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## Reconciling Holocaust Scholarship and Personal Data Protection: Facilitating Access to the International Tracing Service Archive

Collin McDonald\*

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# Reconciling Holocaust Scholarship and Personal Data Protection: Facilitating Access to the International Tracing Service Archive

Collin McDonald

## Abstract

This Note examines whether amendment of the ITS charter is necessary to effectuate researcher access, or whether, as a matter of international law, in its capacity as an international organization (“IO”), the ITS can allow access without amendments. Addressing this question implicitly raises two collateral issues that inform the discussion. First, to what degree should an IO Member State’s domestic legal framework dictate that State’s position in a consensus-based IO decision-making process. Second, when changes in the global political context render an existing IO legal structure ill-suited to an IO’s evolving mission, to what degree is it appropriate to re-interpret rather than amend an IO’s charter documents in order to accommodate the requirements of the new situation? Part I of this Note first outlines the history of the ITS and the treaty creating it, then briefly describes the approach to personal data protection taken in the European Union and the United States. Part I also addresses jurisdictional issues: the legal status of an IO in relation to domestic legal regimes, and the EU approach to jurisdiction are both considered in the context of the Archive controversy. Part II of this Note contrasts the two basic positions taken during the negotiation process—for and against amendment—and considers how each approach might find support in treaty language, past practice, existent legal frameworks, and in equitable considerations. Part III posits a hypothetical means to proceed without amendment, but argues that alternative mechanisms are likely no less burdensome, and that the amendment process is itself beneficial. Finally, this Note concludes by suggesting a practical means to work around the current impasse, without compromising the integrity of the legal framework of the ITS.

## NOTE

# RECONCILING HOLOCAUST SCHOLARSHIP AND PERSONAL DATA PROTECTION: FACILITATING ACCESS TO THE INTERNATIONAL TRACING SERVICE ARCHIVE

*Collin McDonald\**

### INTRODUCTION

On July 26, 2006, eight of eleven International Tracing Service (“ITS”) Member States signed an agreement (“Agreement”) that will, for the first time ever, make the ITS-administered archive (“Archive”) of Holocaust documents available to outside researchers.<sup>1</sup> By October 30, 2006 the remaining three ITS Members had also signed the Agreement.<sup>2</sup> Many expected access to commence as soon as the end of 2006, and the long effort to open the Archive seemed to be nearing a successful conclusion.<sup>3</sup> The acrimonious environment that had surrounded the negotiations—one stakeholder had likened Germany’s negotiating position to Holocaust denial—became one of conciliation and qualified optimism regarding the prospect of swift ratifica-

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\* J.D. Candidate, 2007, Fordham University School of Law; Notes & Articles Editor, Volume XXX, *Fordham International Law Journal*.

1. *See Germany Signs Nazi Files Accord* BBC ONLINE, July 26, 2006, <http://news.bbc.co.uk/2/hi/europe/5216470.stm> (last visited Feb. 3, 2007) [hereinafter *Germany Signs*] (stating agreement has been reached, signed by some Member States); *see also Nations Agree to Open Archives of Holocaust*, DESERET NEWS, July 27, 2006, at A4 [hereinafter *Nations Agree*] (stating agreement has been reached, signed by some Member States); *Nazi Files Thrown Open to Research*, BIRMINGHAM POST (UK), July 27, 2006, at 10 [hereinafter *Nazi Files*] (stating agreement has been reached, signed by some Member States).

2. *See* International Tracing Service (“ITS”), Amendment of the Bonn Accords, <http://www.its-arolsen.org/english/index.html> (follow “News” then “Amendment of the Bonn Agreements” hyperlinks) (last visited Mar. 2, 2007) (announcing all parties signed as of October 30, 2006); *see also* Arthur Max, *Meeting Called to Review Progress on Opening Long-Secret Nazi Archive*, AP WORLDSTREAM, Jan. 24, 2007 (mentioning all Member States signed agreement to open ITS archive (“Archive”).

3. *See Nations Agree*, *supra* note 1 (mentioning expectation of ITS archive (“Archive”) opening by end of 2006); *see also Accord to Open Nazi Archives Signed*, N.Y. TIMES, July 27, 2006, at A6 (noting statements anticipating Archive will open by December 31, 2006).

tion of the Agreement by Members.<sup>4</sup>

Since the creation of the ITS, both Germany and the EU have enacted strong data privacy laws.<sup>5</sup> Since 1991, when efforts to open the Archive first began, Germany, along with Italy, the ITS Director, and occasionally other Member States, repeatedly argued that in order to open the Archive, the ITS charter documents had to be amended to create substantial data privacy safeguards and effective means of redress.<sup>6</sup> Germany and the other parties emphasized the paramount importance of protecting individuals whose personal information is contained within the Archive.<sup>7</sup> In contrast, the United States, along with other Member States and interested parties favored opening the Archive immediately, without amending the charter documents.<sup>8</sup> They argued that data safeguard mechanisms and means of redress beyond those already existing under respective Member States' domestic legal systems were unnecessary, and would create needless complications and further delay.<sup>9</sup> To a certain extent Ger-

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4. See Roger Cohen, *U.S.-German Flare-Up Over Vast Nazi Camp Archives*, N.Y. TIMES, Feb. 20, 2006, at A3 (reporting comments by Paul Shapiro, Director of Advanced Holocaust Studies at United States Holocaust Memorial and Museum, characterizing hiding Archive records as form of Holocaust denial; reporting other officials and stakeholders on both sides of issue); see also *Nazi Files*, *supra* note 1 (reporting optimistic comments of German Deputy Foreign Minister Guenter Gloser); Press Release, U.S. Dept. of State Diplomatic Mission to Germany, Ambassador Timken Participates in ITS Amendment Signing Ceremony (July 26, 2006), available at [http://berlin.usembassy.gov/germany/timken\\_its.html](http://berlin.usembassy.gov/germany/timken_its.html) (releasing statement by U.S. Ambassador to Germany William Timken congratulating Member States, urging swift parliamentary ratification by States requiring that step).

5. See Gesetz zum Schutz vor Mißbrauch personenbezogener Daten bei der Datenverarbeitung [Bundesdatenschutzgesetz] [German Federal Data Protection Act], Jan. 27, 1977, BGBl. I at 201 (F.R.G.) (establishing first German Federal data privacy statute, subsequently replaced by German Federal Data Protection Act of 1990); see also Council of Europe, Convention for the Protection of Individuals with Regard to Automatic Processing of Personal Data, Jan. 28, 1981, Europ. T. S. No. 108, 20 I.L.M. 317 [hereinafter Council Convention] (establishing requirement for and parameters of data privacy laws for EU Member States).

6. See Cohen, *supra* note 4 (reporting insistence by Germany and former ITS Director Charles Biedermann that treaty be amended, data privacy safeguards created); see also Sam Loewenberg & Julian Borger, *Closed Archive Leads to Holocaust Denial Claim*, GUARDIAN (UK), Feb. 21, 2006, at 17 (describing arguments in favor of amendment and creation of privacy safeguard framework); *Nations Agree*, *supra* note 1 (mentioning Italy's past objections to opening the Archive).

7. See Cohen, *supra* note 4 (describing German position); see also Loewenberg & Borger, *supra* note 6 (outlining German position).

8. See Cohen, *supra* note 4 (outlining U.S. position); see also Loewenberg & Borger, *supra* note 6 (describing U.S. position).

9. See Cohen, *supra* note 4 (reporting arguments of parties disfavoring amend-

many's arguments prevailed—the announced Agreement took the form of amendments to the ITS charter documents.<sup>10</sup> The text of the Agreement is not publicly available, so it is not possible to analyze exactly how the competing points of view were reconciled.<sup>11</sup> Reports in the media indicate that access will be facilitated by providing digital copies of the Archive to Member States, a proposal the United States had raised during negotiations.<sup>12</sup>

Looking past the legal issues, the conflicting positions of the parties might be understood to reflect a divergence in their weighing of potential costs and benefits, i.e., whether the possibility that personal details of knowable individuals might be revealed in a way that would harm those individuals or their families in fact outweighs the benefit to society that will follow from allowing access to one of the most extensive and important collections of Holocaust records in existence.<sup>13</sup> It is frequently argued that because many of the records within the Archive are unique, opening the Archive will help facilitate a greater understanding of the Holocaust.<sup>14</sup> It has also been suggested that the data privacy issue has been used to delay resolution of the Archive issue by parties motivated to avoid additional restitution, insurance, or other claims arising on the basis of information contained in the Archive.<sup>15</sup> Germany has responded to this criti-

ments); *see also* Loewenberg & Borger, *supra* note 6 (describing arguments against amendments).

10. *See* *Germany Signs*, *supra* note 1 (indicating process will be by amendment); *see also* *Nations Agree*, *supra* note 1 (stating treaty will be amended); *Nazi Files*, *supra* note 1 (noting amendments agreed upon).

11. *See* *Germany Signs*, *supra* note 1 (omitting details of agreement); *see also* *Nations Agree*, *supra* note 1 (foregoing description of amendments).

12. *See* Max, *supra* note 2 (mentioning potential copying, transfer of Archive to interested Member States); *see also* Arthur Max, *Technical Experts Take Another Step Toward Opening Long Secret Nazi Archive for Research*, AP ALERT—BUSINESS, Feb. 15, 2007 (reporting preparations for continued digital copying of Archive materials, provision of Archive Materials in digital format).

13. *Cf.* Cohen, *supra* note 4 (contrasting U.S. and German arguments); Loewenberg & Borger, *supra* note 6 (Contrasting U.S. and German arguments).

14. *See* Jeffrey Fleishman, *Little Slips of Lost Lives*, L.A. TIMES, June 17, 2006, at 1 (reporting assessment by Deidre Berger, Director of American Jewish Committee in Berlin, of potential to gain greater insight into Holocaust from study of documents in Archive); *see also* Stephen Graham, *Germany Agrees to Open Nazi Archives*, CHI. SUN TIMES, July 27, 2006, at 25 (reporting statement of Israeli Ambassador Shimon Stein regarding potential to improve understanding of Holocaust).

15. *See* Cohen, *supra* note 4 (reporting insinuation that Germany was intentionally seeking to delay process, potential for new claims arising from material in Archive); *see*

cism by emphasizing that its central concern is protecting Holocaust victims from additional harm that would result if their sensitive personal information were made publicly available.<sup>16</sup> Many survivor advocates view the privacy argument as a red herring, arguing that the very people most interested in opening the Archive are Holocaust survivors themselves.<sup>17</sup> Some parties close to the negotiation process suggested that Germany's insistence on proceeding by amending the charter documents to the exclusion of other means was also an effort at delay, as arguments over procedure distracted negotiations from the central substantive issues.<sup>18</sup> Unfortunately, despite the optimistic July 2006 proclamations, the Archive situation might still be far from resolution.<sup>19</sup> As of April 2007, only four ITS Members—Israel, Poland, the United Kingdom, and the United States—have taken all steps necessary to formally adopt the Agreement; and, while Germany, Luxembourg, and the Netherlands have indicated the possibility of completing ratification by the annual ITS meeting in May 2007, a typical timeframe for ratification by all eleven Members has been estimated at closer to three years.<sup>20</sup>

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also Matthew Campbell, *Nazi Files to Solve Holocaust Riddles*, SUN. TIMES (UK), Mar. 11, 2007, at 31 (quoting Holocaust survivor questioning timing of Assicurazioni Generali settlement); Loewenberg & Borger, *supra* note 6 (quoting Johannes Houwink ten Cate, Professor of History and Genocide Studies at the University of Amsterdam, “[t]hey have been stalling for eight years”).

16. See Cohen, *supra* note 4 (reporting privacy concerns expressed by Germany and ITS Director); see also Loewenberg & Borger, *supra* note 6 (describing German concern over release of private data).

17. See Fleishman, *supra* note 14 (mentioning longstanding desire of Holocaust survivors and Jewish organizations to access Archive); see also Campbell, *supra* note 15 (recounting desire expressed by survivor that Archive be made accessible); Greg Gordon, *Sixty Years Later Survivors are Kept Waiting for Holocaust Facts*, MINNEAPOLIS STAR TRIB., May 9, 2005, at 1A (reporting disbelief at lack of access to Archive expressed by family members of Holocaust survivors and survivors themselves, including Nobel Laureate Elie Wiesel).

18. See Cohen, *supra* note 4 (reporting comments accusing Germany of intentionally creating delay); see also Loewenberg & Borger, *supra* note 6 (recounting criticism over continual delays).

19. See Melissa Eddy, *Opening of Vast Holocaust Archive Could Take Years Longer*, AP WORLDSTREAM, Jan. 19, 2007 (describing final ratification as possibly years away); see also Max, *supra* note 12 (reporting final resolution may take years).

20. See Sara J. Bloomfield, Letter to the Editor, *A Plea to Open The Holocaust Files*, N.Y. TIMES, Feb. 17, 2007, at A14 (recounting which Member States have ratified) (author is Director of United States Holocaust Memorial Museum); see also Desmond Butler, *Holocaust Survivors Seek Nazi Files*, AP ONLINE, Mar. 29, 2007 (reporting status of ratification); Eddy, *supra* note 19 (reporting estimated ratification timeframe for ratification).

Ironically, despite the optimistic July 2006 announcement, the prospect of continued delays has again led to the possibility of proceeding without amendments.<sup>21</sup>

This Note examines whether amendment of the ITS charter is necessary to effectuate researcher access, or whether, as a matter of international law, in its capacity as an international organization (“IO”), the ITS can allow access without amendments. Addressing this question implicitly raises two collateral issues that inform the discussion. First, to what degree should an IO Member State’s domestic legal framework dictate that State’s position in a consensus-based IO decision-making process. Second, when changes in the global political context render an existing IO legal structure ill-suited to an IO’s evolving mission, to what degree is it appropriate to re-interpret rather than amend an IO’s charter documents in order to accommodate the requirements of the new situation?

Part I of this Note first outlines the history of the ITS and the treaty creating it, then briefly describes the approach to personal data protection taken in the European Union and the United States. Part I also addresses jurisdictional issues: the legal status of an IO in relation to domestic legal regimes, and the EU approach to jurisdiction are both considered in the context of the Archive controversy. Part II of this Note contrasts the two basic positions taken during the negotiation process—for and against amendment—and considers how each approach might find support in treaty language, past practice, existent legal frameworks, and in equitable considerations. Part III posits a hypothetical means to proceed without amendment, but argues that alternative mechanisms are likely no less burdensome, and that the amendment process is itself beneficial. Finally, this Note concludes by suggesting a practical means to work around the current impasse, without compromising the integrity of the legal framework of the ITS.

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21. See Max, *supra* note 2 (reporting prospect of continued delay, reporting meeting will be held to consider means to accelerate resolution); see also Butler, *supra* note 20 (paraphrasing statement of U.S. Special Envoy for Holocaust Issues, J. Christian Kennedy, stating if ratification not complete by end of year other means for opening Archive to be pursued).

I. HISTORY OF THE INTERNATIONAL TRACING SERVICE  
("ITS") ARCHIVE, TREATY FRAMEWORK, AND  
JURISDICTIONAL ISSUES

A. Contents and History of the Archive

1. Contents of the Archive

The Archive contains information on approximately 17.5 million individual civilian Holocaust victims.<sup>22</sup> It is comprised of over fifty million individual document pages, and fills over 25,000 meters (approximately sixteen linear miles) of shelf space.<sup>23</sup> The Archive contains camp records and other documentation compiled by the Nazis, along with records relating to the immediate aftermath of the war.<sup>24</sup> The Nazi-compiled documentation lists reasons for which prisoners were arrested, details of punishments, records of illnesses, and myriad other details that might offer further insight into the conduct of the Holocaust.<sup>25</sup> Some fear that opening the Archive could result in the identities of individual victims being made public, along with potentially sensitive details regarding their arrest and internment.<sup>26</sup> Germany and the former ITS Director had argued that victims of medical experiments, persons who collaborated while imprisoned, persons accused of homosexuality, and other similarly situated individuals would be harmed, or their surviving family

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22. See Official Statement, International Committee of the Red Cross ("ICRC"), International Tracing Service and Historical Research, Mar. 21, 2006, [hereinafter ICRC Statement on Historical Research] <http://www.icrc.org/web/eng/siteeng0.nsf/html/international-tracing-service-280206> (last visited Mar. 3, 2007) (indicating approximate number of distinct individuals referenced in Archive); see also Arthur Max, *Papers Open Window Into Hitler's Death Camps*, N.J. REC., Nov. 19, 2006, at A1 (indicating approximate number of distinct individuals referenced in Archive).

23. See ICRC Statement on Historical Research, *supra* note 22 (indicating volume of documents in Archive); see also Max *supra* note 22 (indicating volume of documents in Archive).

24. See Cohen *supra* note 4 (indicating provenance of material in Archive); see also Max *supra* note 22 (describing sources of documents in Archive).

25. See Loewenberg & Borger, *supra* note 6 (describing sensitive nature of materials in Archive); see also Butler, *supra* note 20 (reporting comments of Paul Shapiro, Director of the Center for Advanced Holocaust Studies at the United States Holocaust Memorial Museum, characterizing uniqueness of Archive records); Max, *supra* note 22 (providing detailed descriptions of nature of materials in Archive and their informational content).

26. See Cohen, *supra* note 4 (recounting fears expressed by Germany, others that identities and sensitive information might be released); see also Loewenberg & Borger, *supra* note 6 (discussing German reticence to release potentially sensitive information).



members would be prejudiced, should these details ever become publicly available.<sup>27</sup> The contents of the Archive illustrate the astonishing level of detail with which the Nazis recorded the progress of the genocide. There are, for example, lists documenting the quantity and size of lice found on inmates.<sup>28</sup> The Archive also contains records related to familiar historical figures, such as the ledger documenting Anne Frank's deportation from Holland, and German industrialist Oskar Schindler's original list of Jewish factory workers, who were saved from the camps through his employment in his factory.<sup>29</sup> It also contains records relating to countless unknown others; for example, in one document an anonymous Soviet prisoner of war who had been at Auschwitz describes witnessing thousands of prisoners being herded into the gas chambers each day, piles of dead children, gutters flowing with blood, and live prisoners being cast directly into pits of burning bodies.<sup>30</sup>

## 2. Creation of the Tracing Service and the ITS

The ITS grew out of the Central Tracing Bureau, which had been established by the British Red Cross in 1943 for the purpose of tracing and registering displaced and missing persons.<sup>31</sup> In 1944, the Supreme Headquarters Allied Expeditionary Force assumed the duties of the Central Tracing Bureau.<sup>32</sup> From the

27. See Cohen, *supra* note 4 (pointing out concerns expressed over potential for harm resultant from release of information from Archive); see also Loewenberg & Borger, *supra* note 6 (recounting arguments related to potential harms due to release of sensitive information from Archive).

28. See Cohen, *supra* note 4 (mentioning existence of detailed records, including lice treatments); see also Fleishman, *supra* note 14 (reporting existence of inventory lists documenting head lice found on individual prisoners).

29. See Eddy, *supra* note 19 (reporting copy of Schindler's list of protected workers resides in Archive); see also Arthur Max, *Name Stands Out on Nazi List*, CHI. TRIB., Nov. 25, 2006, at 11 (describing unique ledger recording deportation and imprisonment of Anne Frank).

30. See Max, *supra* note 22 (recounting recorded testimony of Soviet ex-prisoner of war); see also Fleishman, *supra* note 14 (recounting other examples of information on anonymous individual victims contained in Archive).

31. See ICRC Statement on Historical Research, *supra* note 22 (describing evolution of administration of Archive); see also ITS, History [hereinafter ITS Homepage History Section], <http://www.its-arolsen.org/english/index.html> (follow "History" Hyperlink) (last visited Mar. 3, 2007) (outlining history of Archive and Tracing Service).

32. See ICRC Statement on Historical Research, *supra* note 22 (describing development of Archive administration); see also ITS Homepage History Section, *supra* note 31 (outlining evolution of Archive and Tracing Service).

end of the war until 1947 the Tracing Service was run by the U.N. Relief and Rehabilitation Administration, and during that period the Archive was moved to its present location in Bad Arolsen, Germany.<sup>33</sup> The International Refugee Organization administered the Tracing Service from 1947 to 1951.<sup>34</sup> The Allied High Commission for Germany took over the Tracing Service until the end of the Occupation, whereupon the ITS was established.<sup>35</sup>

The ITS came into existence upon the expiration of World War II Allied Occupation Authority, for the purpose of continuing the dual task of tracing displaced persons and making information about such persons available through appropriate channels.<sup>36</sup> The ITS was established by an exchange of notes signed at Bonn on June 6, 1955 (“Bonn Accords”), which consist of the agreement chartering the organization (“Main Agreement”) and an Annex Agreement (“Annex”) that addresses issues surrounding the administration of the Tracing Service and Archive.<sup>37</sup> The Bonn Accords came into force on May 5, 1955, and were set to expire after five years.<sup>38</sup> They were renewed for a five-year term in 1960,<sup>39</sup> and again for an indefinite term in 1965.<sup>40</sup> The

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33. See ICRC Statement on Historical Research, *supra* note 22 (summarizing history of administration of Archive); see also ITS Homepage History Section, *supra* note 31 (outlining development of Archive and Tracing Service).

34. See ICRC Statement on Historical Research, *supra* note 22 (describing evolution of administration of Archive); see also ITS Homepage History Section, *supra* note 31 (summarizing development of Archive and Tracing Service).

35. See ICRC Statement on Historical Research, *supra* note 22 (outlining development of administration of Archive); see also ITS Homepage History Section, *supra* note 31 (recounting history of Archive and Tracing Service).

36. See ICRC Statement on Historical Research, *supra* note 22 (tracing evolution of administration of Archive); see also Cohen, *supra* note 3 (mentioning role of Allied Forces in gathering documentation and creating Archive).

37. See Agreement Constituting an International Commission for the International Tracing Service, June 6, 1955, 6 U.S.T. 6186, 219 U.N.T.S. 79 [hereinafter Bonn Accords]; see also ICRC Statement on Historical Research, *supra* note 22 (describing adoption of Bonn Accords); ITS Homepage History Section, *supra* note 31 (recounting history of Archive).

38. See Bonn Accords, *supra* note 37, pmbl., art. 10 (indicating date of entry into force, expiry of Bonn Accords as five years from date of entry into force); see also ITS Homepage History Section, *supra* note 31 (indicating year of adoption and date of expiration).

39. See Protocol Renewing and Amending the Agreement of June 6, 1955, Sept. 30-Oct. 7, 1960, 12 U.S.T. 444, 377 U.N.T.S. 402 [hereinafter 1960 Amendments]; see also ITS Homepage History Section, *supra* note 31 (mentioning renewal of five year term).

40. See Bekanntmachung der Vereinbarung über die Verlängerung und Änderung des Abkommens über die Errichtung eines Internationalen Ausschusses für den Interna-

eleven Member States of the ITS form the International Commission ("IC").<sup>41</sup> By consensus agreement, the IC provides operational directives to the International Committee of the Red Cross ("ICRC"), the body charged with carrying out the day-to-day operations of the ITS.<sup>42</sup> The ICRC discharges this responsibility by appointing a Director, subject to approval by the IC.<sup>43</sup> The Bonn Accords require that the Director must be a Swiss national.<sup>44</sup> The terms of the settlement ending the Occupation oblige the German Government to ensure the continued operation of the ITS, which includes funding ongoing operations.<sup>45</sup>

### 3. Structure of the Bonn Accords

This Note interprets the language of the Bonn Accords in accordance with the Vienna Convention on the Law of Treaties ("Vienna Convention").<sup>46</sup> Because the Bonn Accords and all

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tionalen Suchdienst [Protocol Renewing and Amending the Agreement of June 6, 1955], Oct. 15, 1973, BGBl. II at 1520, 1522 (F.R.G.), U.S. Dept. of State Airgram A-1479 (declassified), July 19, 1967 [hereinafter 1965 Amendments]; *see also* ITS Homepage History Section, *supra* note 31 (noting indefinite renewal effective May 5, 1965).

41. *See* Bonn Accords, *supra* note 37, art. 1 (establishing International Committee ("IC")); *see also* ICRC Statement on Historical Research, *supra* note 22 (describing IC as comprised of eleven Member States).

42. *See* Bonn Accords, *supra* note 37, art. 2, Annex pmbl. (establishing administrative process and respective roles of IC and ICRC); *see also* ICRC Statement on Historical Research, *supra* note 22 (expressing ICRC understanding of their responsibility in administering Archive).

43. *See* Bonn Accords, *supra* note 37, Annex art. 1 (stating IC must approve ICRC appointee); *see also* ITS Homepage History Section, *supra* note 31 (describing role of Director).

44. *See* Bonn Accords, *supra* note 37, Annex art. 1 (establishing parameters of qualification for ITS Director); *see also* ITS Homepage History Section, *supra* note 31 (describing nationality and role of Director).

45. *See* Bonn Accords, *supra* note 21, pmbl. (describing requirement that continuation of tracing service be assured); *see also* Grundgesetz für die Bundesrepublik Deutschland [Basic Law], art. 25 (1949) (F.R.G.) (requiring treaty obligations supersede German domestic law, thereby binding Germany to treaty obligation); Vicki C. Jackson, Constitutional Comparisons: Convergence, Resistance, Engagement, 119 HARV. L. REV. 109, 113 n.15 (citing German Basic Law as example of constitution implementing international law); Max, *supra* note 2 (describing German obligation to fund Archive, German reticence to entirely absorb cost of scanning Archive into electronic format).

46. *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (codifying international law of treaty interpretation); *see also* *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 433 (2d Cir. 2001), *cert. denied*, 534 U.S. 891 (2001) (holding Vienna Convention is used by United States as guide to general principles of treaty interpretation despite non-ratification by United

subsequent amendments were concluded before the Vienna Convention entered into force, the Vienna Convention is not directly applicable to the Bonn Accords.<sup>47</sup> In keeping with well-accepted practice, however, Articles 31, 32, and 33 of the Vienna Convention are utilized to reflect a codification of customary international law on treaty interpretation.<sup>48</sup> The Vienna Convention provides that treaties must be interpreted in good faith, in accordance with the ordinary meaning of the terms in their written context, and in light of the object and purpose of the treaty.<sup>49</sup> The Vienna Convention also provides that when a treaty is concluded in more than one language, all official versions are equally authoritative.<sup>50</sup> A treaty's text, including the preamble and annex, is the primary source from which the meaning of a treaty is derived.<sup>51</sup> Subsequent agreements that interpret the meaning of a treaty, and subsequent practice in applying the treaty, may also inform the meaning of treaty language.<sup>52</sup> *Travaux préparatoires* are acceptable to help confirm the meaning of a treaty provision; however, their use to actually determine the meaning of a provision is disfavored, unless the text

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States); RESTATEMENT (THIRD) OF FOREIGN RELATIONS, part III, introductory note (1997) [hereinafter RESTATEMENT (THIRD)] (describing United States' adherence to Vienna Convention).

47. See Bonn Accords, *supra* note 37, pmbl. (noting Bonn Accords entered into force May 5, 1955); see also Vienna Convention, *supra* note 46, art. 4 (stating Vienna Convention not effective retroactively).

48. See *Sovereignty Over Pulau Litigan and Pulau Sipadan (Indon. v. Malay.)*, 2002 I.C.J. 625, 645-646 (Dec. 17) (holding Vienna Convention reflects codification of customary international law, utilizing articles 31 and 32 as interpretive guides); see also *LaGrand Case (F.R.G. v. U.S.)*, 2001 I.C.J. 466, 502 (Jun. 27) (holding Vienna Convention reflects codification of customary international law, utilizing articles 31 and 33 as interpretive guide).

49. See Vienna Convention, *supra* note 46, art. 31(1) (outlining interpretative norms); see also *LaGrand Case*, 2001 I.C.J. at 501-03 (describing interpretative norms as enshrined in Vienna Convention articles 31 and 33); RESTATEMENT (THIRD), *supra* note 46, § 325 (enunciating interpretative norms employed by United States, reflective of Vienna Convention).

50. See Vienna Convention, *supra* note 46, art. 33 (indicating official versions of treaties are equally effective, regardless of language); see also *LaGrand Case*, 2001 I.C.J. at 501-03 (describing interpretative norms as enshrined in Vienna Convention articles 31 and 33).

51. See Vienna Convention, *supra* note 46, art. 31 (outlining primacy of textual interpretation); see also RESTATEMENT (THIRD), *supra* note 46, § 325(1) (indicating primacy of treaty language).

52. See Vienna Convention, *supra* note 46, art. 31 (permitting use of subsequent practice to inform meaning); see also RESTATEMENT (THIRD), *supra* note 46, § 325(2) (describing acceptability of subsequent practice to inform meaning of treaty language).

and subsequent practice leave the meaning ambiguous, obscure, or would lead to a result that is manifestly absurd or unreasonable.<sup>53</sup>

The preambles of both the Main Agreement and the Annex to the Bonn Accords describe the purpose and intended function of the ITS. The preamble to the Main Agreement describes the mission of the ITS as continuing the operations of the Tracing Service, which was established “for the purpose of tracing missing persons and collecting, classifying, preserving and rendering accessible to governments and interested persons the documents relating to Germans and non-Germans who were interned in National-Socialist concentration or labor camps or to non-Germans who were displaced as a result of the Second World War.”<sup>54</sup> The preamble to the Annex, which governs relations between the IC and the ICRC, expresses the IC Members’ desire “that the future operations of the International Tracing Service shall be conducted in such a way that the information contained in the archives of the International Tracing Service shall, as hitherto, be freely available to interested persons, organi[z]ations, and authorities, for humanitarian purposes.”<sup>55</sup>

Annex Article Four (“Article Four”) describes who may receive information from the ITS, and what degree of access such persons will enjoy.<sup>56</sup> The language of Article Four in the original 1955 Bonn Accords appears to contemplate relatively permissive rights to access the information contained within the Archive, stating: “all information which can be of assistance to, and is of direct interest to, a person or persons requesting such information” will continue to be provided through appropriate channels.<sup>57</sup> When the Bonn Accords were renewed in 1960, the drafters narrowed the language of Article Four.<sup>58</sup> The new lan-

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53. See Vienna Convention, *supra* note 46, art. 32 (disfavoring use of *travaux préparatoires*, limiting their permissibility), see also RESTATEMENT (THIRD), *supra* note 46, §325, cmt. (e) (describing Vienna Convention treatment of *travaux préparatoires*).

54. Bonn Accords, *supra* note 37, pmbl.

55. Bonn Accords, *supra* note 37, Annex pmbl.

56. See Bonn Accords, *supra* note 37, Annex art. 4 (establishing parameters of access enjoyed by Members); see also Cohen *supra* note 3 (describing in general terms rights of access and restrictions on access).

57. Bonn Accords, *supra* note 37, Annex art. 4.

58. Compare Bonn Accords, *supra* note 37, Annex art. 4 (outlining rights of access in relatively broad terms), with 1960 Amendments, *supra* note 39 (narrowing language of Annex article IV).

guage stated the “basic task” of the ITS “is to provide, for humanitarian purposes, to the individuals directly concerned personal information extracted from its archives and documents.”<sup>59</sup> The *chapeau* of the 1960 Amendments also contains an assurance from Germany that they will not interfere with the ongoing operations of the ITS: “For its part, the Government of the Federal Republic of Germany shall continue to ensure that the International Committee of the Red Cross may carry out the administration of the archives and documents of the International Tracing Service at Arolsen without interference of any kind.”<sup>60</sup>

In 1962, a group of Belgian historians, the *Centre National d’Histoire des Guerres Mondiales* made a request to the IC, asking that the ITS undertake an unspecified historical study.<sup>61</sup> As the IC did not consider the ITS competent in the historical field, the IC requested that Members submit national research bodies capable of and interested in conducting research, with the understanding that these groups would be invited to make use of the Archive for historical research.<sup>62</sup> Years later, commencing January 1, 1996, the IC began allowing access to the small portion of the Archive containing information of a non-sensitive nature.<sup>63</sup>

Annex Article Three (“Article Three”) describes IC Member States’ rights to access materials within the Archive. The original 1955 text stated that each IC Member would enjoy “free access to all the archives and documents reposing with the [ITS]”, provided they coordinate their activities with the Director.<sup>64</sup> Article Three was narrowed, effective 1965.<sup>65</sup> IC Members may still ac-

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59. 1960 Amendments, *supra* note 39.

60. 1960 Amendments, *supra* note 39.

61. See U.S. Dept. of State, Airgram A-1457 (declassified), Jan. 9, 1963 [hereinafter Airgram A-1457], (reporting request from historians that ITS undertake historical study, requesting names of suitable research organizations); see also U.S. Dept. of State, Airgram A-313 (declassified), Apr. 3, 1963 [hereinafter Airgram A-313], (responding to request of Airgram A-1457, suggesting several organizations).

62. See Airgram A-1457, *supra* note 61 (reporting request); see also Airgram A-313, *supra* note 61 (responding to request in Airgram A-1457).

63. See ITS, Historical Research [hereinafter ITS Statement on Historical Research], <http://www.its-arolsen.org/english/index.html> (follow both “Historical research” hyperlinks) (last visited Mar. 4, 2007) (describing portion of Archive accessible to historians); cf. Max, *supra* note 16 (illustrating scope and nature of Archive material inaccessible due to privacy concerns).

64. Bonn Accords, *supra* note 37, Annex art. 3.

65. Compare Bonn Accords, *supra* note 37, Annex art. 3, with 1965 Amendments, *supra* note 40 (amending Annex article III, narrowing terms under which IC Members can access Archive).

cess the Archive, but only for the purpose of inspecting the Archive and documents.<sup>66</sup> The newer language also conditions IC Member access on agreement by the Director, and makes explicit the requirement that Annex Article Five (“Article Five”) be observed.<sup>67</sup> Article Five, which never has been amended, addresses privacy concerns.<sup>68</sup> It requires that “all reasonable steps” be taken to avoid releasing personal information that “might prejudice the interests of the person or persons concerned or [the interests] of their relatives.”<sup>69</sup>

Article Three appears to have been amended in response to a perceived threat of infiltration by the Soviet bloc. IC Members were concerned that these governments would attempt to gain access to the Archive and then search for compromising information about their own citizens.<sup>70</sup> For this same underlying reason Annex Article Eight, which established means to accede to the IC, was eliminated, forestalling the possibility of Soviet Bloc governments joining the ITS.<sup>71</sup>

## B. *Data Privacy Laws, Jurisdictional Laws, and Capacities and Immunities of International Organizations*

### 1. Data Privacy Laws

The data privacy laws of IC Members, and the overall approach to data privacy protection that these laws reflect, have informed Members’ respective approaches to the Archive issue.<sup>72</sup> While a comprehensive examination of these laws is be-

66. See 1965 Amendments, *supra* note 40 (altering language of Annex article III, making access for purpose of inspection); see also Cohen, *supra* note 4 (reporting IC Members’ right to inspect).

67. See 1965 Amendments, *supra* note 40 (adding language to Annex article III requiring agreement of Director, referencing Annex article V); see also Cohen, *supra* note 4 (quoting Annex article V in discussion of IC Member access for inspection).

68. See Bonn Accords, *supra* note 37, Annex art. 5 (requiring steps be taken to guard privacy); see also Cohen, *supra* note 4 (quoting Annex article V).

69. See Bonn Accords, *supra* note 37, Annex art. 5; see also Cohen, *supra* note 4 (quoting Annex article V).

70. See U.S. Dept. of State, Airgram A-280 (declassified), Aug. 5, 1964 [hereinafter Airgram A-280] (articulating perceived threat of tyrannical communist governments searching Archive for information on their citizens); see also U.S. Dept. of State, Airgram A-908 (declassified), Nov. 20, 1964 [hereinafter Airgram A-908] (proposing amended language for Annex article III).

71. See Airgram A-280, *supra* note 70 (describing communist threat); see also Airgram A-908, *supra* note 70 (proposing deletion of Annex article VIII).

72. See Cohen, *supra* note 4 (contrasting parties’ positions and relative strictness of

yond the scope of this Note, a brief summary of the framework they provide will aid the discussion that follows.<sup>73</sup> Germany, along with all EU Member States, is bound by the Council of Europe Convention on the Automatic Processing of Personal Information (“Council Convention”), which establishes standards within which EU members must enact data privacy legislation.<sup>74</sup> Rather than delving into the minutiae of German data privacy law, this Note utilizes the Council Convention to describe the parameters within which German (and other EU) domestic data privacy laws must fall. Likewise, Germany and all other EU Members are bound by Directive 95/46/EC of the European Parliament on the transfer of personal data to third countries (“European Directive 95/46/EC”), so the limits it places on the transfer of data will be briefly discussed.<sup>75</sup>

Privacy in the United States is understood as a negative right.<sup>76</sup> As a result, the U.S. approach to privacy is structured around protecting citizens against governmental interference with individual privacy—government is seen as a threat to privacy, not as a guarantor thereof.<sup>77</sup> By limiting government’s abil-

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data privacy laws); *see also* Loewenberg & Borger, *supra* note 6 (comparing positions taken by Germany and United States, reporting Germany’s desire to create comprehensive data protection mechanism).

73. On data protection laws, *see generally*, DATA PROTECTION LAWS OF THE WORLD (Christopher Millard & Mark Ford eds., 1998) (2006) (presenting overview of data privacy laws worldwide, specific information regarding various jurisdictions); BUSINESS GUIDE TO PRIVACY AND DATA PROTECTION LEGISLATION (Charles E.H. Franklin ed., 1996) [hereinafter BUSINESS GUIDE] (describing domestic and supranational data privacy regulations).

74. *See* Council Convention *supra* note 5; *see also* Mark Ford, *Council of Europe*, in 1 DATA PROTECTION LAWS OF THE WORLD, *supra* note 73 (discussing Council Convention).

75. *See* European Parliament and Council Directive No. 95/46/EC, O.J. L 281/31 (1995) [hereinafter European Directive 95/46/EC], (1995) (on the protection of individuals with regard to the processing of personal data and on the free movement of such data); *see also* Joel R. Reidenberg, *The Simplification of International Data Privacy Rules*, 29 FORDHAM INT’L L.J. 1128, 1131-32 (2006) (discussing European Directive 95/46/EC).

76. Negative Rights are those rights the enjoyment of which requires the forbearance or non-action of the other party involved. *See* BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY 609 (Nicholas Bunnin & Jiyuan Yu eds., 2004) (defining negative rights within general definition of rights); *see also* John Simmons, *Inalienable Rights and Locke’s Treatises*, 12 PHIL. & PUB. AFF. 175, 191 (contrasting negative rights with positive rights within discussion of philosopher John Locke’s writings on inalienable rights).

77. *See* Joel R. Reidenberg, *Setting Standards For Fair Information Practice in the U.S. Private Sector*, 80 IOWA L. REV. 497, 501-03 (1995) (contrasting bases of U.S. and EU data privacy regimes, explaining U.S. approach); *see also* Eric Shapiro, Note, *All is Not Fair in the Privacy Trade: The Safe Harbor Agreement and the World Trade Organization*, 71 FORDHAM



ity to intrude on the sphere of the individual, and operating with the presumption that, absent reasons to the contrary, government should not restrict citizens' access to information, the United States has traditionally favored more open access to personal information and disfavored governmental regulation in this area.<sup>78</sup> The European approach reverses the presumption, viewing the individual's expectation of privacy as a positive right,<sup>79</sup> and government as a guarantor of rather than a threat to that right.<sup>80</sup> The Council Convention provides an overview of the parameters of European data privacy laws most relevant to this Note. In general terms, the Council Convention requires that signatory States must protect the individual against abuses resulting from the collection of personal data; must regulate the flow and exchange of such data; and, in the absence of proper legal safeguards, must prohibit the processing of sensitive data, which generally includes data regarding an individual's race, politics, health, religion, sexual life, criminal record, and other areas; and allows Member States to carve out derogations in instances where doing so benefits the public interest.<sup>81</sup> Germany, along with the rest of the EU, provides serious enforcement mechanisms in its domestic data privacy legislation, with severe fines and incarceration available to remedy the most egregious breaches of data privacy rules.<sup>82</sup>

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L. Rev. 2781, 2784-85 (2003) (describing U.S. and EU approaches to data privacy regulation).

78. See Reidenberg, *supra* note 77, at 501-03 (outlining U.S. attitude toward data privacy regulation in historic and constitutional terms); see also Shapiro, *supra* note 77, at 2784-85 (contrasting divergent views of United States and EU regarding data privacy regulation).

79. Positive rights are rights dependent on the positive actions of another party. See BLACKWELL DICTIONARY OF WESTERN PHILOSOPHY, *supra* note 76, at 609 (defining negative rights within general definition of rights); see also Simmons, *supra* note 76, at 191 (contrasting negative rights with positive rights within discussion of Locke's writings on inalienable rights).

80. See Reidenberg, *supra* note 77, at 501-03 (contrasting bases of U.S. and EU data privacy regimes, explaining EU approach); see also Shapiro, *supra* note 77, at 2784-85 (describing U.S. and EU approaches to data privacy regulation).

81. See Council Convention, *supra* note 5, arts. 1, 4, 6-8, 9(2) (delineating types of personal data and means of data collection or exchange requiring safeguard, allowing derogations in public interest) see also Ford, *supra* note 74 (explaining parameters and effect of Council Convention).

82. See BUSINESS GUIDE *supra* note 73, at 193, 221 (describing possible sanctions resultant from violation of data privacy law in France, Germany); see also Sophie Boucher & Marc d'Haultfoeuille, *France*, in 1 DATA PROTECTION LAWS OF THE WORLD, *supra* note 73, at 22-24 (outlining sanctions under French data privacy law); Matthias

European Directive 95/46/EC, enacted to require a uniform and adequate degree of protection in situations where personal data is transferred to third party (*i.e.* non-EU) countries, allows for derogations in certain instances.<sup>83</sup> Grounds for derogation include important public interest grounds, situations involving a data registry intended to provide information to the public, and data registries that are open to persons with a legitimate interest in the information.<sup>84</sup> In an effort to avoid possible disruptions in transfers of data from the EU to the United States, which would have had serious commercial ramifications, the parties negotiated a "Safe Harbor."<sup>85</sup> The Safe Harbor allows U.S. companies to self-certify as compliant with EU data privacy standards, and creates an enforcement mechanism through the Federal Trade Commission.<sup>86</sup> Both France and Germany have, in notable instances, allowed broad public access to archives of historical importance that contain potentially sensitive personal information. The French Government opened files pertaining to the Algerian War of Independence, and, as a condition of taking possession of the Berlin Document Center, which holds records pertaining to Nazi membership, the German Government agreed to allow continued unfettered access to that archive.<sup>87</sup>

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Meister & Joachim Schrey, *Germany*, in 1 DATA PROTECTION LAWS OF THE WORLD, *supra* note 73, at 26-28 (outlining sanctions under German data privacy law).

83. See European Directive 95/46/EC, *supra* note 75, art. 26 (enunciating possibility of derogation); see also Barbara Crutchfield George, Patricia Lynch & Susan J. Marsnik, *U.S. Multinational Employers: Navigating Through the "Safe Harbor" Principles to Comply With the EU Data Privacy Directive*, 38 AM. BUS. L.J. 735, 752 (reviewing framework of data protection created in European Directive 95/46/EC).

84. See European Directive 95/46/EC, *supra* note 75, art. 26 (listing permissible grounds for derogation); see also George et al., *supra* note 83, at 752 (reviewing framework of data protection created in European Directive 95/46/EC). The Council Convention likewise allows derogations to be created under the laws of the individual State in situations benefiting the public interest. See Council Convention, *supra* note 5, art. 9(2) (defining acceptable parameters for derogation).

85. See Reidenberg, *supra* note 75, at 1132-33 (describing Safe Harbor); see also Shapiro, *supra* note 77, at 2786-87 (outlining structure of Safe Harbor).

86. See George et al., *supra* note 83, at 764-66 (describing mechanics of Safe Harbor); see also Shapiro, *supra* note 77, at 2786-87 (outlining structure of Safe Harbor).

87. See ACCESS TO HOLDINGS OF THE BERLIN DOCUMENT CENTER: U.S. DEPT. OF STATE APPENDIX TO TESTIMONY BEFORE THE S. FOR. REL. SUBCOMM. ON INT'L ORGS., INT'L SEC., AND HUM. RTS. [hereinafter ACCESS TO BERLIN DOCUMENT CENTER] (1994), available at <http://www.h-net.org/~german/discuss/transfer/whatis.html> (last visited Mar. 4, 2007) (describing background and context of turnover of Berlin Document Center to German control, enunciating agreement to allow public access under terms of respective national archives); see also France to Open Archives on Algerian War [hereinafter

## 2. Capacities and Immunities of International Organizations

In general terms, an IO determines its own functional capacity, which in turn determines what related immunities the IO will enjoy.<sup>88</sup> The default presumption in international law is that an IO should enjoy such capacities and immunities as are necessary for the effective fulfillment of its public mandate.<sup>89</sup> National bodies would otherwise be in a position to make pronouncements binding on the policy decisions of an IO.<sup>90</sup> The public mandate of an IO is demarcated by the extent to which it was created to conduct an independent activity related to the functioning of the international community.<sup>91</sup> To the extent that an act is necessary for the public purpose of an IO, the IO is presumptively immune with respect to that act.<sup>92</sup> In response to this broad ability of an IO to define its own capacities and immunities, commentators have argued that in certain situations these immunities should be circumscribed, so that individuals negatively affected by the public function of an IO might seek redress for their grievances through legal channels.<sup>93</sup>

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France to Open Archives], XINHUA NEWS AGENCY, Nov. 28, 2000 (reporting French Government announcement that Algerian War archives would no longer be closed to public access).

88. See *infra* notes 89-93 and accompanying text.

89. See A.S. MULLER, *INTERNATIONAL ORGANIZATIONS AND THEIR HOST STATES* 89, 151 (1995) (discussing determination of capacities and presumption of immunities of international organizations); see also *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174 (Apr. 11) (holding United Nations has such capacities as were created in it by Member States—international organizations' capacities are self-determined); 1 D.P. O'CONNELL, *INTERNATIONAL LAW* 94-98 (2d. ed., 1970) (discussing parameters of capacities and immunities of international organizations).

90. See MULLER, *supra* note 89, at 151 (justifying need for coextensive capacities and immunities); see also 2 D.P. O'CONNELL, *INTERNATIONAL LAW* 927 (2d. ed., 1970) (describing international organizations as immune from process unless immunity expressly waived).

91. See MULLER, *supra* note 89, at 88-91 (describing functional capacity view of international organizations, wherein capacity is coextensive with function); see also O'CONNELL, *supra* note 89, at 98-99 (outlining functional capacity approach to international organizations, wherein capacities are coextensive with independent activities for which international organization was chartered).

92. See MULLER, *supra* note 89, at 153 (outlining presumption of immunity for international organization in pursuit of public purpose); see also O'CONNELL, *supra* note 89, at 927 (describing international organizations as immune from process unless immunity expressly waived).

93. See Emmanuel Gaillard & Isabelle Pingel-Lenuzza, *International Organisations and Immunity From Jurisdiction: To Restrict or to Bypass*, 51 *INT'L. & COMP. L. Q.* 1, 5-11 (2002) (arguing in some contexts representation and justice best served by curtailing

### 3. Forum for Litigation and the European Union

EU law strongly favors maintaining jurisdiction within the European Union over actions involving EU domiciles.<sup>94</sup> Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (“Brussels I. Regulation”) addresses conflicts of jurisdiction.<sup>95</sup> The Brussels I. Regulation contains clauses that address choice of forum agreements and forum selection in general.<sup>96</sup> The Brussels I. Regulation strongly favors honoring forum selection clauses, providing that when the forum selected is that of a Member State, and at least one of the parties to the action is domiciled in the EU, that choice of forum shall be honored.<sup>97</sup> The Brussels I. Regulation also presumes that unless the parties involved have arranged otherwise, forum selection clauses are exclusive—they operate to the exclusion of other fora.<sup>98</sup> The Brussels I. Regulation is strongly protective of EU Member jurisdiction over pending actions, with its Article II having been interpreted to strongly favor the jurisdiction of EU Members over that of non-Member States, even when the defendant might be seriously inconvenienced by having to litigate the complaint in

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immunities of international organizations); *see also* MULLER, *supra* note 89, at 176-82 (observing curtailment of immunities might be justified in certain circumstance).

94. *See generally* ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND ARBITRATION* 438-456 (2d. ed. 2002) (discussing EU approach to jurisdictional issues).

95. *See* Council Regulation No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, O.J. L 12/1, arts. 2-6, 23, 27 (2001) [hereinafter Brussels I. Regulation] (establishing framework of EU approach to conflict of jurisdiction); *see also* LOWENFELD, *supra* note 94, at 438-56 (discussing EU treatment of foreign judgments and assertions of jurisdiction in context of Brussels Convention on Jurisdiction and Recognition of Judgments in Civil and Commercial Matters, J.O. L 299/32 (1972), *amended by* O.J. L 304/77 (1978), *amended by* O.J. L 388/1 (1982), *amended by* O.J. L 285/1 (1989) [hereinafter Brussels Convention], legal framework subsequently replaced by Brussels I. Regulation).

96. *See* Brussels I. Regulation, *supra* note 95, arts. 2-6, 23, 27 (2001) [hereinafter Brussels I. Regulation] (establishing framework of EU approach to conflict of jurisdiction); *see also* LOWENFELD, *supra* note 94, at 438-56 (discussing EU framework regarding foreign judgments and assertions of jurisdiction in context of Brussels Convention).

97. *See* Brussels I. Regulation, *supra* note 95, art. 23(1) (establishing priority of EU forum over non-EU forum); *see also* LOWENFELD, *supra* note 94, at 438-56 (discussing priority of EU forum in EU law, in context of Brussels Convention).

98. *See* Brussels I. Regulation, *supra* note 95, art. 23(1) (mandating presumption of exclusivity in forum selection clauses); *see also* LOWENFELD, *supra* note 94, at 438-56 (discussing presumption of exclusivity of forum selection clauses in EU law, under Brussels Convention).

the EU Member State.<sup>99</sup> Essentially, so long as one party to the litigation is an EU domicile, and at least one party to the action brings a related action in an EU forum, the entire complaint will be heard in the EU forum.<sup>100</sup>

## II. *CONFLICTING VIEWS REGARDING AMENDMENTS AND SAFEGUARDS*

Part II of this Note contrasts the position taken most prominently by Germany (“German Approach”) with that taken most prominently by the United States (“U.S. Approach”). The respective positions are described in the context of the language of the Bonn Accords, past practice of the ITS, and relevant areas of domestic and international law. This Note describes each approach in general terms; while every effort has been made to accurately and concisely approximate the respective positions, it is recognized that all the nuance of each view will not have been captured.

### A. *The U.S. Approach*

The United States has been one of several IC Member States aggressively advocating the immediate opening of the Archive on the basis of the current Bonn Accords framework.<sup>101</sup> The U.S. Approach has argued that all Holocaust records in the Archive should immediately be made available, and that no amendment of the Bonn Accords is necessary to do so.<sup>102</sup> A primary motivation for the U.S. Approach has been to enable access to the Archive without further delay, so that Holocaust survivors can see the benefits of access within their lifetimes.<sup>103</sup>

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99. See Brussels I. Regulation, *supra* note 95, art. 2 (creating strong preference for EU forum for pending actions); see also *Owusu v. Jackson*, Case C-281/02, [2005] E.C.R. I-1383, ¶ 46 (holding that although Jamaican defendant seriously inconvenienced by litigating in England, stay in favor of foreign forum on basis of *forum non conveniens* not permitted).

100. See Brussels I. Regulation, *supra* note 95, art. 2 (creating strong preference for EU forum); see also *Owusu*, E.C.R. I-1383, ¶ 46 (denying petition for *forum non conveniens* stay).

101. See Cohen, *supra* note 4 (framing Archive issue as dispute between United States and Germany); see also Gordon, *supra* note 17 (reporting recent efforts by United States to open Archive).

102. See Cohen, *supra* note 4 (reporting U.S. statements favoring immediate opening of Archive); see also Loewenberg & Borger, *supra* note 6 (describing U.S. position favoring immediate access).

103. See Max, *supra* note 2 (quoting Paul Shapiro, U.S. Holocaust Memorial Mu-

For the U.S. Approach to prevail, it would be necessary to establish that the language of Article Four and subsequent practice do not preclude liberalizing access to the Archive.<sup>104</sup> One could argue that Article Four does accommodate the provision of access for historical research purposes as a secondary mission of the ITS: the plain language of Article Four does not expressly exclude accommodating persons interested in conducting historical research, and the language of the preambles to the Main Agreement and the Annex can be read to suggest a more broad humanitarian purpose for the ITS.<sup>105</sup> The Vienna Conventions allow subsequent practice to be used to interpret the meaning of a treaty provision.<sup>106</sup> As the 1960 version of Article Four is the version in force today, it could be argued that the subsequent practice referenced above—the Belgian historians' request and the opening of non-sensitive sections of the Archive in 1996—establish that access can be liberalized without amending the Bonn Accords.<sup>107</sup> At the very least, subsequent practice renders the meaning of Article Four ambiguous, allowing reference to the *travaux préparatoires* under norms of treaty interpretation.<sup>108</sup> In that regard, the *travaux préparatoires* reveal that the narrowing of the Bonn Accords and the establishment of a highly restrictive access protocol in the 1960's came in direct response to no longer salient Cold-War-era concerns.<sup>109</sup> Because the political conditions that obliged such restrictions on access to the Archive

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seum, describing process as being on actuarial timetable, not diplomat's or archivist's timetable); see also Gordon, *supra* note 17 (quoting Karel Fracapane, Secretary of International Holocaust Task Force on Education, Research, and Remembrance, characterizing situation as emergency, with number of remaining survivors quickly dwindling).

104. See 1960 Amendments, *supra* note 39 (amending Annex article IV); see also Cohen, *supra* note 4 (reporting argument by former ITS Director that unless amended, Bonn Accords forbid access).

105. See Bonn Accords, *supra* note 37, pmbl, Annex pmbl.; see also 1960 Amendments, *supra* note 39 (amending Annex article IV)

106. See Vienna Convention, *supra* note 46, art. 31 (permitting use of subsequent practice to inform meaning); see also RESTATEMENT (THIRD), *supra* note 46, § 325(2) (describing acceptability of subsequent practice to inform meaning of treaty language).

107. See Airgram A-1457, *supra* note 61 (reporting request by Belgian Historians for study to be conducted, indicating decision of IC to invite researchers to access Archive); see also ITS Statement on Historical Research, *supra* note 63 (describing portion of Archive open to research, containing non-sensitive information).

108. See Vienna Convention, *supra* note 46, art. 32 (allowing use of *travaux préparatoires* in face of ambiguity of treaty language and subsequent practice), see also RESTATEMENT (THIRD), *supra* note 46, §325, cmt. (e) (describing Vienna Convention treatment of *travaux préparatoires*).

109. See Airgram A-280, *supra* note 70 (describing perception of threat of Archive

no longer exist, it could be argued that a policy favoring secrecy over access is no longer justified.<sup>110</sup> On these same grounds, it could be argued that, subject to the unanimous approval of the IC, interested persons can be granted access to the Archive and materials therein by means of the creation of operational directives.<sup>111</sup> Of course, reasonable measures would have to be taken to protect the privacy of individuals whose data is contained in the Archive, as required by Article Five.<sup>112</sup>

### B. *The German Approach*

The German Approach acknowledges the importance of allowing access, but conditions opening the Archive on amending the Bonn Accords to implement substantial data privacy safeguards to protect known or knowable individuals and their families.<sup>113</sup> In contrast with the U.S. Approach, which emphasizes the anticipated general social benefit of opening the Archive, the German Approach focuses on the potential harm to individuals that could result.<sup>114</sup> The German Approach frames the Archive as a collection of personal data, and views the ITS as obliged to guard the privacy of the individuals concerned.<sup>115</sup>

Regarding Article Four, the German Approach might argue that by the plain language of the Bonn Accords the tracing function is the central responsibility of the ITS, and that unless the

infiltration by communist governments); *see also* Airgram A-908, *supra* note 70 (proposing more restrictive language for Annex article III).

110. *See* Fleishman, *supra* note 14 (describing longstanding desire of Holocaust survivors to access Archive); *see also* Campbell, *supra* note 15 (recounting survivor's desire that Archive be accessible); Gordon, *supra* note 17 (reporting disbelief at continued closure of Archive expressed by family members of Holocaust survivors and survivors themselves, including Nobel Laureate Elie Wiesel).

111. *See* Bonn Accords, *supra* note 37, art. 2, (establishing process of IC creating operational directives to be carried out by ICRC); *see also* ICRC Statement on Historical Research, *supra* note 22 (describing ICRC role carrying out directives).

112. *See* Bonn Accords, *supra* note 37, Annex art. 5 (establishing requirement of reasonable measures); *see also* Cohen, *supra* note 4 (quoting Annex article V).

113. *See* Cohen, *supra* note 4 (reporting German position favoring data privacy safeguards); *see also* Loewenberg & Borger, *supra* note 6 (describing German concern over potential release of sensitive personal information from Archive).

114. *See* Cohen, *supra* note 4 (outlining U.S. and German positions regarding Archive); *see also* Loewenberg & Borger, *supra* note 6 (describing U.S. and German positions regarding Archive).

115. *See* Cohen, *supra* note 4 (indicating concern over possible release of personal information); *see also* Loewenberg & Borger, *supra* note 6 (describing German concern over potential dissemination of sensitive personal information from Archive).

Bonn Accords are amended, the ITS mandate does not accommodate historical research.<sup>116</sup> Subsequent practice supports this interpretation; the ITS has historically operated as a closed archive devoted almost exclusively to its tracing task.<sup>117</sup> Outside parties have been refused access, and IC Members, per the terms of Article Three, have only been allowed access subject to agreement with the ITS Director.<sup>118</sup> In view of this language and practice, a strong argument could be made that a re-interpretation of the Bonn Accords would violate the norms of treaty interpretation, favoring selective (re)interpretation over actual treaty language.<sup>119</sup> Further, the argument could be raised that, in deciding what capacities and immunities the ITS should enjoy, the need to facilitate redress for individuals whose personal information might be released justifies restricting or tempering its immunities and making it reachable by legal process should individuals' data privacy rights be compromised.<sup>120</sup> In other words, the German Approach might seek to ensure that data subjects could seek redress directly from the ITS, so thereby the ITS and not the data subjects themselves would bear the burden of enforcing the protection of sensitive personal data.<sup>121</sup>

### C. *Contrasting the Two Approaches*

To those favoring the U.S. Approach, the German Ap-

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116. See 1960 Amendments, *supra* note 39 (amending Annex article IV to state the "basic task" of the ITS "is to provide, for humanitarian purposes, to the individuals directly concerned personal information extracted from its archives and documents."); see also Cohen, *supra* note 4 (reporting German position that Bonn Accords must be amended).

117. See Cohen, *supra* note 4 (describing ITS focus on tracing function, inaccessibility of Archive); see also Gordon, *supra* note 17 (reporting on Tracing Service and closed Archive).

118. See 1965 Amendments, *supra* note 40 (altering language of Annex article III, making access for purpose of inspection, subject to agreement with the ITS Director); see also Cohen, *supra* note 4 (reporting IC Members' right to inspect); Max, *supra* note 2 (indicating rarity of outsider accessing Archive).

119. See Vienna Convention, *supra* note 46, art. 32 (disfavoring use of *travaux préparatoires*, limiting their permissibility), see also RESTATEMENT (THIRD) §325, cmt. (e) (describing Vienna Convention treatment of *travaux préparatoires*).

120. See Gaillard & Pingel-Lenuzza, *supra* note 93 (arguing in some contexts representation and justice best served by curtailing international organization immunities); see also MULLER, *supra* note 52, at 176-82 (observing curtailment of immunities might be justified in certain circumstance).

121. See Cohen, *supra* note 4 (describing German arguments in favor of stringent data privacy safeguard mechanism); see also Loewenberg & Borger, *supra* note 6 (indicating German position in favor of safeguards to prevent release of sensitive data).



proach, inasmuch as it deemed amendment of the Bonn Accords a necessary condition, could be seen as favoring legal formalities at the expense of achieving rapid resolution.<sup>122</sup> After all, attempts to amend the Bonn Accords have foundered repeatedly in the past, as IC Members continually bogged down in discussions over legal formalities.<sup>123</sup> Advocates of the U.S. Approach have argued that it is improper to hold the ITS to the domestic legal standard of a Member State, and that doing so only serves to delay resolution.<sup>124</sup> The latter argument has strong legal support: as an IO acting pursuant to its public purpose—which under the U.S. Approach would include providing access to the Archive—the ITS is presumptively immune from German law.<sup>125</sup> Additionally, the German Constitution grants treaty obligations primacy over national laws, and as a general matter, States are obliged to avoid acting to frustrate the objectives of treaties to which they are signatories.<sup>126</sup> If, as could be argued, the IC has determined that opening the Archive for research is part of the ITS mission, it could also be argued that the German Constitution and international law both suggest limits to the extent to which it is justifiable for Germany to continue as the lone holdout in favor of a certain course of action.<sup>127</sup>

Advocates for the U.S. Approach might also point out that German data privacy law did not prevent the Berlin Document

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122. See Cohen, *supra* note 4 (contrasting U.S. and German arguments); see also Loewenberg & Borger, *supra* note 6 (contrasting U.S. and German arguments).

123. See Cohen, *supra* note 4 (indicating past efforts to reach agreement had failed); see also Max, *supra* note 2 (reviewing current difficulty surrounding access issue).

124. See Cohen, *supra* note 4 (reporting insinuation that Germany was intentionally seeking to delay process); see also Loewenberg & Borger, *supra* note 6 (quoting Johannes Houwink ten Cate, Professor of History and Genocide Studies at the University of Amsterdam, “[t]hey have been stalling for eight years”).

125. See MULLER, *supra* note 52, at 89, 151 (discussing determination of capacities and presumption of immunities of international organizations); see also O’CONNELL, *supra* note 52, at 94-98 (discussing determination of capacities and presumption of immunities of international organizations).

126. See Basic Law, *supra* note 45, art. 25 (stating treaty obligations take precedence over domestic German law); see also Vienna Convention, *supra* note 46, art. 18 (declaring States must not act to frustrate objectives of treaty to which are signatory).

127. See, e.g., *Nations Agree*, *supra* note 1 (reporting agreement reached by IC Members to open Archive for research purposes); see also Basic Law, *supra* note 45, art. 25 (establishing treaty obligations supersede domestic German law); Vienna Convention, *supra* note 46, art. 18 (declaring States must avoid frustrating objectives of treaty to which are signatory).

Center from remaining freely accessible to the public, nor did French data privacy law, which must function within the same parameters as German data privacy law, foreclose opening the military archive pertaining to the Algerian War of Independence.<sup>128</sup> European Directive 95/46/EC specifically contemplates exceptions for archives containing important historical information or data registries that are open to persons with a legitimate interest, and the Council Convention allows derogations to be created under the laws of the individual State in situations benefiting the public interest.<sup>129</sup> Advocates of the U.S. Approach might argue that even if the ITS were subject to EU data privacy law, these grounds for exception would permit the ITS to transfer data to jurisdictions not meeting EU data protection standards, and would allow IC Members within the EU to relax protection standards in light of a greater public interest.<sup>130</sup> The fact that the Safe Harbor was created in a business context would illustrate that derogations from European Directive 95/46/EC are certainly possible, provided the parties are sufficiently motivated.<sup>131</sup> In sum, the U.S. Approach might assert that so long as the IC were to take reasonable precautions to protect the privacy of individuals (as required by Article Five), there is no legal impediment to the IC opening the Archive as an administrative matter, by providing operating instructions to the ICRC as described in the Bonn Accords.<sup>132</sup>

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128. See ACCESS TO BERLIN DOCUMENT CENTER, *supra* note 87 (describing continued access to Berlin Document Center following turnover to German control); see also *France to Open Archives*, *supra* note 87 (indicating France to open military archive pertaining to Algerian war). French and German data privacy law must both conform to the Council Convention and European Directive 95/46/EC. See *supra* notes 74-75 and accompanying text.

129. See Council Convention, *supra* note 5, art. 9(2) (defining acceptable parameters for derogation); see also European Directive 95/46/EC, *supra* note 75, art. 26 (listing permissible grounds for derogation); George et al., *supra* note 83, at 752-53 (reviewing framework of data protection created in European Directive 95/46/EC).

130. See Council Convention, *supra* note 5, art. 9(2) (defining parameters for derogation); see also European Directive 95/46/EC, *supra* note 75, art. 26 (listing grounds for derogation).

131. See Reidenberg, *supra* note 75, at 1132-33 (describing Safe Harbor); see also Shapiro, *supra* note 77, at 2786-87 (outlining structure of Safe Harbor).

132. See Bonn Accords, *supra* note 37, art. 2, Annex art. 5 (establishing process of IC creating operational directives to be carried out by ICRC, requiring reasonable measures to protect privacy of individuals whose information is in Archive); see also ICRC Statement on Historical Research, *supra* note 22 (describing ICRC role in carrying out directives).

To those favoring the German Approach, the effort to enact a rigorous data protection scheme might be better understood as an attempt to prevent additional harm befalling those who already suffered in the Holocaust, and not as an attempt to foist a Member State's domestic legal standard on the rest of the IC.<sup>133</sup> During the negotiation process, however, Germany voiced concerns that proceeding without amendment would leave the German Government vulnerable to suit by German citizens whose data privacy was violated, and indicated it could not approve of a plan that did not substantially comport with German data privacy standards.<sup>134</sup> These statements enhanced the impression held by some parties to the negotiations that Germany was effectively attempting to impose their domestic legal standard on the ITS, and was trying to delay resolution of the Archive issue.<sup>135</sup>

In support of the German Approach, it could be argued that the contents of the Archive make it sufficiently different from the Berlin Document Center and the French Military Archives as to make direct comparison inappropriate.<sup>136</sup> Both the Berlin Document Center and the French Military Archives contain information mainly related to perpetrators, not victims, which would seemingly alter the moral calculus.<sup>137</sup> In light of this difference, a more circumspect approach to access, placing data protection in the foreground, would be a moral impera-

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133. See Cohen, *supra* note 4 (contrasting U.S. and German arguments); see also Loewenberg & Borger, *supra* note 6 (examining U.S. and German positions).

134. See Cohen, *supra* note 4 (reporting Germany's stated concern over suits by citizens, desire for data protection mechanism substantially comporting with domestic data privacy law); see also Loewenberg & Borger, *supra* note 6 (reporting German arguments in favor of strong data protection mechanism).

135. See Cohen, *supra* note 4 (reporting insinuation that Germany was intentionally seeking to delay process); see also Loewenberg & Borger, *supra* note 6 (quoting Johannes Houwink ten Cate, Professor of History and Genocide Studies at the University of Amsterdam, "[t]hey have been stalling for eight years").

136. See Cohen, *supra* note 4 (describing information within Archive as pertaining to Holocaust victims, quoting statement of former ITS director Charles Biederman that no moral justification exists for opening Archive); see also ACCESS TO BERLIN DOCUMENT CENTER, *supra* note 87 (describing contents as pertaining to Nazi party membership and Nazi-affiliated organizations).

137. See Cohen, *supra* note 4 (indicating information within Archive pertains to Holocaust victims, quoting former ITS director Charles Biederman stating no moral justification exists for opening Archive); see also ACCESS TO BERLIN DOCUMENT CENTER, *supra* note 87 (describing contents as relating to Nazi-affiliated organization memberships).

tive.<sup>138</sup>

### III. RECONCILING DATA PROTECTION WITH ARCHIVAL ACCESS

The substantive focus of the German Approach—that controls should be put in place to guard against and remedy any possible breach of individuals' private data—is not addressed by simply arguing that amendment to the Bonn Accords is unnecessary as a matter of international law.<sup>139</sup> As discussed above, the IC has reached an agreement to amend the Bonn Accords to accommodate research, although the text of this agreement has not been made publicly available.<sup>140</sup> Part III of this Note argues that the IC could create a data protection regime through means other than amending the Bonn Accords. It is hoped that by suggesting a data protection mechanism that does not require amending the Bonn Accords, this Note will illustrate that, aside from the delays inherent in ratifying treaty amendments, the argument over whether or not to amend the Bonn Accords was largely immaterial to the substantive issues under discussion. In imagining an alternative to amending the Bonn Accords it becomes apparent that any solution will likely be complicated; in the interest of finding rapid resolution, one must hope that the IC will proceed by the least complicated means possible.<sup>141</sup>

#### A. *A Hypothetical Means to Achieve Data Protection, Without Amending the Bonn Accords*

The IC could effectuate a protection and enforcement mechanism within the existing Bonn Accords framework by approving a resolution and issuing operational directives to the ICRC, the standard means by which the IC guides ITS activi-

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138. See Cohen, *supra* note 4 (reporting comments placing Germany's arguments in favor of stringent data protection mechanism in moral context); see also Loewenberg & Borger, *supra* note 6 (describing German arguments favoring strong data protection).

139. See *supra* notes 113-15, 105-10 and accompanying text (encapsulating German approach to Archive issue, constructing argument that amendments unnecessary).

140. See *supra* notes 1, 10 and accompanying text (indicating agreement signed, ratification in process, text not available).

141. See *supra* note 103 and accompanying text (describing urgency of situation, need for most rapid resolution possible).

ties.<sup>142</sup> Clearly, under international law, the IC is entitled to guide the ITS within the limits of its public purpose; an IO by default enjoys such capacities and immunities as are necessary for the effective fulfillment of its public mandate.<sup>143</sup> As a basic matter, the operational directives would have to include the administrative guidance necessary to facilitate access—for instance, describing whether access would be on-site in Bad Arolsen or through the duplication and provision of materials off-site.<sup>144</sup>

A data privacy protection and enforcement mechanism might take shape along the following lines. First, through a non-disclosure agreement (“NDA”), the IC might mandate that any party accessing the Archive must affirm that, absent the written consent of the individual data subject, the person gaining access agrees to refrain from disseminating sensitive personal data pertaining to that subject in any way that could render that subject identifiable.<sup>145</sup> Second, the NDA could specify that any breach of data would be deemed to have occurred in either the country of domicile of the data subject or at the site of the Archive (Bad Arolsen, Germany).<sup>146</sup> Third, the resolution, directives, and NDA might specify that the data subject, their immediate heirs, and the ITS Director (on behalf of the two other parties) are all beneficiaries of the agreement between the ITS and the party accessing the Archive, and as such are entitled to pursue injunctive relief and/or damages.<sup>147</sup> The text of the NDA might also include an explicitly exclusive forum selection clause, specifying that the data subject and/or heir, or the ITS Director on the

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142. See *supra* notes 42, 111 and accompanying text (outlining process of IC administration through issuing directives).

143. See *supra* note 89 and accompanying text (explaining presumption of coextensive capacities and immunities).

144. See *supra* note 12 and accompanying text (indicating potential solution involving duplication of Archive off-site access).

145. Recent publication of material from Archive with subject rendered anonymous seems to have provoked no negative reaction from German Government. See, e.g., Max, *supra* note 22 (including examples of information from Archive, rendered anonymous); see also Fleishman, *supra* note 14 (recounting information on anonymous individual victims contained in Archive).

146. This would strongly favor EU Members maintaining jurisdiction over pending actions arising under this agreement. See *supra* notes 94-100 and accompanying text (explaining strong preference for EU forum under Brussels I. Regulation).

147. Allowing the Director to maintain an action would create greater likelihood of enforcement, and avoid shifting burden of enforcement to individual data subjects. See *supra* note 121 and accompanying text (enunciating argument against burdening data subjects with enforcement of their own data privacy rights).

subject or heir's behalf is entitled, at their discretion, to bring an action in their own country of domicile, in the country of domicile of the party accessing the Archive, or in Germany (the site of the Archive).<sup>148</sup> Under the EU approach to forum selection, allowing data subjects or the ITS Director to bring the action in their chosen venue would achieve a very high degree of certainty that the NDA between the ITS and the researcher could be enforced under a data privacy regime favorable to data subjects—one which provides sufficient remedies and enforcement mechanisms.<sup>149</sup> In the case of German citizens, such mechanisms taken together would essentially guarantee that unless they were to elect otherwise, a release of their private data would be remediable under German law.<sup>150</sup> As further means to achieve certainty, and pursuant to its public purpose, the IC could deem the ITS present in Germany to the extent necessary to facilitate pursuit of remediation for breaches of data privacy.<sup>151</sup> An approach of this type would require little in the way of administrative oversight, as enforcement would be effectuated through existing domestic and supranational legal systems, should the need arise.<sup>152</sup>

Would this type of approach to protecting personal information within the Archive be satisfactory to those favoring the German Approach?<sup>153</sup> Outside the context of actual negotiations there is no way to know, however, one might view this situation as analogous to that which led to the Safe Harbor being created within the European Directive 95/46/EC—where the benefits of allowing access to data outweighed the careful in-

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148. With respect to litigation involving EU domiciles, forum selection clauses are presumed exclusive, and their enforcement is highly favored. *See supra* notes 97-98 and accompanying text (outlining EU approach to forum selection clauses).

149. *See supra* notes 81-82, 97-98 and accompanying text (describing data privacy law framework within EU and EU Member States, outlining EU approach to forum selection clauses).

150. *See supra* notes 94-100 and accompanying text (describing favoring of EU forum under Brussels I. Regulation).

151. *See supra* notes 89-93 and accompanying text (outlining capacities and immunities of international organizations, pointing out immunity is presumed unless explicitly waived, indicating potential justifications for waiver of immunity).

152. Conversely, any effort to proactively guard data privacy, such as by redacting documents before rendering them accessible, would further burden those interested in gaining rapid access by further increasing the time needed to prepare the Archive. *See supra* note 103 and accompanying text (describing urgency of situation, need for rapid resolution).

153. *See supra* notes 113-15 (describing German point of view favoring privacy safeguards at the expense of rapid access).

instincts of officials accustomed to enforcing stringent data privacy regimes.<sup>154</sup> Further, in light of the strong equitable arguments in favor of allowing access to the Archive,<sup>155</sup> and in light of the fact that derogations in the public interest are available under the data privacy regimes at issue,<sup>156</sup> the favored approach should include reasonable measures to safeguard personal information as required by Annex Article Five, with great weight given to the public interest served by allowing access to the archive.<sup>157</sup> Reasonable protections, interpreted in light of the equities discussed above,<sup>158</sup> should weigh the benefits of access more heavily than the benefits of elaborate data protection mechanisms.<sup>159</sup>

### B. *Amendment or Not—Why is it Important?*

Leaving aside the questions of whether an ad-hoc data protection mechanism as described here would be effective, whether it would be fair to burden data subjects with an enforcement role, and whether, given the amount of time that has elapsed, any real harm is likely to result if the Archive is simply opened with no additional data privacy controls, the fundamental metric of success or failure in this situation will be the length of time required to successfully open the Archive.<sup>160</sup> Although amendments have been negotiated and signed, the slow process of ratification is still delaying the opening of the Archive.<sup>161</sup> Ironically, IC Members are again raising the possibility of pro-

154. *See supra* notes 85-86 and accompanying text (describing Safe Harbor agreement and underlying commercial rationale).

155. *See supra* notes 13-14, 25-30, 103 and accompanying text (describing potential benefits of opening Archive, urgency of situation, need for rapid resolution).

156. *See supra* notes 81, 83-84 and accompanying text (describing grounds for derogation within EU data privacy law framework).

157. *See supra* notes 67-69 and accompanying text (discussing in overall context of Bonn Accords Annex article V requirement that reasonable means be taken to protect individual privacy).

158. *See supra* notes 13-14, 25-30, 103 and accompanying text (describing potential benefits of opening Archive, urgency of situation, need for rapid resolution).

159. In light of the presumably remote potential for individuals to be harmed, versus the likely benefits of opening the Archive, simplicity and rapidity should be sought out. *See supra* notes 13-18 and accompanying text.

160. *See supra* notes 13-14, 25-30, 103 and accompanying text (describing potential benefits of opening Archive, urgency of situation, need for rapid resolution).

161. *See supra* notes 19-20 and accompanying text (explaining status of ratification, likely timeframe for completion).

ceeding by means other than amendment.<sup>162</sup> In light of this situation, and considering that the proposed amendments might yet be discarded, it is unfortunate that so much time was spent arguing over whether or not to amend the Bonn Accords, rather than quickly settling that question and focusing instead on substantive legal and political issues.<sup>163</sup>

Despite the delay inherent in the ratification of amendments, proceeding via amendment does bring important, albeit less tangible benefits. The amendments will have enshrined a formal basis for access, and ratification by all IC Members will affirm broad Member support for this element of the ITS mission.<sup>164</sup> Further, while aggressive reinterpretation of treaty language might offer the most expedient solution, such an approach comes at the cost of devaluing the treaty language itself and subordinating longstanding treaty commitments to political convenience—devaluing international legal frameworks in general.<sup>165</sup> The process of amendment and the debate surrounding this process facilitates greater transparency regarding the operations of the ITS, which, considering its history of undue secrecy, is an important benefit not to be overlooked.<sup>166</sup> A formal and transparent process might, in theory, also lead to greater involvement by constituencies within IC Member States, as well as provide notice to other stakeholders who wish to make their views known.<sup>167</sup> To retain the benefits of proceeding formally without needlessly causing further delay in the opening of the Archive, the IC might consider adopting the current amendments on an interim basis as an administrative directive, pending their formal ratification by all IC Members—a strategy that would allow the

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162. *See supra* note 21 and accompanying text (mentioning potential revisiting of need for amendments).

163. *See supra* notes 13-14, 25-30, 103 and accompanying text (explaining possible benefits of opening Archive, urgency of situation, need for rapid resolution).

164. *See supra* notes 20, 42 and accompanying text (indicating Member States are pursuing ratification, mentioning element of consensus-based operation of the IC).

165. The Vienna Convention disfavors interpretation of treaty text in contravention of plain language and/or subsequent practice. *See supra* notes 49-52 and accompanying text (outlining elements of Vienna Convention norms of treaty interpretation).

166. *See supra* note 117 and accompanying text (noting Archive has long been closed to outsiders).

167. Debate over the Archive in recent years and media reports surrounding it have raised general awareness of the issue. *See supra* note 17 and accompanying text (citing article reporting disbelief among interested public upon learning of existence of Archive, and that Archive is inaccessible).



IC to shift its focus to resolving the technical and funding issues it faces in making the promise of access a tangible reality.<sup>168</sup>

### CONCLUSION

Resolving the ITS dispute has always been contingent on finding an outcome that is politically acceptable to all IC Member States. The continued failure to successfully effectuate access to the Archive is not due to any particularly thorny legal issues, but rather seems to derive from IC Members' divergent assessments of the equities involved and the inherent difficulty of operating on a consensus basis. The debate over whether or not the Bonn Accords must be amended seemed to distract the IC from the central underlying issue—whether opening the Archive presented a sufficient risk of individuals being harmed through release of their private data, as to warrant creating a stringent and proactive data protection mechanism. Although in theory the IC might have proceeded without amending the Bonn Accords, it seems unlikely that sidestepping the amendment process would have made agreement on the substantive issues any less difficult. The debate over amending or not simply had to be resolved either way, so that the underlying substantive issues could be fully engaged. Proceeding by amendment will itself bring certain benefits. By amending rather than broadly reinterpreting the Bonn Accords, the IC will stabilize their meaning and enhance their authority. Likewise, in a small way, the stability and authority of the international legal system as a whole will benefit.

The situation of the ITS is unique, both in a historical sense and due to the overwhelming need to rapidly find a workable solution. In light of the human cost of continued delay, and considering the likelihood that unless the process is somehow expedited it could still be years before the Archive is opened, in this particular circumstance perhaps a creative solution is warranted. The IC might consider adopting the amendments on an interim basis as operational directives, in a way analogous to the proposed solution outlined above.<sup>169</sup> In this way, whatever solu-

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168. *See supra* notes 111-12 and accompanying text (explaining capacity of IC to guide ITS operations through directives, positing means to proceed by directives rather than amendment).

169. *See supra* notes 111-12, 142-59 and accompanying text (explaining capacity of

tion that has been settled upon could be implemented immediately, minimizing the delays inherent in treaty ratification. By continuing to pursue ratification, the IC could likewise reap whatever less tangible benefits result from observing that particular legal formality.<sup>170</sup>

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IC to guide ITS operations through directives, positing hypothetical means to proceed by directives rather than amendment).

170. *See supra* notes 164-67 (positing potential benefits of observing formality of amendment).

