of subjects, rather than solely the convenience of lawyers. This test could balance all parties' interests and lead to a single jurisdiction experiencing the predominant effect. Second, countries, NGOs, and bar associations should help draft and sign onto international agreements with certain minimum standards for international human rights fact-finding lawyering. Third, a transnational body should be established to impose specific standards and monitor compliance. While the danger of universalizing standards for conduct in diverse jurisdictions will still exist, such an entity could provide clarity for lawyers and, potentially, redress for fact-finding subjects.

A. SPECIFY A NEW PREDOMINANT-EFFECT TEST PRIORITIZING SUBJECTS

United States bar associations should revise the predominant-effect test to prioritize the effects of fact-finding on subjects. Doing so would comport with what Shannon Roesler labels "ethical cosmopolitanism": "respect[ing] the human dignity of others by honoring their stories, beliefs, and commitments."[167] Any solution to choice-of-law in international human rights fact-finding practice must be mindful of local perspectives—even those that might be suspicious of foreign lawyers and human rights discourses.[168] At an even more fundamental level, choice-of-law rules should reflect awareness that human rights fact-finding can jeopardize the safety of research subjects, especially if they are, themselves, stateless.[169]

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165. MODEL RULES pmbl.

166. *See also* Notess, *supra* note 77, at 782–83 (describing the frequent self-regulation of NGOs).

167. *See* Roesler, *supra* note 92, at 219.

168. *See* Hurwitz, *supra* note 43, at 519.

169. *See generally, e.g.*, Mariano-Florentino Cuéllar, *Refugee Security and the Organizational Logic of Legal Mandates*, 37 GEO. J. INT'L L. 583 (2006). See also discussion supra Part IV.B.2.

Currently, Rule 8.5(b)(2) ignores the stories, beliefs, and commitments of the subjects of human rights fact-finding. It is true that the *Model Rules* are first intended to "provide a structure for regulating conduct through disciplinary agencies,"[170] and it is true that fact-finding lawyers may espouse "ethical cosmopolitanism" in choosing which ethics rules should apply to their conduct. Prioritizing the effects on jurisdictions in the predominant-effect test when evaluating the conduct of fact-finding lawyers working with particularly vulnerable populations, however, is at odds with the "responsibility to assure that [the legal profession's] regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."[171] Thus, Rule 8.5(b)(2)'s ignorance of fact-finding subjects must be fixed.

To do so, bar associations could adopt one of two measures. First, they could revise the predominant-effect test for *all* choice-of-law inquiries, requiring that lawyers consider their clients' interests when balancing the effects of their conduct. Alternatively, they could carve out an exception for fact-finding lawyering, either through a new rule, a new subpart of Rule 8.5(b)(2), or a new comment. Further research should be conducted to evaluate whether considering clients' interests is preferable in other contexts.

B. DRAFT AND SIGN INTERNATIONAL AGREEMENTS HOLDING LAWYERS ACCOUNTABLE

Countries, NGOs, and bar associations should help draft and sign onto international instruments tailored to human rights fact-finding conducted by lawyers, like the World Medical Association adopted the Declaration of Helsinki.[172] Further, codes like the *Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers*[173] should include provisions binding on lawyers completing human rights fact-finding in those jurisdictions. Such agreements would, under comment 7 to the Model Rule, obviate the need for any further choice-of-law analysis.[174] If drafted like the Helsinki Declaration, international agreements regulating human rights fact-finding could establish clear standards for working with vulnerable populations, as well as address the ethical concerns discussed in Part I.

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170. MODEL RULES scope.

171. MODEL RULES pmbl.

172. World Med. Assoc., Declaration of Helsinki (June 1964). The Declaration of Helsinki provides explicit standards for "promot[ing] and safeguard[ing] the health, well-being and rights of patients . . . involved in medical research." *Id.* at art. 4. Specifically, the Declaration provides for measures including the minimization of risk, *id.* at art. 17, and informed consent, *id.* at art. 25–32.

173. Council Bars & L. Soc'ys Europe, Charter of Core Principles of the European Legal Profession and Code of Conduct for European Lawyers (2013).

174. MODEL RULES R. 8.5(b)(2) cmt. 7.

C. ESTABLISH TRANSNATIONAL BODY TO IMPOSE STANDARDS AND MONITOR COMPLIANCE

Finally, a transnational body charged with regulating human rights fact-finding should be established. Such a recommendation is not unprecedented: organizations completing similar work already exist. The Council for International Organizations of Medical Sciences, for example, was established by the World Health Organization and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and issues ethical guidelines for health-related human subjects research.[175] The International Bar Association, too, has both Professional Ethics[176] and Regulation of Lawyers' Compliance[177] Committees, which issue guidance on lawyer conduct. Further, the International Bar Association hosts a Human Rights Institute that both provides training and conducts fact-finding on human rights issues affecting the legal community.[178] Additionally, some have even suggested that lawyers be certified to practice internationally.[179]

A transnational body to regulate human rights fact-finding by lawyers would fill troubling gaps in the current regulatory framework. Domestic IRBs alone are not enough: NGOs and even law school clinics may not be required to submit to human subjects research review,[180] and IRB standards may not be best suited to foreign non-medical contexts.[181] Leaving regulation to local bar associations, too, is ineffective: much of the relevant conduct of human rights fact-finding occurs in a different country under different legal systems.[182] The same is true of national regulators.[183] Although ECOSOC may recognize NGOs in a consultative manner,[184] it does not conduct independent oversight of their activities: "HROs [human rights organizations] are ultimately able to do what they want, regardless of principles expressed within operational guidelines of founding mandates."[185] Because there is no clear oversight of international human rights fact-finding in

175. *See* Council for Int'l Orgs. Med. Scis., *supra* note 138 (2016); *Bioethics*, COUNCIL FOR INTERNATIONAL ORGANIZATIONS OF MEDICAL SCIENCES, https://cioms.ch/bioethics/ [https://perma.cc/J6Y3-P4MW] (last visited Apr. 26, 2021).

176. *See Professional Ethics Committee Home*, INTERNATIONAL BAR ASSOCIATION, https://perma.cc/4QYU-5ZME (last visited Apr. 26, 2021).

177. *See Regulation of Lawyers' Compliance Committee Home*, INTERNATIONAL BAR ASSOCIATION, https://www.ibanet.org/PPID/Constituent/Regulation_of_Lawyers_Compliance/Default.aspx [https://perma.cc/UZ9Y-9VRE] (last visited Apr. 26, 2021).

178. *See About the IBAHRI*, INTERNATIONAL BAR ASSOCIATION, https://perma.cc/PKA5-N6ZG (last visited Apr. 26, 2021).

179. *See, e.g.*, Frank, *supra* note 87, at 985.

180. *See* Moley, *supra* note 71, at 373–74.

181. *See id.* at 377–78.

182. *See* Rogers, *supra* note 133, at 1083.

183. *See id.* at 1083–84.

184. *See* Blitt, *supra* note 88, at 274.

185. *Id.* at 322. And: "NGO fact-finding missions remain *ad hoc* affairs that tend to operate fast and loose as far as procedural standards are concerned." *Id.* at 334.

the United States or internationally, a transnational body that both issues and enforces standards is essential.

CONCLUSION

Rule 8.5(b)(2)'s choice-of-law analysis is inadequate when applied to the work of international human rights fact-finding lawyers. It provides little guidance on the applicable ethical rules, thereby fragmenting the regulation of fact-finding lawyers and completely ignoring the needs of fact-finding subjects. If the purpose of the *Model Rules* is to provide a framework for the relationship between lawyers and legal systems, these flaws must be addressed. Specifying a new predominant-effect test that includes subjects' needs in the balance, concluding international agreements that specify basic standards, and establishing a transnational regulatory body to oversee international human rights fact-finding missions could fit choice-of-law analysis to the complex work of investigating human rights abuses.