CONTENTS

Featured Articles

Student Articles

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2023-2024

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International Focus at
Loyola University Chicago School of Law

Curriculum

Loyola University Chicago School of Law provides an environment where a global perspective is respected and encouraged. International and Comparative Law are not only studied in theoretical, abstract terms but also primarily in the context of values-based professional practice. In addition to purely international classes, courses in other disciplines – health law, child and family law, advocacy, business and tax law, antitrust law, and intellectual property law – have strong international and comparative components.

International Centers

The United Nations has designated Loyola University Chicago School of Law as the home of its Children's International Human Rights Initiative. The Children's International Human Rights Initiative promotes the physical, emotional, educational, spiritual, and legal rights of children around the world through a program of interdisciplinary research, teaching, outreach and service. It is part of Loyola's Civitas ChildLaw Center, a program committed to preparing lawyers and other leaders to be effective advocates for children, their families, and their communities.

Study Abroad

Loyola's international curriculum is also expanded through its foreign programs and field-study opportunities:

International Programs

- A four-week annual summer program at Loyola's permanent campus in Rome, Italy – the John Felice Rome Center – focusing on varying aspects of international and comparative law.
- A two-week annual summer program at Loyola's campus at the Beijing Center in Beijing, China focusing on international and comparative law, including a semester long course in the spring in Chicago to educate students on the Chinese legal system.

International Field Study

- A ten-day, between-semester course in London on comparative advocacy, where students observe trials at Old Bailey, then meet with judges and barristers to discuss the substantive and procedural aspects of the British trial system. Students also visit the Inns of the Court and the Law Society, as well as have the opportunity to visit the offices of barristers and solicitors.
- A comparative law seminar on *Legal Systems of the Americas*, which offers students the opportunity to travel to Chile over spring break for on-site study and research. In Santiago, participants meet with faculty and students at the Law Faculty of Universidad Alberto Hurtado.
- A one-week site visit experience in San Juan, Puerto Rico, where students have the opportunity to research the island-wide health program for indigents as well as focus on Puerto Rico's managed care and regulation.
- A comparative law seminar focused on developing country's legal systems. The seminar uses a collaborative immersion approach to learning about a particular country and its legal system, with particular emphasis on legal issues affecting children and families. Recent trips have included Tanzania, India, Thailand, South Africa, and Turkey.

Wing-Tat Lee Lecture Series

Mr. Wing-Tat Lee, a businessman from Hong Kong, established a lecture series with a grant to the School of Law. The lectures focus on aspects of international or comparative law.

The Wing-Tat Lee Chair in International Law is held by Professor James Gathii. Professor Gathii received his law degree in Kenya, where he was admitted as an Advocate of the High Court, and he earned an S.J.D. at Harvard. He is a prolific author, having published over 60 articles and book chapters. He is also active in many international organizations, including organizations dealing with human rights in Africa. He teaches International Trade Law and an International Law Colloquium.

International Moot Court Competition

Students hone their international skills in two moot competitions: the Phillip Jessup Competition, which involves a moot court argument on a problem of public international law, and the Willem C. Vis International Commercial Arbitration Moot, involving a problem under the United Nations Convention on Contracts for the International Sale of Goods. There are two Vis teams that participate each spring – one team participates in Vienna, Austria against approximately 300 law school teams from all over the world, and the other team participates in Hong Kong SAR, China, against approximately 130 global law school teams.

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We would like to recognize friends and alumni of Loyola who contributed this past year to our international law program by supporting Loyola's Vis Moot Program:

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Who is to Guard the Guardians Themselves? Russia's Invasion of Ukraine, Racism and Transitional Justice

Cosmas Emeziem*

Abstract

This Article investigates the deep-rooted connection between racism and the development of international law, emphasizing its enduring influence on Transitional Justice. The normatization of international law and its instrumentation by imperial actors in pursuit of their interests have perpetuated systemic racism. The war in Ukraine is a poignant illustration of conflicts as arenas for imperial supremacy, racism, accountability failures, and the struggle for transitional justice—in the face of ever-expanding imperial aspirations.

Thus, the unresolved question of who guards the guardians themselves looms, particularly in light of Russia's involvement as a permanent United Nations Security Council member. Racism often manifests as power imbalance and a lack of accountability through Transitional Justice. Drawing on Critical Race Theory and Third World Approaches to International Law, this Article proposes that these frameworks offer valuable tools for comprehending the hegemonic orders perpetuating racism, subordination, and transitional (in)justice.

Accordingly, dismantling the racial underpinnings that persist within international law and transitional justice makes fostering a more inclusive, equitable, and just international society possible.

Table of Contents

* Drinan Fellow and Visiting Assistant Professor of Law, Boston College Law School, Newton, MA. He serves on the Editorial Board of the *African Journal of Law and Justice System*. I am grateful to the Editorial Board of Loyola University Chicago International Law Review, especially Alisha Shah and Alex Angyalosy, for doing an excellent work of getting this article ready for publication. For inspiration and support, I thank Petronilla Emeziem, Hyacinth Ibeh, Immaculata Enwere, and Amarachi Emeziem. The usual disclaimers apply. ©Author 2022 https://orcid.org/0000-0003-0019-8996.

I. Introduction

Transitional Justice is articulated and narrated as a set of judicial and non-judicial measures for accountability and remediation of mass human rights violations, reparation, restoration, (re)affirmation of just public order, and prevention of repetition in the aftermath of conflicts or authoritarian regimes.[1] Transitional Justice is also about foresight, imagination, and proactive justice. Institutions and societies can respond to threats to human rights, such as conflicts, by timely and tailored (re)imagination and reform of institutions and practices, thus dismantling those foundations that bolster impunity and encourage violence against others, such as racism.[2]

This is vital because racism in Transitional Justice is not unique to the (sub) discipline.[3] Rather, racism in Transitional Justice is an iteration of racism in International Law.[4] To dismantle racism in Transitional Justice, scholars must see these tangles between International Law and racism—which have continued to morph and shape the times and branches of the law.[5]

Unearthing racism is crucial because racism in transitional justice is both a backward and forward phenomenon—a swinging rapier that marks the temporal

[1] *See generally* Stephan Parmentier, *Transitional Justice*, *in* The Cambridge Companion to International Criminal Law 53 (William A. Schabas ed., 2016); Colleen Murphy, *Introduction*, *in* The Conceptual Foundations of Transitional Justice 1–37 (2017); Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 69 (2003); Ruti G. Teitel, Transitional Justice 3-30 (2000); Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 Third World Q. 275 (2008); Eric A. Posner & Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 Harv. L. Rev. 761, 762 (2003).

[2] On racism, *see* The United Nations Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), U.N.T.S 660, 9464 (Dec. 21, 1965).

[3] *See* U.N. GAOR, 72nd Sess., 73rd plen. mtg. at 2, U.N. Doc. A/72/157 (Jan 25, 2018) (expressing alarm at the spread in many parts of the world many racist extremist movements promoting right wing agendas, racial supremacist views, violence and intolerance against migrants and refugees).

[4] Hugo Van der Merwe & M. Brinton Lykes, *Racism and Transitional Justice*, 14 Int'l J. Transitional Justice 415, 416 (2020); *see* U.N. GAOR, 77th Sess., U.N. Doc A/72/512 (Oct. 7, 2022) (discussing contemporary forms of racism, racial discrimination and related intolerance of 7 October 2022; also recognizes the glorification of Nazism, and continued cooptation of young people into extremist organizations such as Neo-Nazi groups).

[5] *See* The United Nations World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration and Programme of Action,* (Sep. 8, 2001) (acknowledged among other things the long history of racism as manifested in slavery, and slave trade—especially the transatlantic slave trade).

dimensions of the experiences of racialized communities and peoples around the world.[6] Racism is an ever-present problem because although the human cohabitation of the earth across cultures, times, and climes is given, the existence of ideologies of domination has often created avenues of alienation and violence.[7]

Racism is also backward in providing easy foundations of inferiorization—to justify previous violence and sow the seeds of future violence.[8] Racism is also mutant and coopts other forms of prejudices such as Nazism, antisemitism, and violent nationalism in service of its inherently discriminating goals.[9] It is forward because it consolidates the *othering* and consequent violations through acts of violence, cycles of violence, theories of inferiority, silencing, and total domination. This can be done by ensuring that vulnerable populations and communities are overawed or exterminated so that no one is left to tell the story.[10]

At other times, those who survive are forever silenced out of fear: "*The casualties are not only those who are dead, they are well out of it, [. . .].*"[11] By so doing, the narratives and memories of violence are preempted so that what is remembered, or the memories of the atrocities are colored to suit the interests of the conquering power. This robs the living by ensuring nonrecognition, remediation, reparation, and restoration. It also inspires impunity. The enduring temporal and inter-temporal significance of these can be dispositive. Over time, the story of the victims could become mere footnotes—if not complete erasures—on the vast narrative of international law.[12]

I contend so because international law's structures, encounters, and narratives have often been about racial othering and consequent violations. Sometimes, these violations are deemed proper for the "civilization" and "development" of

6 E. Tendayi Achiume, *Transnational Racial (In)Justice in Liberal Democratic Empire*, 134 Harv. L. Rev. 378, 378 (2021) (using George Floyd's case to illustrate racism's transnational dimensions).

7 Michael Gorup, *The Strange Fruit of the Tree of Liberty: Lynch Law and Popular Sovereignty in the United States*, 18 Persp. Pol. 819, 827 (2020) (exploring how spectacle lynching played a role in constituting the racialized public sphere and affirming who was sovereign, and who was the subordinate in that public order).

8 United Nations Education and Scientific Organization (UNESCO), Declaration on Race and Racial Prejudice, art. 2 (Nov. 27, 1978) (noting that "racism includes racist ideologies, prejudices, attitudes, discriminatory behavior, structural arrangements, and institutional practices resulting in racial inequality as well as the fallacious notion that discriminatory relations between groups are morally and scientifically justifiable;" it also noted with the gravest concern the ever-changing forms of racism and racial prejudice).

9 On new forms of racism, *see* Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, E. Tendayi Achiume, Oct. 7, 2022 (combating glorification of Nazism, neo-Nazism and other practices that contribute to fueling contemporary forms of racism, racial discrimination, xenophobia and related intolerance).

10 *See generally* Alison Des Forges, Leave No One to Tell the Story: Genocide in Rwanda (1999).

11 John Pepper Clarke, The Casualties (1970) (on the Biafran war (Nigeria) 1967-1970 and the consequences of the war); Syl Cheyney-Coker, *Visions and Reflections on War: Book Review Casualties: Poems 1966/68 by John Pepper Clarke*, 1 Ufahamu: J. Afr. Stud. 93, 97 (1971).

12 Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 Vill. L. Rev. 827, 832-33 (2000) (on the prevalence of racism in international law and how the discourse is often avoided).

the victims.[13] This is the source of racism in Transitional Justice.[14] At other times racism is embedded in the hierarchies and relationships formed in international law and its effect on the dynamics of international relations. Many scholars of the global South continue to explore the theme of racism, although doctrinal international law often peripheralizes, if not wholly avoids, the discussion of race.[15]

To overcome racism in transitional justice, we must engage these grounds of racialized encounters in international law. This is vital because when imperial powers and interests are implicated, accountability and transitional justice become almost impossible.[16] This can be seen in international law and the domestic sphere with violent law enforcement against Blacks and minorities—and how that often escapes reckoning.[17]

Imperial powers ignore our protestations because they deem themselves the guarantors of international order. Scholars sometimes enable these imperial dispositions by emphasizing "the clash of civilizations" and the easy resort to unilateral use of force in international law.[18] The powers of the members of the United Nations Security Council (UNSC-P5) consolidate this commitment to a presidium that is answerable only to itself, either as a composite entity or to themselves individually: so *"who is to guard the Guardians themselves […] in crime, complicity guarantees silence*."[19] Such plenary powers, when misused, can cause significant harm to communities and peoples, as is currently the case in Ukraine.

Thus, on February 24, 2022, when Russia commenced a new phase of the war against Ukraine, it was advancing an imperial pursuit and, at the same time, justifying it with rhetoric of otherness, superiority, and a claim of the right of

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[13] Christopher Szabla, *Civilising Violence: International Law and Colonial War in the British Empire, 1850–1900*, 25 J. Hist. Int'l L. 70, 73-74 (2023); *see generally* Ntina Tzouvala, *The Standard of Civilisation in International Law: Politics, Theory, Method*, *in* Capitalism as Civilisation: A History of International Law (2020); Robert Knox, *Civilizing Interventions? Race, War, and International Law*, 26 Camb. Rev. Int'l Aff. 111, 116 (2013).

[14] Mutua explores the contradictions in human rights discourse framed along the savage-victim-savior triage. *See* Makau Mutua, *Savages, Victims, and Saviors: The Metaphor of Human Rights*, 42 Harv. Int'l L.J. 201, 224 (2001).

[15] James Thuo Gathii, *Studying Race in International Law Scholarship Using a Social Science Approach*, 22 Chi J. Int'l L. 71, 93-94 (2021) (showing the different issues regarding the avoidance of race in international law scholarship within the American Society of International Law publications).

[16] *See* Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 Harv. Int'l L.J. 3, 24, 42 (2011).

[17] For instance, the death of George Floyd opened up a debate in international and domestic law on racist law enforcement. *See* Virgine Ladisch & Anna Myriam Roccatello, *The Color of Justice: Transitional Justice and the Legacy of Slavery and Racism in the United States*, ICTJ Briefing (April 2021).

[18] Samuel Huntington, *The Clash of Civilizations?*, 72 Foreign Aff. 22, 22-32 (June 1, 1993).

[19] Juvenal, *Satire VI*, lines 347-348 (A. S. Kline trans.) (2011). The concept of the 'sacred trust of civilization' is enshrined in the foundations of the Mandate System under the League of Nations. Its vestiges are found in the Trusteeship System of the United Nations. *See generally* Charles H. Alexandrowicz, *The Juridical Expression of the Sacred Trust of Civilization*, 65 Am. J. Int'l L. 149, 157 (1971); *see generally* Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of the Trusteeship,* 9 Max Planck Y.B. U.N. L. 47 (2005); C. L. Upthegrove, Empire by Mandate 16-17 (1954); *see generally* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. Int'l L. & Pol'y 513 (2002).

conquest and domination.[20] The war has been condemned by many countries of the United Nations (UN)[21] and other international and regional organizations such as the European Union (EU)[22] and the North Atlantic Treaty Organization

[20] Eleanor Watson, *100 days of War in Ukraine: A Timeline*, CBS News (June 3, 2022), https://www.cbsnews.com/news/ukraine-russia-war-timeline-100-days/; Jane Clinton, *Russian-Ukraine War at A Glance: What we Know on day 283 of the Invasion*, The Guardian (Dec. 3, 2022), https://www.theguardian.com/world/2022/dec/03/russia-ukraine-war-at-a-glance-what-we-know-on-day-283-of-the-invasion; Matthew Mpoke Bigg et. al, N.Y. Times (Nov. 28, 2022), https://www.nytimes.com/2022/11/28/world/europe/ukraine-russia-war-kherson.html; Helen Cooper et al., *Winter Will be a Major Factor in the Ukraine War, Officials Say,* N.Y. Times (Nov. 12, 2022), https://www.nytimes.com/2022/11/12/us/politics/winter-ukraine-russia-war.html; Masha Gessen, *The War in Ukraine Launches a New Battle for the Russian Soul*, New Yorker (Oct. 17, 2022), https://www.newyorker.com/magazine/2022/10/17/the-war-in-ukraine-launches-a-new-battle-for-the-russian-soul; Timothy Snyder, *Essay: The War in Ukraine is a Colonial War*, New Yorker (Apr. 28, 2022), https://www.newyorker.com/news/essay/the-war-in-ukraine-is-a-colonial-war; Yuliya Talmazan, *Russian Missiles Knock-out most of Kyiv Water Supply*, NBC News (Oct. 31, 2022), https://www.nbcnews.com/news/world/russian-strikes-hit-key-ukrainian-infrastructure-kyiv-black-sea-rcna54761.

[21] *See* U.N. GAOR, 11th Sess., 1st plen. Mtg at 3, U.N. Doc. A/ES-11/L/1 (2022). The resolution amongst other things:
"Reaffirms its commitment to the sovereignty, independence, unity and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters; 2. Deplores in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2 (4) of the Charter; 3. Demands that the Russian Federation immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State; […]."
Julian Borger, *UN Votes to Condemn Russia's Invasion of Ukraine and Calls for Withdrawal*, The Guardian (Mar. 2, 2022), https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote (141 Members of the 193 member UN states voted for the resolution. 35 Members abstained, and five states voted against. Eritrea, Belarus, Syria and North Korea voted in favor of Russia). Post-World War II reparative measures against Germany are cases in point. There is also the case of Post-World War I against Germany as captured by the Treaty of Versailles. *See* Randall Lassaffer, *Aggression Before Versailles,* 29 Eur. J. Int'l L. 773, 789-97 (2018) (highlighting the history of aggression before World War I); *see Article 10 of the Covenant of the League of Nations* 1919, 13 Am. J. Int'l L. Supp. 128, 131-32 (1919). These have great ramifications for international accountability in the situation in Ukraine. *See London Charter of the International Military Tribunal*, *London* (Aug. 8, 1945); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, U.N. GAOR, 25th Sess., U.N. Doc 2625 (XXV) (Oct. 24, 1970); *see generally* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. United States of America), Merits, Judgement, I.C.J. Rep. 14 (June 27, 1986) [hereinafter The Nicaragua Case] (discussing the subject of aggression); Armed Activities on the Territory of the Congo (Congo v. Uganda), Judgment, 2005, I.C.J. Rep. 168 (Dec. 19) (on aggression and the constituting elements); Julius Stone, *Hopes and Loopholes in the 1974 Definition of Aggression*, 71 Am. J. Int'l L. 224, 239 (1977); Elizbeth Wilmshurst, *Definition of Aggression*, U.N. Audiovisual Libr. Int'l L. (2008) (exploring the development of the concept of aggression and the series of International Law Commission's efforts and other negotiations to come to a generally accepted definition of aggression); *see generally* Claus Kreß & Leonie von Holtzendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. Int'l Crim. Just. 1179 (2010) (highlighting the development of the doctrine of aggression under the Rome Statute of the International Criminal Court (ICC). But the ICC relies on complementarity and the voluntary submission of states to the jurisdiction of the International Criminal Court by accession to the Rome statute. United Nations Security Council has referred situations such as Darfur to the ICC, but this is unlikely to happen with Russia considering the breakdown in the UNSC whenever it involves a permanent UNSC member. *See* U.N. SCOR, 5158th mtg., U.N. Doc. S/Res 1593 (Mar. 13, 2005) (made pursuant to the report of the International Commission of Inquiry on violations of International humanitarian Law and human rights in Darfur *S/2005/60* and referring the situation in Darfur since July 1, 2002, to the Prosecutor of the International Criminal Court).

[22] Eur. Consult. Ass., *Russia's Military Aggression against Ukraine: EU Imposes Sanctions Against President Putin and Foreign Minister Lavrov and Adopts Wide Ranging Individual and Economic Sanctions*, Press Release (Feb. 25, 2022); Eur. Consult. Ass., *G7 Leaders Statement on the Invasion of Ukraine by Armed Forces of the Russian Federation*, Press Release (Feb. 24, 2022); Eur. Consult. Ass., *Ukraine: Declaration by the High Representative on Behalf of the European Union on the Invasion of Ukraine by Armed Forces of the Russian Federation*, Press Release (Feb. 24, 2022); Eur. Consult. Ass., *Council of Europe Adopts Package of Sanctions in Response to Russian Recognition of the Non-government*

(NATO).[23] Equally, an action has been commenced at the International Court of Justice (ICJ) seeking to hold Russia responsible.[24]

The International Criminal Court (ICC) has also followed up on aspects of the problem with an indictment of Putin. Yet, the question remains whether there would be more significant transitional justice accountability and what that may look like.[25] Would it be a Nuremberg-styled Tribunal or a Truth Commission in Kyiv? These questions are crucial in understanding the (im)possibilities of accountability when a member of the United Nations Security Council or other big powers violates international law.[26] Nonetheless, UN resolutions on the war in Ukraine are crucial in analyzing the ongoing iteration of the belligerency between Russia and Ukraine on many grounds.

Three grounds are essential to our discourse. First, the United Nations General Assembly (UNGA) framed its resolutions as aggression against Ukraine. This means that the UNGA has identified a *prima facie* situation of a war of aggression, implicating Russia's state responsibility in international law. Having been so identified, the war and postwar accountability measures relevant to a war of aggression have also been implicated. At the minimum, a Nuremberg-styled Tribunal, or as we saw in the Yugoslav War Crimes Tribunal, is essential to any post-conflict accountability mechanism.

Second, International Criminal Court measures can be issued against leaders and other key players in the War. In many respects, the issues involved are questions of universal jurisdiction. States may, therefore, use available resources within their sovereign powers to pursue accountability. Finally, situations of aggression require reparative accountability and have been exerted in similar circumstances in international law.[27]

Controlled Areas of the Donetsk and Luhansk Oblasts of Ukraine and Sending Troops into the Region, Press Release, (Feb. 23, 2022).

[23] *NATO Condemns Russia's 'Illegal Land Grab'*, DW News (Sept. 30, 2022), https://www.dw.com/en/nato-condemns-russias-illegal-annexation-of-ukrainian-territories/a-63301828.

[24] The war has also become central in the Application filed by Ukraine before the ICJ alleging that Russia is engaged in a "campaign to erase the distinct culture of ethnic Ukrainian and Tatar people in Crimea." *See* Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Judgement, I.C.J., ¶ 5 -6 (Nov. 8, 2019); Julian Borger, *United Nations International Court of Justice Orders Russia to halt Invasion of Ukraine*, The Guardian (Mar. 16, 2022), https://www.theguardian.com/world/2022/mar/16/un-international-court-of-justice-orders-russia-to-halt-invasion-of-ukraine; Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Preliminary Objection, 2023/45 I.C.J (Aug. 22, 2023) (filed at the Registry of the International Court of Justice, February 26, 2022).

[25] On doctrinal considerations and guiding norms regarding responsibility and accountability for the Russian invasion of Ukraine, *see* Tom Dannenbaum, *Accountability for Aggression, Atrocity, Attributability, the Legal Order and Sanitized Violence*, Md. J. Int'l L. (forthcoming 2023) (manuscript at 7-8), https://ssrn.com/abstract=4395834.

[26] From Vietnam, to Nicaragua, and East Timor, holding imperial states and their allies to account for human rights violations has been difficult for international law.

[27] On the legacy of Nuremberg and accountability, *see* Henry T. King Jr., *The Legacy of Nuremberg*, 34 Case W. Res. J. Int'l L. 335, 336 (2002). The United Nations General Assembly (UNGA) resolution A/ES-11/L. 1 of March 1, 2022, drew attention to the contents of resolution 3314 (XXI) of 14 December 1974 on aggression which articulated aggression as the use of armed force against the territorial integrity of or political independence of another state or in any other manner inconsistent with the Charter of the United Nations. U.N. GAOR 3314 (XXIX) Dec. 14, 1974, art. 1-2 provides that:

Still, we should recall that this phase of the war in Ukraine is an extension of the belligerence between the two countries since 2014 when Russia annexed Crimea and subsequently claimed and occupied other Ukrainian territories.[28] These claims of Russia have been faulted by scholars and policy institutions, as attested to by the UN resolutions on the war in Ukraine and previous resolutions focusing on Crimea. Regardless, Russia continued and maneuvered a referendum to consolidate the Crimean annexation from Ukraine as a case of self-determination.[29]

The damages and costs of wars to humanity and international law have not been fully articulated.[30] Like other wars, the conflict in Ukraine has a high destructive capacity. Wars alter destinies and sometimes eliminate entire communities.[31] The more difficult aspect, though, has been the ambivalence of international legal operators towards a deracialized international law and order.[32] In other words, racism has endured in international law and order.[33] Certain peoples have often been viewed as inferior; thus, their conquest and domination is a natural cause

"Aggression is the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the charter of the United Nations [article 1]. The first use of armed force by a state shall constitute prima-facie evidence of an act of aggression although the security council may in conformity with the charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances, including the fact that acts concerned, or their consequences are not of sufficient gravity [article 2]."

[28] *See* Thomas D. Grant, *Annexation of Crimea*, 109 Am. J. Int'l L. 68, 72 (2015) (the annexation bears the hallmarks of colonial annexation); U.N. GAOR, 68th Sess., plen mtg.80, U.N. DOC 68/262, Apr. 1, 2014 (100 states voted in favor of Ukraine, condemning the annexation and affirming the sovereign territorial integrity of Ukraine including Crimea); Amandine Catala, *Secession and Annexation: The Case of Crimea*, 16 Ger. L.J. 581, 581 (2015); Paul D'Anieri, *The Sources of Conflict over Ukraine*, *in* Ukraine and Russia: From Civilized Divorce to Uncivil War 26 (2019).

[29] Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, 16 Ger. L.J. 365, 383 (2015).

[30] *See generally* Joseph E. Stiglitz & Linda j. Bilmes, The Three Trillion Dollar War: The True Cost of the Iraq Conflict (2008); Ilan Berman, *The Real Cost of Russia's Ukraine War*, The Hill (Nov. 30, 2022), https://thehill.com/opinion/international/3756097-real-costs-of-russias-ukraine-war/; Guy Faulconbridge, *Explainer | Blood Treasure and Chaos: The Cost of Russia's War in Ukraine*, Reuters (Nov. 10, 2022), https://www.reuters.com/world/europe/blood-treasure-chaos-cost-russias-war-ukraine-2022-11-10/; Bianca Pallaro & Alicia Parlapiano, *Four Ways to Understand the 54 billion in US Spending on Ukraine*, N.Y. Times (May 20, 2022), https://www.nytimes.com/interactive/2022/05/20/upshot/ukraine-us-aid-size.html; Maureen Groppe, *US Aid to Ukraine Could Hit $53B. Here's What it Covers, How it Compares and Who Pays for It*, USA Today (May 7, 2022), https://www.usatoday.com/story/news/politics/2022/05/17/ukraine-aid-bill-break-down/9674471002/?gnt-cfr=1.

[31] Martin Luther King, Jr., *The Quest for Peace and Justice*, Nobel Lecture, December 11, 1964 (on the inherent problems associated with war).

[32] Thiago Amparo & Andressa Vieira e Silva, *George Floyd at the UN: Whiteness, International Law and Police Violence*, 7 U.C. Irvine J. Int'l Transnat'l & Compar. L. 91, 105-109 (2022) (on the often-careful avoidance of the proper discussion of racism in the UN and how that helps keep the structures in place).

[33] Christopher Gevers, *"Unwhitening the World": Rethinking Race and International Law*, 67 UCLA L. Rev. 1652, 1663 (2021); W.E.B. (William Edward Burghardt) Du Bois, *The Problem of the 20th Century is the Problem of the Color Line*, Pittsburgh Courier, Jan. 14, 1950, at 8-9; W.E.B. Du Bois, *Inter-Racial Implications of the Ethiopian Crises: A Negro View*, 14 Foreign Aff. 82, 82-84 (1935) (highlighting racialism in international law and how imperial powers often manufacture convenient reasons for invading and pillaging the racialized other. This has significance for transitional justice since transitional justice often fails to hold these imperial powers to account).

and calling of the principal structures of international law.[34] This is evident in the war in Ukraine now—especially considering the rhetoric of inferiority from Moscow.

The disposition to dominate has inspired many wars of expansion, conquest, and violations of human dignity—which are never reckoned with in transitional justice. This lack of reckoning for historical injustice continues to affect the tenets of transitional justice, especially as it pertains to colonial violations and reparations for historical injustices such as enslavement, lynching, dispossession,

[34] On debate seeking to refocus attention to the racialized nature of international law, its resilience and continuities, *see* Michele Goodwin & Gregory Shaffer, *Colonialism, Capitalism, and Race in International Law: Introduction to Symposium Issue*, 7 U.C. Irvine J. Int'l Transnat'l & Compar. L. 1, 3-4(2022); Dire Tladi, *Representation, Inequality, Marginalization and International Law-Making: The Case of the International Court of Justice and the International Law Commission*, 7 U.C. Irvine J. Int'l Transnat'l & Compar. L. 60, 67-68 (2022); José E. Alvarez, *The Case for Reparations for the Color of COVID*, 7 U.C. Irvine J. Int'l Transnat'l & Compar. L. 7, 35 (2022); Ali Hammoudi, *International Order and Racial Capitalism: The Standardization of 'Free Labour' Exploitation in International Law*, 35 Leiden J. of Int'l L. 779, 792 (2022); Liliana Obregón, *Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt*, 31 Leiden J. Int'l L. 597, 614-15 (2018) (the author uses Haiti and France to demonstrate how the control and management of non-European peoples, territorial acquisitions, and exploitation and commercialization of their natural resources were integral to the legal and social frameworks through which European empires grew and expanded); *see* Holly Ellyatt, *Kessinger Still Lives in the 20th Century: Ukraine Hits Back at Suggestion it Should Cede Land to Russia*, CNBC (May 25, 2022), https://www.cnbc.com/2022/05/25/ukraine-rejects-kissinger-suggestion-it-should-cede-land-to-russia.html; Brad Dress, *Zelensky Rips Kissinger Over Suggestion Ukraine Cede Territory to Russia*, The Hill (May 25, 2022), https://thehill.com/homenews/3502032-zelensky-rips-kissinger-over-suggestion-ukraine-cede-territory-to-russia/; Morgan Chalfant, *US Won't Pressure Ukraine to Concede Territory to Russia, Says Official,* The Hill (June 16, 2022), https://thehill.com/homenews/administration/3526096-us-wont-pressure-ukraine-to-concede-territory-to-russia-says-official/; John Bowder, *Zelensky Says Ukraine Won't Cede Eastern Territory to Russia to End War*, The Independent (Apr. 17, 2022) https://www.the-independent.com/news/world/americas/us-politics/russia-ukraine-war-zelensky-donbas-b2059703.html; Zachary Rogers, *Biden Plans to Pressure Ukraine to Cede Territory to Russia-backed Groups, Report Says*, ABC News (Dec. 9, 2021), https://abcnews4.com/news/nation-world/biden-plans-to-pressure-ukraine-to-cede-territory-to-russia-backed-groups-report-says; Jimmy Quinn, *Zelensky Rejects Macron Pressure to Cede Ukrainian Territory*, National Review (April 4, 2022), https://www.nationalreview.com/corner/zelensky-rejects-macron-pressure-to-cede-ukrainian-territory/; Jorge L. Ortiz, *John Bacon, Zelensky Rejects Plan to Concede Territory to Russia; Ukraine Hero Alive in Russian Custody; Live Updates*, USA Today (May 26, 2022, 11:34 AM), https://www.usatoday.com/story/news/politics/2022/05/25/ukraine-russia-invasion-live-updates/9916925002/; Tom Porter, *Kissinger Says Ukraine Must give up land to Russia, Warns west not to seek to humiliate Putin with defeat*, Bus. Insider India (May 24, 2022), https://www.businessinsider.in/politics/world/news/kissinger-says-ukraine-must-give-up-land-to-russia-warns-west-not-to-seek-to-humiliate-putin-with-defeat/articleshow/91766173.cms; Steven Nelson, *Biden Says Ukraine Might Have to Give Russia Land in Negotiated Settlement*, N.Y. Post (June 3, 2022, 1:08 PM), https://nypost.com/2022/06/03/biden-says-ukraine-might-have-to-give-russia-land/. Conceding land for peace is often a privilege of the powerful in international law, with colonial ramifications beyond Ukraine's war. There is a need to break free from this bind of international law. *See* art. 22 of the Covenant of the League of Nations 1919 (on the sacred trust of civilization for those colonies who by virtue of the war had lost their previous sovereigns); *see* Antony Anghie, *Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations*, 34 N.Y.U. J. Int'l L. & Pol'y 513, 587 (2001); Nele Matz, *Civilization and the Mandate System Under the League of Nations as Origin of the Trusteeship,* 9 Max Plank Y.B. U.N. L. 47, 67 (2005); *see generally* H. H. Perritt, *Structures and Standards for Political Trusteeship*, 8 UCLA J. Int'l L. & Foreign Aff. 385 (2002); *see generally* Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 London Rev. Int'l L. 31 (2015); Rotem Giladi, *The Phoenix of Colonial War: Race, the Laws of War, and the 'Horror on the Rhine'*, 30 Leiden J. Int'l L. 847, 849 (2017) (exploring the anxieties and morphing of vocabularies of international law to find legal justification of colonial and racialized international law); Katherine Fallah & Ntina Tzouvala, *Deploying Race, Employing Force: 'African Mercenaries' and the 2011 NATO Intervention in Libya*, 67 UCLA L. Rev. 1580, 1609 (2021).

displacement, and forced assimilation through the Indian residential school system.[35]

For centuries, tribes, nations, and peoples, perceived as the *racial other*, have been at the mercy of dominant forces to the ruin of humanity.[36] The global law and order founded on racial supremacy can never be a source of sustained peace and deracialized transitional justice. It will always be brittle and dependent on the continued strategic games of states and dominant powers. In other words, a deracialized international order is a fundamental standard for global justice, collective just security, and a deracialized transitional justice.

The continuity of treating specific populations, groups, and peoples as disposables is a significant problem in international law. This has enduring legacies for transitional justice.[37] The defunct Soviet Union had considerable labeling of communities even within the Union, suggesting that 'some are less than others.'[38] Perhaps we can also consider the insular cases in the United States increasingly highlighting the imperial circumscription of groups based on race and other categories.[39]

Other symptoms of the racial orders we maintain domestically and transnationally can be seen in migration policies and the dehumanization of suspected immigrants and workers.[40] In apartheid South Africa, Blacks were required to carry passes based on supremacist laws and regulations.[41] Colonized peoples

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[35] Matthew Evans & David Wilkins, *Transformative Justice, Reparations and Transatlantic Slavery*, 28 Soc. Legal Stud. 137, 142-47 (2019); Jose Atiles-Osoria, *Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice*, 7 State Crime J. 349, 352 (2018); Regina Menachery Paulose & Ronald Gordon Rogo, *Addressing Colonial Crimes Through Reparations: The Mau Mau, Herero and Nama*, 7 State Crime J. 369, 375 (2018).

[36] G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco De Vitoria and Bartolome De Las Casas*, 2 Aust. Y.B. Int'l L. 1, 25-34 (1992); Francine Hirsch, *Opinion | 'De-Ukrainization' is Genocide—Biden was Right to Sound the Alarm*, The Hill (Apr. 14, 2022), https://thehill.com/opinion/international/3267060-de-ukrainization-is-genocide-biden-was-right-to-sound-the-alarm/ (exploring how President Putin ramped up his rhetoric in the weeks before the war as a way of justifying the war of aggression; President Putin refers to the Ukrainian leaders as Nazis).

[37] Matiangai Sirleaf, *Disposable Lives: Covid-19, Vaccines, and the Uprising*, 121 Colum. L. Rev. F. 71, 72 (2021) (discussing the politics of Covid-19, vaccine access and how it was easy to racialize Africans. Although it is not in the context of war and refugees, the idea of disposability based on racial categorization is a feature of the evolution of international law).

[38] Jeff Sahadeo, *Black Snouts Go Home! Migration and Race in Late Soviet Leningrad and Moscow,* 88 J. Mod. Hist. 797, 797 (2016).

[39] Sherry Levin Wallach, *The Insular Cases Must Be Overturned*, Bloomberg L. (Aug. 3, 2022), https://news.bloomberglaw.com/us-law-week/the-insular-cases-must-be-overturned; Lawrence Hurley, *Supreme Court Declines to Consider Overturning Racist 'Insular Cases'*, NBC News (Oct. 17, 2022), https://www.nbcnews.com/politics/supreme-court/supreme-court-declines-consider-overturning-racist-insular-cases-rcna52156; Christina D. Ponsa-Kraus, *The Insular Cases Run Amok: Against Constitutional Exceptionalism in the Territories*, 131 Yale L.J. 2390, (2022); *see generally* Juan R. Torruella, *The Insular Cases: The Establishment of a Regime of Political Apartheid,* 29 U. Pa. J. Int'l L. 283 (2007).

[40] Kevin R. Johnson, *Systemic Racism in the U.S. Immigration Laws*, 97 Ind. L.J. 1455 (2022) (highlighting racialized immigration laws and culture of violence against immigrants and how policies and judicial deliberations have largely left such racist laws or interpretations such as the Chinese exclusion laws intact).

[41] The Pass Laws Act 67 of 1952 (S. Afr.) (requiring Black South Africans over the age of 16 to carry a passbook everywhere at all times). There were other racial laws including The Group Areas Act 41 of 1950 (S. Afr.) (segregated living areas based on racialized categories). *See generally* Kevin Hopkins, *Assessing*

under British rule were also "British-protected persons."[42] They were designated based on the discretion of colonial administrators. The exclusion of people in the colonies from British citizenship was a tool of racial ordering, control, and domination.[43] Continuities of othering are also apparent in the case of the Rohingyas and other targeted groups worldwide.[44]

Hence, the politics and promises of being categorized as unequal, inferiors, incomplete citizens, and inchoate sovereigns remain with us. Sometimes, these designations set the foundation for mass human rights atrocities. What has been lacking is not the imaginative insight to design tools of discrimination, othering, and violence but the willingness to apply that creativity to produce an inclusive and deracialized international law order and transitional justice.

The inability of the United Nations (UN) to facilitate an amicable settlement of the Ukrainian war and the insistence on territorial expansion by Russia reveals the persisting inertia within our multilateral institutions. The entanglements of the five permanent United Nations Security Council (UNSC-P5) members with these problems have further exacerbated the incapacitations of our international institutions to reach for justice, accountability, and enduring peace.[45]

We must imagine new pathways that will guarantee the equality of all peoples, even amid unequal capacities and material resources. This entails accepting the realities of racism in the system and working to dismantle them. In **Part I**, this Article sheds light on the problems of global (in)justice, war, and postwar accountability. **Part II** probes the conflict in Ukraine—examining its imperial foundations and self-determination entwined with the conflict. **Part III** highlights how racism manifests through time, place, manner, epistemologies, and logic(s) of international law and transitional justice. **Part IV** delves into collective just security—exploring how Critical Race Theory (CRT) and Third World Approaches to International Law (TWAIL) can help foster a less imperial and racialized international system and transitional justice. In **Part V**, the Article further contends that lasting global peace does not lie in violent domination. **Part VI** concludes the Article with suggestions on pathways to deracialized international law and transitional justice.

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the World's Response to Apartheid: A Historical Account of International Law and Its Part in the South African Transformation, 10 U. Mia. Int'l & Compar. L. Rev. 241 (2001).

[42] Although a British Protected Person may hold a British passport, such a person has only certain limited privileges but not the full rights of citizenship.

[43] Justin Desautels-Stein, *A Prolegomenon to the Study of Racial Ideology in the Era of International Human Rights*, 67 UCLA L. Rev. 1536 (2021) (exploring the theme of exclusion of different peoples from the international society as a core aspect of racism in international law. The Critical Race Theory Canon in International Law is gradually catching up).

[44] Michelle Foster & Timnah Rachel Baker, *Racial Discrimination in Nationality Laws: A Doctrinal Blind Spot of International Law*, 11 Colum. J. Race & L. 83 (2021) (on the presumed statelessness of Rohingyas and the inability of both international and domestic laws to solve the problem despite their exposure to genocide).

[45] Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, Just Security (Mar. 16, 2022), https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/.

II. The War in Ukraine, International Law and Transitional Justice

Imperial claims of superiority and racism are at the heart of the lack of accountability and limitations of transitional justice in international law.[46] This claim of superiority can also come in the form of exceptionalism—"We are not like those people."[47] For instance, the scholarly commitment to America as "the shining city on the hill," "a beacon of liberty," and "a self-righteous" nation with the capacity to advance civilization is sometimes a commitment that avoids the shortcomings of the American hegemony and also preempts any form of accountability in international law and human rights.[48]

At other times, imperial orderings and racialism in international law manifest as false universalism built around inherent exclusion. The paradox is ever present in examining international law and its evolution.[49] In the current situation, it is notable that Ukraine is an idyllic country with a strategic location that gives it an uncommon power to leverage relationships. Yet, that geography — historically coveted by hegemonic powers — has also been part of its nightmare. It is amid a raging strategic competition between powerful states and alliances. The human, material, and environmental cost of the war in Ukraine is immense and continues to mount.

War often looks like footage for those distant from the frontiers — especially after the initial shocks and outcry that follow their onset. Indifference and spatial distancing are often possible in protracted wars. But Ukraine need not become another set of footage without accountability because of imperial claims of superiority. It is an ongoing human catastrophe and a metaphor for global wars in Syria, Yemen, South Sudan, Ethiopia, or other human and environmental destruction frontiers. This Part explores the war through three important positions—foundations, violations, and potential post-conflict accountability measures.

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[46] Imperial states often have a Hobbesian disposition to international law and belief in the need to control and overawe. Larry May, *A Hobbesian Approach to Cruelty and the Rules of War*, 26 Leiden J. Int'l L. 293 (2013) (exploring the Hobbesian approach, although it argues specifically in the context of wars). Other scholars have also highlighted the misinterpretation of Hobbes and its subsequent misuse in international law, to mean the need for a hegemon or a preeminent sovereign with capacity on its own or in alliance with a few other states to enforce international order. *See also* James Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. Pa. L. Rev. 383 (1987); David Dyzenhaus, *Hobbes on International Rule of Law*, 28 Ethics & Int'l Aff. 53 (2014); Anthony D' Amato, *Is International Law Really "Law"?*, 79 Nw. L. Rev. 1293 (1985); *see generally* Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 Glob. Pol'y 127 (2010).

[47] Monica Ciobanu & Mihaela Serban, *Legitimation Crisis, Memory and the United States Exceptionalism: Lessons from Post-Communist Eastern Europe*, 14 Memory Stud. 1282 (2021).

[48] The exceptionalism is seen in the debates about courts referencing of foreign law and drawing inspiration from other systems for legal development. *See* Steven G. Calabresi, *A Shining City on a Hill: American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 Bos. U. L. Rev. 1335 (2006); Sarah Cleveland, *Foreign Authority, American Exceptionalism and the Dred Scott Case*, 82 Chi. Kent L. Rev. 393 (2007); Harold Hongju Koh, *On American Exceptionalism*, 55 Stan. L. Rev. 1479 (2003); Johan D. Van der Vyver, *American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness*, 50 Emory L.J. 775 (2001).

[49] Emmanuelle Jouannet, *Universalism and Imperialism: The True False Paradox of International Law?*, 18 Eur. J. Int'l L. 379 (2007).

A. Foundations

There are several complexities to the war in Ukraine. Yet, four foundational structures can provide meaningful standards for analyzing the problem and perhaps show how best to settle the current conflict and commence the accountability, repair, and restoration processes of Ukraine and the Ukrainian people. The first foundation is the equality of states and refraining from the use of force or threat of force in the relationship among states. Second, we must consider the issue of Self-determination as it pertains to Ukraine. The third foundation is state responsibility in international law, international criminal law, and international humanitarian law. Finally, it is imperative to situate Ukraine as a global superpower and geopolitical contestation site.

These four juridical foundations are complex because they have legal and institutional implications. How they are resolved will set the parameters of transitional justice's (*im*)possibilities. However, it is important to outline the settled canons of international law. The capacity of some powerful states to violate these canons does not detract from their legal validity.

Thus, the juridical equality of all states is fundamental to the membership, friendly relationship, and responsibility of states under the United Nations and international law regimes.[50] This *de jure* equality of states does not lose sight of the potential uneven power capabilities of states arising from such factors as better military potency or war technology: But commits to the possibilities of global peace and security hinged on deracialized humanity and collective just security.[51] Therefore, strong and seemingly weak states must settle their international disputes peacefully so that peace, security, and justice are not endangered.[52]

In that regard, states as equal sovereigns and members of the UN are forbidden from the *"threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purpose of*

[50] Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207 (1944); Ann Van Wynen Thomas & A. J. Thomas Jr., *Equality of States in International Law—Fact or Fiction?*, 37 VA. L. REV. 791 (1951); Fredrick Charles Hicks, *The Equality of States and the Hague Conferences*, 2 AM. J. INT'L L. 531 (1908).

[51] Arnold D. McNair, *Equality in International Law*, 26 MICH. L. REV. 131, 131 (1927) (highlighting the foundations of the principle of equality of states) (quoting Oppenheim, McNair writes, "[T]he equality before international law of all states of the family of Nations is an invariable equality derived from their international personality. Whatever inequality may exist between states as regards their size, population, power, degree of civilization, wealth and other qualities, they are nevertheless equals as international persons.").

[52] The equality of states in international law is also captured by the doctrine of *par in parem non habet imperium*—no state can claim jurisdiction over another full sovereign state. It is also the foundation of state immunity in international law. *See generally* Yoram Dinstein, *Par in Parem non Habet Imperium*, 1 ISR. L. REV. 407 (1966). For more on the Pacific Settlement of Disputes in International Law, *see* U.N OFF. LEGAL. AFF., HANDBOOK ON THE PEACEFUL SETTLEMENT OF DISPUTES OFFICE OF LEGAL AFFAIRS, at 1-20, [OLA/COD/2394] 1-20 (1992); The Final Act of the Conference on Security and Cooperation in Europe adopted at Helsinki, August 1, 1975, 14 I.L.M. 1292; Inter-American Treaty of Reciprocal Assistance, art. 1-2, Sept. 2, 1947, 21 U.N.T.S. 324. G.A. Res. 37/10, The Manila Declaration on the Peaceful Settlement of International Disputes (Nov. 15, 1982); *see* Emmanuel Roucounas, *Manila Declaration on the Peaceful Settlement of International Disputes*, U.N. AUDIOVISUAL LIBR. INT'L L. (Nov. 15, 2008); European Convention on the Peaceful Settlement of Disputes, Apr. 29, 1957, 320 U.N.T.S. 4646; General Act for the Peaceful Settlement of International Disputes, art. 44, Sept. 26, 1948, 93 U.N.T.S. 2123 (revised by the United Nations General Assembly in 1949).

the UN."[53] These fundamental prohibitions are aimed at actualizing the primary goal of the UN to maintain effective global peace and security through collective measures.[54] The jurisprudence in the field also aligns with these enunciated first principles of the United Nations Charter. In the Nicaragua Case, the International Court of Justice, in enunciating the principle of equality and friendly relations amongst states, noted that it entails the right of every sovereign state to conduct its affairs without outside interference.[55]

In those cases where it is seemingly proper to intervene, *opinion juris* is tilted towards non-interference.[56] This is clear from the jurisprudence in the Corfu Channel Case.[57] Although the United Kingdom had claimed the right to intervene by conducting a mine sweep of the Corfu Channel, which is in the territorial jurisdiction of Albania, without first obtaining the sovereign consent of Albania, the International Court of Justice held that the alleged right of intervention was a manifestation of force which is only available to the most powerful states.[58]

The principle of non-intervention in the domestic affairs of other states as an aspect of sovereignty and equality of states is also articulated in the *UNGA resolution 2131(XX)*–Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty.[59] By the nature of the events, as they have continued to unfold in the war in Ukraine, Russia breached the principles of equality of sovereigns. This is even starker when the ongoing war is mirrored against the backdrop of the accepted

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[53] *See generally* U.N. Charter art. 2.

[54] *Id.* (noting that "the purpose of the United Nations is to maintain international peace and to that end take effective collective measures for the prevention and removal of threats to peace and for the suppression of acts of aggression or other breaches of the peace to bring about peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to the breach or peace."). These fundamentals are also entrenched further by the United Nations Declarations on the Principles of Friendly Relations—G.A. Res. 2625 (XXV) (Dec. 11, 1970).

[55] The Nicaragua Case, *supra* note 21, ¶ 192- 209 (¶ 202: "[T]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference: though examples of trespass against this principle is not infrequent, the Court considers that it is part and parcel of customary international law […] expressions of an opinio juris regarding the existence of the principle of non-intervention in customary international law are numerous and not difficult to find […] The existence in the opinio juris of States of the principle of non-intervention is backed by established and substantial practice. It has moreover been presented as a corollary of the principle of the sovereign equality of States.").

[56] Edward McWhinney, *Declaration on the Granting of Independence to Colonial Countries and Peoples 1960*, U.N. Audiovisual Libr. Int'l L. (2008).

[57] Corfu Channel (Alb./U.K.), Judgement, 1949 I.C.J. 35 (Apr. 9).

[58] *Id.* at 35. ("A manifestation of a policy of force such as has in the past given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible […] for from the nature of things, it would be reserved for the most powerful states and might easily lead to perverting the administration of international justice itself.")

[59] G.A. Res. 2131 (XX) (Dec. 21, 1965). This declaration also reaffirmed the principles of non-intervention proclaimed in the charters of the organization of American states, the league of Arab State and the Organization of African Unity (now African Union) as affirmed at the Conferences held in Montevideo, Buenos Aires, Chapultepec and Bogota as well as the decisions of the Asian-African Conference of Heads of States or Government of Non-aligned countries. *See* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 Leiden J. Int'l L. 345 (2009).

practices of international law, international humanitarian law, and international criminal law.[60]

On the use of force, the UN Charter envisages collective security, except in those situations whereby the state can invoke the right of self-defense.[61] However, an aggressor state cannot invoke the right of self-defense to support a war of aggression. Thus, despite the many opinions on self-defense in international law under *Article 51* of the UN Charter, self-defense depends on foundations of *necessity, immediacy, and proportionality against an armed attack*.[62] Where such conditions do not warrant an apprehension of armed attack, it would be a breach of the Charter for a state to proceed unilaterally to use force against another state.[63]

The facts of the case in Ukraine do not seem to fulfill any criteria warranting Russia's reliance on *Article 51* of the UN Charter. Notwithstanding the difference of opinions by scholars and jurists on *Article 51* to specific cases, the Russian intervention in Ukraine and the ensuing conflict is illegal under collective justice and security and states' rights to self-defense.[64]

Although Ukraine may be enjoying more visibility because of NATO's strategic commitments in Ukraine and Eastern Europe in general, Ukraine and its resilient struggle with an imperial force is a metaphor for the struggle of many similarly situated states in the global south. These interventions by very powerful states in other states, sometimes based on uncertain foundations such as "weapons of mass destruction," "advancing democracy," protecting national interests, and other justifications, are often against the racialized others, leaving many destructions and abuses in their wake. Also, they are sealed from just reckoning and transitional justice. Arguably, the fate of Ukraine has been the fate of many third-world and racialized countries over time.

This takes us to the second point in the overarching four foundations of our discourse: the right of self-determination of peoples in international law. The right to self-determination in international law plays a strong role in the ongoing conflict in Ukraine.[65] The right envisages the right of peoples to chart their own

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[60] Adil Ahmad Haque, *An Unlawful War*, 116 Am. J. Int'l L. 155 (2022) (symposium on Ukraine and the International Order, setting out some of the violations of international law, international humanitarian law and international criminal law arising from Russia's invasion of Ukraine).

[61] *See generally* Hans Kelsen, *Collective Security and Collective Self-Defense, Under the Charter of the United Nations*, 42 Am. J. Int'l L. 783 (1948); Stephen M. DeLuca, *The Gulf Crises and Collective Security Under the United Nations Charter*, 3 Pace Y.B. Int'l L. 267 (1991).

[62] Dapo Akande & Thomas Liefländer, *Clarifying Necessity, Imminence, and Proportionality in the Law of Self-Defense*, 107 Am. J. Int'l L. 563 (2013).

[63] For a general review of the doctrine of self-defense and the use of force in international law, *see* Russell Buchan, *Non-Forcible Measures and the Law of Self-Defense*, 72 Int'l & Compar. L. Q. 1 (2022); *see also* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 41 (July 8); Oil Platforms (Islamic Republic of Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 76 (Dec. 12).

[64] Elizabeth Wilmshurst, *The Chatham House Principles of International Law on the Use of Force in Self-Defense*, 55 Int'l & Compar. L. Q. 963 (2006) (highlighting the conditionalities for resort to self-defense in international law).

[65] Umut Özsu, *Ukraine, International Law, and the Political Economy of Self-Determination*, 16 Ger. L.J. 434 (2015).

political and national destiny.[66] This includes choosing the type of governance, the process of governance, the economic processes, and their paths toward relationships with other countries.

Yet, the right to self-determination has its admirers and those who do not admire it.[67] The right is often respected by those seeking liberation from domineering or colonial foundations of public order. For this set of people, whether as minority groups, racialized groups, indigenous groups, or colonized peoples, self-determination is a revelation of their hopes for a better future wherein they could be free from the restraints of imperial legal domination.

Woodrow Wilson believed that the doctrine of self-determination was a democratic ideal that had to be made by the people. However, he was also aware of how the European imperial powers continued their domination of many other peoples outside of Europe. Beyond the Wilsonian principles, self-determination was equally an important issue in the early years of the United Nations.[68] This is epitomized by the Declaration on granting independence to colonial countries and peoples.[69] *Resolution 1514* acknowledges the "*inalienable rights and freedom of exercise of sovereignty and self-determination of all peoples.*"[70]

The ICJ has explored the jurisprudence of the right to self-determination—upholding the underpinning principles as captured in the United Nations Charter and the UNGA *resolution 1514(XV)* of 14 December 1960.[71] It is apparent from the literature that in colonial circumstances, the right to self-determination in international law generally enjoys a stronger normative endorsement by states.[72] The legal and scholarly controversy hinges on those situations that fall under secession from independent or non-colonial circumstances.

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66 Jan Klabbers, *The Right to Be Taken Seriously: Self-Determination in International Law*, 28 HUM. RTS. Q. 186 (2006).

67 Helen Quane, *The United Nations and the Evolving Right to Self-Determination*, 47 INT'L & COMPAR. L. Q. 537 (1998); Robert McCorquodale, *Self-Determination: A Human Rights Approach*, 43 INT'L & COMPAR. L. Q. 857 (1994); Matthew Saul, *Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?* 11 HUM. RTS. L. REV. 609 (2011); Deborah Z. Cass, *Rethinking Self-Determination: A Critical Analysis of Current International Law Theories*, 18 SYRACUSE J. INT'L L. 21 (1992); James J. Summers, *The Status of Self-Determination in International Law: A Question of Legal Significance or Political Importance*, 14 FIN. Y.B. INT'L L. 271 (2004); James J. Summers, *The Right of Self-Determination and Nationalism in International Law*, 12 INT'L J. MINORITY & GRP. RTS. 325 (2005); Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43 INT'L & COMPAR. L. Q. 241 (1994); Nathaniel Berman, *Sovereignty and Abeyance: Self-Determination and International Law*, 7 WISC. INT'L L.J. 51 (1988).

68 Woodrow Wilson, President, U.S, 14 Points Address to Congress (Jan. 8, 1918) *in* LIBR. CONG., Jan. 1918.

69 *See* G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960).

70 *Id.*

71 Southwest Africa; Second Phase (Eth. v. S. Afr; Liber. V. S. Afr.), Judgment, 1966 I.C.J 6 (July 18); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16 (June 21); Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

72 *See* Anna Stilz, *Decolonization and Self-Determination*, 32 SOC. PHIL & POL'Y 1 (2015). Also, self-determination is often mapped into the decolonial narrative even in the circumstances of the rights of indigenous peoples within otherwise settled sovereign and territorial jurisdictions such as in the case of Canada and Australia. *See* Karen Engle, *Indigenous Rights Claims in International Law: Self-Determination, Culture, and Development*, *in* DAVID ARMSTRONG, ROUTLEDGE HANDBOOK OF INTERNATIONAL

The doctrinal literature in international law commits to respecting the existing boundaries of states.[73] Still, the Ukrainian situation has both the controversial and the colonial situation tied together. The first part is that Ukraine, like other associated states in the defunct Union of Soviet Socialist Republics (USSR), in exercising its right to self-determination, declared its independence from the USSR in 1990 following the political and economic shifts after 1989.[74] This declaration of independence marked a watershed in the life and future direction of the Ukrainian people. Before the end of the Cold War, an attempt to declare independence would have been met with a military clampdown from Moscow.[75]

Thus, Ukraine departed from colonial dependence to political, economic, cultural, and social autonomy.[76] The autonomy and effort to consolidate this new—self-determined political trajectory is evident in their national institutions, language, economic commitments, and democratic practices.[77] Ukraine's diplomatic and strategic engagements have been adjusted since 1991 in line with this exercise of the right of self-determination.[78] Like other independent states,

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Law 335 (1st ed. 2009); Kalana Senaratne, *A History of Internal Self-Determination*, *in* Internal Self-Determination in International Law: History, Theory, and Practice 12 (2021) (exploring the evolution of the right to self-determination in international law).

[73] The principle of *uti possidetis juris* highlights this canon. Recent scholarships have attempted to complicate this approach. *See* Michal Saliternik, *Expanding the Boundaries of Boundary Dispute Settlement: International Law and Critical Geography at the Crossroads*, 50 Vand. L. Rev. 113 (2021); Anne Peters, *The Principle of Uti Possidetis Juris: How Relevant is it for Issues of Secession?*, *in* Self Determination and Secession in International Law 95 (Christian Walter et al. eds., 2014).

[74] The instrument of declaration of independence reads thus:
"In view of the mortal danger surrounding Ukraine in connection with the state coup in the USSR on August 19, 1991; continuing the thousand-year tradition of state development of Ukraine, proceeding from *the right of a nation to self-determination* (emphasis added) in accordance with the Charter of the United Nations and other international legal documents, and implementing the Declaration of state sovereignty of Ukraine, the Verkhovna Rada of the Ukrainian Soviet Socialist Republic Solemnly declares Independence of Ukraine and Creation of the Independent Ukraine state—Ukraine […]."
See The Act of Declaration of Independence of Ukraine, Supreme Soviet of the Ukrainian SSR, Aug. 24, 1991.

[75] Richard Nelson, *Moscow Crushes the Prague Spring - Archive*, *August 1968: How the Guardian Reported the Russian and Warsaw Pact Invasion of Czechoslovakia, 50 Years Ago*, The Guardian (Aug. 10, 2018), https://www.theguardian.com/world/from-the-archive-blog/2018/aug/10/russia-crushes-prague-spring-czechoslovakia-1968; Robert Tait, *Prague 1968: Lost Images of the Day That Freedom Died*, The Guardian (Aug. 19, 2018), https://www.theguardian.com/world/2018/aug/19/prague-1968-snapshots-day-freedom-died; Mare Santora, *50 Years After Prague Spring, Lessons on Freedom (and a Broken Spirit)*, N.Y. Times (Aug. 20, 2018), https://www.nytimes.com/2018/08/20/world/europe/prague-spring-communism.html.

[76] Francis X. Clines, *Ukrainian Voters Crows the Polls to Create a Nation*, N.Y. Times, Dec. 2, 1991, at A1.

[77] On December 1, 1991, the Ukrainian public in a highly participatory referendum ratified the declaration of independence. Thereby sealing the turn towards a new social, economic, cultural and political order in the country. *See* Johnathan Steel et al., *Ukrainians Push USSR to Brink: Gorbachev Warns Independence Will be a Disaster,* The Guardian (Dec. 2, 1991), https://www.theguardian.com/world/1991/dec/02/ukraine.jamesmeek; Serge Schneemann, *Crimea Parliament Votes to Back Independence from Ukraine*, N.Y. Times, May 6, 1992, at A8; Francis X. Clines, *Ex-Communist Wins in Ukraine; Yeltsin Recognizes Independence*, N.Y. Times, Dec. 3, 1991, at A1; Francis X. Clines, *Change Is 'Natural, 'Ukrainian Says*, N.Y. Times, Nov. 30, 1990, at 5; Stephen Kinzer, *Europe Is Expected to Move more slowly on Ukraine*, N.Y. Times, Nov. 29, 1991, at A20.

[78] Rob de Wijk, *The Struggle for Ukraine*, *in* Power Politics: How China and Russia Reshape the World 137 (Vivien Collingwood trans., 2015) (on some of the history of the struggle for a different Ukraine since independence and how it maps into larger regional power relations in Europe).

Ukraine has sought relationships and courted allies from different parts of the world, including in Eastern and Western Europe. The diplomatic adjustment is a prickly matter to Russia, whose limited fortunes in international affairs since 1991 have left it seeking new ways of regaining its 'sphere of influence' in Europe and beyond.[79]

Arguably, the more contested part of self-determination is that of self-determination processes akin to secession in non-colonial contexts.[80] In several situations worldwide, achieving political independence from imperial powers did not automatically produce harmony in the polity. Rather, it was only the beginning of the real effort by the minorities to seek to chart their paths to freedom—economically, politically, socially, and culturally.

In many of these situations, marginalized communities such as indigenous tribes, loosely divided by colonial cartographers and allotted to different sovereign states, have had to seek ways of reaffirming their right to economic, social, and political self-determination.[81] In some cases, these were amicably done; in other situations, they were sources of lasting civil wars with devastating consequences for human dignity, community harmony, and global peace and security.[82] In the current situation in Ukraine, the right to self-determination has been misused by Moscow to justify its interventions.

This view that Russia is abusing the international law on self-determination by supporting 'separatist groups' and stage-managing referenda is further reinforced by the UN's condemnations of Russia. The UN has continued to condemn the Russian effort to choreograph referenda in the territories under occupation contrary to international law. Such pseudo-referenda, if successful, will permanently change the character of these territories, which are internationally recognized as Ukrainian territories even before the state of hostility.[83] The status quo *ante bellum* is that these occupied territories are within Ukraine's recognized sovereign territorial boundaries. In any peace process and post-conflict examination of the Ukrainian situation for accountability or any other form of diplomatic and legal arrangement between the parties, the state of these territories before the war will be a dispositive factor in determining the iterations of those engagements.

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[79] Paul D'Anieri, *New World Order? 1989–1993*, *in* Ukraine and Russia: From Civilized Divorce to Uncivil War 27 (2019).

[80] Robert McCorquodale, *Self-Determination Beyond the Colonial Context and its Potential Impact on Africa*, 4 Afr. J. Int'l & Compar. L. 592, 593 (1992).

[81] The existence of "plurinationalism" or "plurinationalist" states is a pointer to the continued debate about the nature of self-determination that is not purely a colonial context. *See* Nancy Postero & Jason Tockman, *Self-Governance in Bolivia's First Indigenous Autonomy: Charagua*, 55 Latin Am. Rsch. Rev. 1, 3 (2020). These come with their own challenges including legal pluralism and how to balance the normative and juridical sources through constitutional making in these plurinationalists states.

[82] M. G. Kaladharan Nayar, *Self-Determination Beyond the Colonial Context: Biafra in Retrospect*, 10 Tex. Int'l L.J. 321, 321 (1975) (exploring self-determination, beyond the traditional narrative of decolonization).

[83] Margaret Besheer, *UN General Assembly Rejects Russia's 'Referendums,' 'Annexation' in Ukraine*, Voice of America (Oct. 12, 2022), https://www.voanews.com/a/un-general-assembly-rejects-russia-s-referenda-annexation-in-ukraine-/6787420.html.

On state's responsibility in international law, states as juridical persons have obligations for their internationally wrongful acts.[84] Some of these obligations are embedded in *jus cogens* norms and other aspects of customary international law.[85] Others are articulated in conventions, treaties, and general principles of international law. Conflicts such as the ongoing war in Ukraine implicate these norms and the obligations of states. The implications can arise from the outright violation of laws of war and the commission of torture, genocide, and crimes against humanity.

The conventions and treaties form the frameworks for enforcing states' responsibility. Yet the international responsibility of states for their internationally wrongful acts does not easily yield to accountability mechanisms, especially when powerful states such as Russia, the United States, China, the United Kingdom, and France are involved.[86] This contradicts the ideals of equality of all states in international law, which is the core of contemporary inter-state relations.

The International Law Commission (ILC) Draft Articles on the Responsibility of States for their Internationally Wrongful Acts encapsulates the commitment to equality before the law of all states and provides the foundations upon which the international community seeks to build a strong accountability structure. Thus, every internationally wrongful act of a state entails the international responsibility of that state.[87]

An internationally wrongful act may include actions, omissions, or a combination of both. Whether there has been an internationally wrongful act depends on the requirements of obligation or "on the frameworks of established conditionalities."[88] In the current situation, there are pieces of evidence showing the commitment to internationally wrongful acts, beginning with the invasion of Ukraine and other ongoing violations of international humanitarian law. There are also potential cases of war crimes and crimes against humanity.[89] These internationally wrongful acts will require reparations and remediation as articulated

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[84] *See generally* Stephan Wittich, *The International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts Adopted on Second Reading*, 15 Leiden J. Int'l L. 891 (2002).; James Crawford, Pierre Bodeau & Jacqueline Peel, *The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading*, 94 Am. J. Int'l L. 660 (2000).

[85] *See* Mark W. Janis, *Nature of* Jus Cogens, 3 Conn. J. Int'l L. 359, 359 (1988) (discussing jus cogens).

[86] Ingrid (Wuerth) Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 Am. J. Int'l. L. 687, 694 (2022) (there are known cases of the misuse of force in international law attributable to permanent security council members of the UN. Although the authors have tried to distinguish the present situation in Ukraine from the interventions by UN P5 members, the war resonates generally like the usual justifying arguments by powerful states for their interventions in less powerful states).

[87] Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 32-33 (2001).

[88] James Crawford, The International Law Commission's Articles On State Responsibility: Introduction, Text And Commentaries 77 (2002).

[89] Ukraine has a pending proceeding against Russia before the International Court of Justice relating to the interpretation, application, and fulfilment of the 1948 Convention on the prevention of the crime of Genocide. More than 30 European States have applied to join this proceeding and they were so admitted by a decision of the ICJ on June 9, 2023. *See* Press Release, International Court of Justice, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), I.C.J. Press Release 2023/27 (June 9, 2023).

by the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[90]

The next point of intersection in the conflict is that Ukraine has become a site of strategic competition among states. In particular, Russia is contending for strategic positioning—depending on how many territories it can include in its imperial legacy.[91] This is not surprising considering Ukraine's declared commitment towards more alliance with NATO and the Western European States. It is a replay of what happens in many global South countries at the onset of conflicts.

For instance, external actors often jostle to influence the war's trajectory and the country's potential post-conflict disposition. It highlights how powerful states have often remodeled imperial programs and projects to meet their strategic interests.[92] These manifest in proxy wars or other forms of war commitments, sometimes without a confrontation between the powerful states.[93]

Equally, war situations often inspire an array of alliances based on ideology, economic interests, and other forms of affiliation. Yet, the human cost of war is constant, and as long as the war continues, suffering remains. The economic entanglements of Russia with other parts of Europe have made the economic sanctions less effective in checking the Russian ambition in Ukraine.

Still, this is not a mere political question because it also highlights the ineffectuality of many international institutions in managing questions of global peace and security when the interests of superpowers are involved. Third World countries and smaller states, many racialized in international law history, usually have no such luxury. Hence, the subordination of smaller states by their imperial neighbors is almost a standard feature of the international law and policy landscape. This is apparent in the ongoing war in Ukraine.

B. Violations

Besides the crime of aggression as articulated by the UN resolutions and the declarations by many other international bodies, the war in Ukraine potentially

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[90] *See* Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 Am. J. Int'l L. 4, 833 (2002); *see generally* Felix E. Torres, *Revisiting the Chorzów Factory Standard of Reparation—its Relevance in Contemporary International Law and Practice,* 90 Nordic J. Int'l L. 190 (2021).

[91] *See generally* Anastasiya Kotova & Ntina Tzouvala, *In Defense of Comparisons: Russia and the Transmutations of Imperialism in International Law*, 116 Am. J. Int'l L. 710 (2022) (highlighting the imperial dimensions of the war in Ukraine and the work by global south scholars to inspire a more nuanced interrogation of the union between international law, its vocabularies, it preferred canons and the colonial contestations of frontline states).

[92] During the Cold War period, powerful states jostled to control/destruction of ideological developments around the world. This is a factor to consider in the many civil wars that were fought in Africa and other places. *See* Eva Hansson, Kevin Hewson, Jim Glassman, *Legacies of Cold War in East and South Asia: An Introduction*, 50 J. Contemp. Asia 493, 493 (2020); *see generally* Teresa S. Encarnacion Tadem, *The Emergence of Filipino Technocrats as Cold War "Pawns"*, 50 J. Contemp. Asia 530 (2020); *see generally* Jim Glassman, *Lineages of the Authoritarian State in Thailand*: *Military Dictatorship, Lazy Capitalism and the Cold War Past as Post-Cold War Prologue*, 50 J. Contemp. Asia 570 (2020).

[93] Alex Marshall, *From Civil War to Proxy War: Past History and Current Dilemmas,* 27 Small Wars & Insurgencies 183, 183 (2016).

violates many other aspects of international law.[94] First, it compromises global peace, justice, and security. The war affected different groups of people, including students in Ukraine from different parts of the world who were forced to abandon their studies and evacuate. We saw the racialized management of refugees.[95] Second, it has led to a disruption of food systems—especially in light of the strategic agricultural capacity of Ukraine. Third, it has added to the number of people who live as refugees around the world, especially in the neighboring countries in Europe. These violations have also been articulated by the United Nations resolutions condemning the invasion. Fourth, Russia's threat to bomb communication satellites potentially violates international laws and public policy commitments on the peaceful use of outer space.[96]

These violations are in the public domain. More important are the sets of violations that are not completely visible but are increasingly seen in news reports, including rape, the killing of civilian populations, and the bombing of hospitals, schools, churches, and the destruction of museums and other cultural property.[97]

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[94] Sofia Cavandoli & Gary Wilson, *Distorting Fundamental Norms of International Law to Resurrect the Soviet Union: The International Law Context of Russia's Invasion of Ukraine*, 69 Neth. Int'l L. Rev. 383, 384 (exploring Russia's claims and justifications of the latest intervention in Ukraine mirrors underlying efforts to distort international law in order to give legitimacy its war of aggression. The authors contend that the intervention is part of Russia's overreaching efforts to reassert itself over former Soviet states).

[95] The racialized nature of refugee management is increasingly receiving attention and Ukraine has illustrated the complex nature of the problem. *See* Cathryn Costello & Michelle Foster, *(Some) Refugees Welcome: When is Differentiating Between Refugees Unlawful Discrimination?*, 22 Int'l J. Discrimination & L. 244, 245 (2022); Shreya Atrey, Catherine Briddick & Michelle Foster, *Guest Editor Introduction: Contesting and Undoing Discriminatory Borders*, 22 Int'l J. Discrimination & L. 210, 211 (2022).

[96] The threat has many other ramifications for international law governing the use of the outer space. Equally, it challenges the provisions of the UN Charter which encourages friendly relations amongst states. Thus, were such a bombing to happen, it will open a strategic angle to the dispute and alter the already complex situations in ways that will compromise global peace and security. *See* U.N. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space art. 3, including the Moon and Other Celestial Bodies, *opened for signature* Dec. 19, 1966, 610 U.N.T.S. 8843; *see also* G.A. Res. 37/92 (Dec. 10, 1982).

[97] Malachy Browne et al., *Videos Suggest Captive Russian Soldiers Were Killed at Close Range*, N.Y. Times (Nov. 20, 2022), https://www.nytimes.com/2022/11/20/world/europe/russian-soldiers-shot-ukraine.html (this requires thorough investigation because the Geneva Conventions on Laws of Warfare prohibits the execution of prisoners of war); Matthew Mpoke Bigg, *An Abyss of Fear: A Report Accuses Russia of Further Abuses Against Civilians*, N.Y. Times (July 24, 2022), https://www.nytimes.com/2022/07/24/world/europe/russia-torture-ukraine-human-rights-watch.html (quoting Human Rights Watch report which highlights that Russian forces have turned the occupied territories into an abyss of terror); Human Rights Watch*, Ukraine: Torture, Disappearances in Occupied South—Apparent War Crimes by Russian Forces in Kherson, Zaporizhzhia Regions*, Hum. Rts. Watch (July 22, 2022, 12:01 AM), https://www.hrw.org/news/2022/07/22/ukraine-torture-disappearances-occupied-south; Marc Santora, Erika Solomon & Carlotta Gall, *'Clear Patterns' of Russian Rights Abuses Found in Ukraine, Report Says*, N.Y. Times (April 13, 2022), https://www.nytimes.com/2022/04/13/world/europe/ukraine-russia-war-abuses.html (reporting how civilians were still bearing much of the brunt of the conflict); Nick Cumming-Bruce, *U.N. Experts Find That War Crimes Have Been Committed in Ukraine*, N.Y. Times (Sept. 23, 2022), https://www.nytimes.com/2022/09/23/world/europe/russia-ukraine-war-crimes-united-nations.html (the commission has documented cases of rape, torture, and unlawful confinement against children); Emma Bubola, *Ukraine Accuses Russia of Violating International Law by Placing Ukrainian Children in Russian Families*, N.Y. Times (Oct. 28, 2022), https://www.nytimes.com/2022/10/28/world/europe/ukraine-accuses-russia-of-violating-international-law-by-placing-ukrainian-children-in-russian-families.html (stating how Russia has been promoting efforts to transfer abandoned or orphaned children from Ukraine to Russia to have them placed in Russian families. President Putin signed a decree to simplify the process). These reposts and news headlines provide general insights to the ongoing violations in the war in Ukraine. However, they are neither

These violations have great ramifications for international criminal responsibility and international humanitarian law.[98] The violations require investigations and documentation to enable appropriate post-war accountability measures.

These transgressions may be scrutinized through the lens of three distinct legal frameworks: jus cogens norms within international law, the corpus of international humanitarian law, and the realm of international criminal jurisprudence. In operation, there is a connection or general convergence between all the different parts of international law that are implicated by the conduct of hostilities in international law. Article *2(4) of the UN Charter* prohibits the resort to force by states to resolve disputes. The attenuation of this provision is recognized in *Article 51*.[99] Self-defense is a very contested aspect of international law, considering how it has been (ab)used in recent decades.[100] Equally, the inability of the UNSC to meaningfully carry out its mandate of ensuring international peace and security because of the competing interests of the five permanent members is material in considering the current limitations in international law and collective just security.[101]

That notwithstanding, international law emphasizes collective just security and amicable settlement of disputes amongst nations. Hence, the provisions of *Chapter VII of the UN* Charter articulated the commitment to collective defense

exhaustive nor dispositive, they invite a deeper investigation regarding the nature of the crimes committed, the extent of the crimes, and the potential accountability measures which they implicate.

98 United Nations, *'Dire' and Deterioration Pattern of Rights Abuse Continued in Ukraine*, U.N. News (Sept. 27, 2022), https://news.un.org/en/story/2022/09/1128131 (according to the UN, since the invasion of 24 February 2022, the UN mission has recorded 5,996 civilian deaths, including 382 children together with 8848 injured. The report noted that the actual figures are much higher due to inability to get complete information from the conflict zone).

99 *See* U.N. Charter art. 51:
"Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

100 Jorge Alberto Ramírez, *Iraq War: Anticipatory Self-Defense or Unilateralism?*, 34 Cal. W. Int'l L.J. 1, 24 (2003).

101 Oscar Schachter, *Self-Defense and the Rule of Law*, 83 Am. J. Int'l L. 259, 261 (1989) (highlighting how states have often deployed self-defense in support of their interests and some of the problems in the field); *see generally* Stephen M. Schwebel, *Aggression, Intervention, and Self-Defense in Modern International Law*, *in* Justice in International Law: Selected Writings 530 (1994); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 Geo. L.J. 173, 174-75 (2004) (exploring the question of preemptive use of force and the arguments used by the United States to justify the invasion of Iraq in March 2003). What is visible in the field is that self-defense has been misused particularly by powerful states to intervene in the territories of other states. Even when the intervention is expected to be aimed at humanitarian ends, it has ended up making the collective security architecture of the United Nations weaker. For instance, in Libya, the intervention, though authorized by the UN was carried out in such a way that the country was thrown into a civil conflict. Thus, the humanitarian fallout of the humanitarian intervention outweighs the supposed gains of that process. It also destroyed the emerging doctrine of responsibility to protect and highlighted the ambivalence of international law to accountability for misuse of force. It also rings through the ongoing conflict in Ukraine as the Russians argue that they are intervening to protect Russians in Ukrainian territory from extermination. *See* Sarah Brockmeier, Oliver Stuenkel & Marcos Tourinho, *The Impact of the Libya Intervention Debates on Norms of Protection*, 30 Glob. Soc'y 113, 113-14 (2016).

and the use of force in international law. Equally, *Chapter VI* of the UN Charter makes for the respective ways through which peaceful settlement of disputes can be made, including mediation, conciliation, good offices, arbitration, and negotiation—to forestall conflicts and situations of war, as these could endanger global peace and security.[102]

These, in combination with the rights of peoples to self-determination as recognized and guaranteed under the UNGA resolution 2105(XX) of 20 December 1965, *article 1 of ICCPR*, and *article 1 ICESCR*[103] form the network of laws generally prohibiting wars except in those special circumstances as self-defense and the exercise of the right to self-determination.[104] The right of self-defense is not a right at large:[105] It is regulated by standards of international law, including the pendency of an armed attack, [106] proportionality, and necessity.[107] Self-defense is often interpreted as an interim measure pending collective security under the United Nations. These principles are part of customary international law.[108] Together with other laws and conventions prohibiting war as a primary means of settling disputes, they are called *jus contra bellum—laws against war*.

Nonetheless, wars still break out between states, and the conduct of hostilities has to be governed by law. Thus, we have the Geneva Conventions on Laws of Warfare, the Genocide Convention,[109] the Torture Convention,[110] the Convention

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[102] *See generally* U.N. Office of Legal Affairs, Codification Division, Handbook on the Peaceful Settlement of Disputes between States, Sales No. E.92.V.7 (1992) [hereinafter UN Handbook]; Revised General Act for the Pacific Settlement of International Disputes, *adopted on* Apr. 28, 1949, 71 U.N.T.S. 912 [hereinafter Pacific Settlement].

[103] UN Handbook, *supra* note 102; Pacific Settlement, *supra* note 102.

[104] UN Handbook, *supra* note 102; Pacific Settlement, *supra* note 102:
"All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

[105] For a highlight of some of the debates surrounding self-defense—restrictive and expansive interpretation, *see* Anne-Charlotte Martineau, *Concerning Violence: A Post-Colonial Reading of the Debate on the Use of Force,* 29 Leiden J. Int'l L. 95, 101 (2016).

[106] *See* The Nicaragua Case, *supra* note 21, ¶ 191.

[107] *Id.* at ¶ 176. It is also the law that the attack is also attributable to the state. *Id.* at ¶ 195.

[108] The customary law on the use of force is also a source of intense debate in the field. The puzzle existing in the field is how states operationalize these customs because often there is a misuse, and the practice of a few European states are endorsed as custom. This leaves the rest of humanity as recipients of norms while European states and their settler communities around the world remain the norm givers. These also raise puzzles for policy makers in international law because giving a sense of belonging to all parts of the globe is key to sustainable multilateralism which is central to global peace and security. *See* Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 Eur. J. Int'l L. 803, 805 (2005); Timothy Kearley, *Raising the* Caroline, 17 Wis. Int'l L.J. 325, 326-27 (1999); Maria Benvenuta Occelli, *"Sinking" the* Caroline*: Why the Caroline Doctrine's Restrictions on Self-Defense Should Not Be Regarded as Customary International Law*, 4 San Diego Int'l L.J. 467, 468-69 (2003) (arguing that the Caroline Doctrine is not customary international law considering the context of the *Caroline*, the exchanged diplomatic notes, and the time of the encounter between the British Government and the United States).

[109] Convention on the Punishment of the Crime of Genocide, *adopted on* Dec. 9, 1948, 78 U.N.T.S. 1021.

[110] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted on* Dec. 10, 1948, 1465 U.N.T.S. 24841.

Against the Use of Chemical Weapons,[111] and the Convention Against Anti-personnel Landmines.[112] These conventions form the general architecture for hostilities: Regulating how wars are fought and attempting to moderate the violations that could arise in one state's unregulated use of violence against another.[113]

These laws are essential to any meaningful analysis of conflicts to ensure that laws and norms of war are not violated and what is to be done if they are violated. They are equally foundational to accountability during wars and in postwar just reckoning. International humanitarian law considers these prohibitions and seeks to ensure that belligerents do not act with impunity, especially regarding captured and wounded combatants, targeting civilian populations, and using prohibited weapons.[114] Where these customs and positive international law instruments on warfare and the regulation of the conduct of hostilities are violated, they form the basis for criminal responsibility against persons who are guilty of these egregious violations.

Historically, the international community has relied on special tribunals, such as the ones in Nuremberg, Tokyo, Rwanda, and Yugoslavia, to hold accountable those who are alleged to have committed genocide, war crimes, or crimes against humanity. These tribunals have inspired the establishment of the International Criminal Court, which is responsible for prosecuting those who violate the laws of war.

In light of the ongoing war in Ukraine, it is crucial to view the general war environment as a crime scene that warrants thorough investigation by neutral entities, such as the United Nations and other multilateral institutions. This approach will ensure that the findings are useful for accountability purposes and for preserving knowledge and learning lessons.[115] Such knowledge will be beneficial in preventing future violations arising from wars, or the illegal intervention of powerful states in the territories of other seemingly less endowed states.

C. (Un)Accountability and Transitional (In)Justice

The conflict in Ukraine has once again shown the world the true cost of war. The human toll of the conflict is obvious and serves as a reminder of the fragility of peace. It also highlights the need for constant vigilance through an international law that is unbiased, works of justice, and collective efforts to ensure just security. Ukraine is not the only country that has suffered from human

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111 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, *opened for signature on* Jan. 19, 1993, 1975 U.N.T.S. 33757.

112 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *adopted on* Sept. 18, 1997, 2056 U.N.T.S. 35597.

113 Daniel Frei, *The Regulation of Warfare: A Paradigm for the Legal Approach to the Control of International Conflict*, 18 J. Conflict Resol., 620, 620-21 (1974).

114 Nils Melzner, International Humanitarian Law: A Comprehensive Introduction 77-127 (Etienne Kuster ed., 2016) (on the conduct of hostilities).

115 The United Nations has established a body of inquiry on the Ukrainian war. *See* Human Rights Council Res. 49/163, U.N. Doc. A/HRC/RES/49/1 (March 4, 2022) (deciding to urgently establish an independent international commission of inquiry to among other things investigate all alleged violations and abuses of human rights).

catastrophes due to war. Libya, Syria, Yemen, South Sudan, and parts of Eritrea and Ethiopia have also faced similar tragedies, including famine and starvation resulting from conflicts in those regions.

However, the situation in Ukraine has its unique aspects due to Russia's illegal territorial ambitions. Currently, Russian forces occupy territories within Ukraine's internationally recognized borders at various levels. Moreover, Russia has threatened to use nuclear power and other forms of deadly force in the conflict.[116] There has also been a threat to bomb communication satellites belonging to states that are assisting Ukraine.[117]

Thus, the situation in Ukraine is complex, as it involves a conflict with a nuclear power that holds significant political and diplomatic influence. It raises questions as to whether those responsible for violating international law will be held accountable and what steps need to be taken to ensure that justice is served. Failing to hold those responsible accountable could set a dangerous precedent. There are two approaches that could be taken: conflict accountability efforts and post-conflict accountability measures. These could be implemented by Ukraine or through international accountability mechanisms like the Rwandan and Yugoslav Criminal Tribunals. However, obstacles exist, such as Russia's membership in the UN Security Council and the dysfunction within the UN's dispute resolution system.

To establish a global accountability order that is fair and promotes peace, powerful states, and their officials need to be held accountable for their actions. This requires a concerted effort by the international community to collect and preserve evidence of violations of international law. Those who violate these norms will likely try to destroy evidence, making it even more essential to prioritize evidence gathering. Institutional condemnation of the war and a commitment to accountability are also critical for establishing a framework for justice.

Although general economic sanctions have been imposed on Russia by NATO and her allies, the reality is that the network of economic entanglements between Russia and the rest of Europe—especially in energy supply and the reliance of Europe on Russian gas—has meant that Russia has continued to access financial

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116 BBC Visual Journalism Team, *Putin Threats: How Many Nuclear Weapons Does Russia Have?*, British Broadcasting Corporation (Oct. 7, 2022), https://www.bbc.com/news/world-europe-60564123; Helene Cooper, Julian E. Barnes & Eric Schmitt, *Russian Military Leaders Discussed Use of Nuclear Weapons, U.S. Officials Say*, N.Y. Times (Nov. 2, 2022), https://www.bbc.com/news/world-europe-60564123; Associated Press, *Putin Says 'No Need' for Using Nuclear Weapons in Ukraine*, PBS (Oct. 27, 2022, 2:55 PM), https://www.pbs.org/newshour/world/vladimir-putin-rules-out-using-nuclear-weapons-in-ukraine#:~:text=MOSCOW%20(AP)%20%E2%80%94%20Russian%20President,insisted%20are%20doomed%20to%20fail.; Sam Meredith, *Putin's 'Incredibly Dangerous' Nuclear Threats Raise the Risk of an Unprecedented Disaster'*, CNBC News (Sept. 23, 2022, 3:49 AM), https://www.cnbc.com/2022/09/23/russia-ukraine-war-putins-nuclear-threats-raise-the-risk-of-disaster.html (were such use of nuclear force to happen, it will totally alter the dynamic of the war, and potentially have larger implications for global health, environmental safety and non-proliferation accords).

117 Joey Roulette, *Russia's Anti-Satellite Threat Tests Laws of War in Space*, Reuters (Oct. 27, 2022, 11:10 PM), https://www.reuters.com/world/russias-anti-satellite-threat-tests-laws-war-space-2022-10-28/#:~:text=The%20Liability%20Convention%20of%201972,orbit%2C%20blasting%20it%20to%20smithereens.

resources.[118] Thus, economic sanctions may have a limited impact on the leaders of Russia.[119] Furthermore, it is worth considering that economic sanctions often immiserate ordinary citizens. Leaders often continue to live their normal lives. Therefore, the place of economic sanctions in situations of war needs significant recalibration and rethinking. It is thus imperative to combine the sanctions with vigorous diplomatic efforts to end the war as the first step towards accountability in a post-conflict scenario.

Ukraine has taken steps to claim reparations against Russia. This has been pursued through the UNGA and other international and multilateral institutions. Ukraine has also secured provisional measures against Russia from the International Court of Justice. The ICJ has enjoined Russia and Ukraine to interim measures, including immediate suspension of military operations that it commenced on 24 February 2022 in the territory of Ukraine. Both parties are also enjoined to refrain from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.[120]

Following the request of the Ukrainian Permanent Representative to the United Nations through the President of the UN Security Council (S/2014/136), the UNGA has since endorsed a resolution.[121] Amongst other commitments, the UNGA resolution—*furtherance of remedy and reparation for aggression against Ukraine*—recalled other important resolutions related to the war in Ukraine to reaffirm Ukraine's sovereignty and territorial integrity.[122] Therefore, while the resolution called on Russia to unconditionally withdraw from Ukrainian territories, it recognized the need for accountability by Russia for any violations of

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[118] The Economist, *Why Russian Oil and Gas is Still Flowing Through Ukraine*, The Economist (Mar. 30, 2023), https://www.economist.com/europe/2023/03/30/why-russian-oil-and-gas-is-still-flowing-through-ukraine (even in war, old pipelines and contracts die hard); John Psaropoulos, *Europe Leaps Towards Energy Autonomy as Sanctions Undercut Russia*, Al Jazeera, (Feb. 28, 2023), https://www.aljazeera.com/news/2023/2/28/europe-leaps-towards-energy-autonomy-as-sanctions-undercut-russia. Some of the reasons for failure of economic sanctions to tame violent regimes includes the possibilities of "arbitrage", existing contractual commitments, carefully framed contractual clauses and solidarity with like-minded states. In many respects the unrestrained use of economic sanctions impacts more the lives ordinary citizens. *See generally* Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 Am. J. Int'l L. Unbound 135 (2022); Michael Bradley, Irving de Lira Salvatierra, W. Mark C. Weidemaier & Mitu Gulati, *A Silver Lining to Russia's Sanctions-Busting Clause?*, 108 Va. L. Rev. Online 326 (2022).

[119] Justin Spike, *Hungary Forces New Energy Deals with Russia Amid Ukraine War*, A.P. News (Apr. 12, 2023, 12:47 PM), https://apnews.com/article/hungary-makes-new-energy-agreement-russia-c069d83bc748cb820c3958bbecf13f17.

[120] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ. Fed'n), Order, 2022 I.C.J. 182 (Mar. 16). The ICJ has over time developed the practice of interim measures in similar situations in exercise of its mandate and jurisdiction as the highest judicial organ of the United Nations. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Order, 2020, I.C.J. 178 (Jan. 23); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Order, 2021 I.C.J. 361 (Dec. 7).

[121] G.A. Res. A/ES-11/L.6 (Nov. 7, 2022) (furtherance of remedy and reparation for aggression against Ukraine).

[122] G.A. Res. A/RES/ES-11/1 (Mar. 2, 2022) (Aggression against Ukraine); G.A. Res. A/RES/ES-11/2 (Mar. 24, 2022) (Humanitarian Consequences of the Aggression Against Ukraine); G.A. Res. A/RES/ES-11/4 (Oct. 12, 2022) (Territorial Integrity of Ukraine; Defending the Principles of the Charter of the United Nations).

international law, the need for the establishment in cooperation with Ukraine of an international mechanism for the reparation for damage, loss or injury arising from the internationally wrongful act of Russia; and, recommended for the creation of an international register to serve as a record, in documentary form of evidence and claims information and damages.[123]

The resolutions and legal proceedings brought before courts, including the ICJ, have three major legal implications for accountability in post-conflict situations.

Firstly, these resolutions provide current opinions of the United Nations and the International Court of Justice in relation to the war. Having such opinions documented makes it easier for future legal and policy interventions to reference and utilize them for the purpose of providing reparative measures against Russia. These resolutions and provisional orders also establish the state of the law, thus preventing any arguments to the contrary. At the very least, they restate the law on wars and accountability, and they establish the history of proceedings and the parties' efforts to ensure accountability.

Secondly, the resolutions and voting patterns of countries that are not directly involved in the war can have a significant impact on opinio juris and the behavior of states. These patterns can give policymakers or diplomats an idea of where each country stands and what they can do to build consensus and create multilateral solutions to a complex problem in the international sphere. Diplomatic exchanges and good offices efforts can also have significant legal implications for conflict resolution. They provide evidence of diplomats and other functionaries in international law on the subject matter at the time, thus laying the foundations for future resolutions and judicial interventions on the subject.

Finally, these resolutions and legal proceedings foreclose plausible deniability by any party to the conflict regarding international law and the expectations of the international community. Other accountability efforts can come from Criminal Tribunals, Truth Commissions, and Memorial programs. These have to be carefully considered and should be context-driven. Whatever approach is adopted should center the victims and their voices instead of centering the voices of international experts.[124] Although international experts' voices are crucial in formulating accountability policies and projects, they have limitations. Such limitations include the potential disposition towards transplanting mechanisms or approaches that may not fit the values and contexts of the emergent post-conflict society.

Thus, measures should be finely balanced with the community's dispositions on how and what they want in postwar accountability programs. This is critical considering how expertise in the field can be highly political because "expert' knowledge tend[s] to be legal, foreign and based on models to be replicated elsewhere."[125] Accountability is imprescriptible, and the failure of international

123 *See* G.A. Res. A/ES-11/L.6 (Nov. 7, 2022).

124 Kieran McEvoy & Kirsten McConnachie, *Victims and Transitional Justice: Voice, Agency and Blame*, 22(4) Soc. & Legal Stud. 489, 496-97 (2013); *see generally* Cheryl Lawther, *'Let Me Tell You': Transitional Justice, Victimhood and Dealing with a Contested Past*, 30 Soc. & Legal Stud. 890 (2021).

125 *See generally* Briony Jones, *The Performance and Persistence of Transitional Justice and its Ways of Knowing Atrocity*, 56 Coop. & Conflict 163 (2021) (highlighting the fact that expertise in transitional

law to hold powerful states accountable is a recipe for cycles of conflict and increased diminution of human dignity. This takes us to the next Part—the spheres of racism in transitional justice.

III. Spheres of Racism in Transitional Justice

The boundaries of racism in transitional justice can vary depending on various factors such as religion and economic capacities. However, we can easily identify four important markers to track the extensions of racism. These markers include time, place, manner, and epistemologies of transitional justice. This section delves into these pillars to provide scholars with a framework for understanding the different forms of racism in transitional justice. The ultimate goal is to achieve global peace, collective just security, and deracialized international law and order.

A. Temporal Considerations

Transitional justice's spheres of racism have often manifested in the structure and normative foundations of transitional justice. One way to explore this is through transitional justice's privileged temporalities and spatial dimensions.[126] Regarding the temporalities or the time-related issues of transitional justice, the takeoff point appears to me to be the historical gap regarding the violence against blacks and other persons of color.

The genealogy of transitional justice is often traced to Nuremberg.[127] This justice genealogy with Nuremberg as the lodestar has many limitations and ramifications for transitional justice. First, it omits many eras and iterations of racialized violence—including property seizures, forced displacement, enslavement, uncompensated labor, and the genocidal elimination of "natives" and indigenous peoples[128]—which ultimately formed the groundwork of colonialism and its enduring consequences in our current global international law order.[129]

justice is both a fact of epistemic community and also political. What is also undertheorized is how epistemic communities can be conservative in terms of membership and diversity of opinions and scholarship. So, there is often a gap regarding the experts and possibilities of racialized communities to participate as interlocutors in that 'exclusive' epistemic community).

126 Zinaida Miller, *The Injustices of Time: Rights, Race, Redistribution, and Responsibility*, 52 COLUM. HUM. RTS. L. REV. 648, 662 (2021); Zinaida Miller, *Temporal Governance: The Times of Transitional Justice*, 21 INT'L CRIM. L. REV. 848 (2021).

127 Teitel, *supra* note 1.

128 *In re* Southern Rhodesia, 211 A.C. (1919); Johnson v. M'Intosh, 21 U.S. 543 (1823) (natives do not have the powers to devise land); Howard R. Berman, *The Concept of Aboriginal Rights in the Early Legal History of the United States*, 27 BUFF. L. REV. 637 (1978); David E. Wilkins, *Johnson v. M'Intosh Revisited: Through the Eyes of Mitchel v. United States*, 19 AM. INDIAN L. REV. 159 (1994); Geoffrey WG Leane, *Indigenous Rights Wronged: Extinguishing Native Title in New Zealand*, 29 DAL. L.J. 42, 46 (2006).

129 Rosemary Nagy, *Settler Witnessing at the Truth and Reconciliation Commission of Canada*, 21 HUM. RTS. REV. 219 (2020) (highlighting how there is a sense of minimalist exploration of the impact of settler colonialism on natives and why this makes a difference in temporal understandings and ramification of transitional justice measures); Patrick Wolfe, *Settler Colonialism and the Elimination of the Native,* 8 J. GENOCIDE RSCH. 387 (2006).

Second, it peripheralizes the resistance and efforts of the racialized groups in international law. Thus, the story leaves the agency and efforts of those who have suffered the burden of the ideals of racial othering in international law to the discretion of the conquering powers. They end up in the historiography of human rights merely as victims and less as persons who also exercised meaningful agency in the resistance of conquering powers.

This type of approach has significant ramifications for the ultimate memory and values embedded in international law and transitional justice. For instance, the Haitian developmental trajectory, the resistance of the people, and the enduring burden of colonial debts are somewhat minimized because of the temporal commitments of transitional justice. This can also be applied in evaluating the larger quest for colonial reparations by the Caribbean states.[130]

Third, it potentially silences (if not erase) the stories of these communities, decenters their experiences, and marginalizes their potential contributions to the answers to our current dilemmas about managing diversity and creating a more inclusive humanity.[131] For example, the pivot to decolonizing international law by mostly global south scholars has enriched the discipline. Yet, the diversifying opportunity is coming behind the principal narrative of transitional justice hinged on Nuremberg and post-World War II perspectives of international human rights.

In many respects, that narrative and scholarship partly led by the path-breaking intervention of Ruti Teitel (a good faith effort, in light of the prevailing scholarship at the time) have dominated the doctrinal foundations of transitional justice.[132] This narrative map into the larger discourse about the origins of human rights in international law and its continuities, which has seen Moyn and Martinez, for instance, place its origins at different timelines and circumstances.[133]

The global recognition of Genocide through the 1949 Genocide Convention and other human rights commitments also has significant ramifications for transitional justice temporalities. The temporal commitments map into a "memory gap" in international law whereby the narratives of the discipline omit the experiences of people who are often racialized.[134] The problem, however, is that this

[130] José Atiles-Osoria, *Colonial State Crimes and the CARICOM Mobilization for Reparation and Justice*, 7 State Crime J. 349 (2018).

[131] Julika Bake & Michaela Zohrer, *Telling the Stories of Others: Claims of Authenticity in Human Rights Reporting and Comics Journalism*, 11 J. Intervention & State Bldg. 81 (2017).

[132] The pioneering work of Ruti Teitel is very crucial in understanding the field. But like every pioneer, the initial mapping may have missed some important landmarks especially when the lights are focused on other more recent questions of violations such as the Holocaust, military dictatorships in Argentina, and disappearances in Latin America. *See generally* Ruti G. Teitel, *Transitional Justice Genealogy*, 16 Harv. Hum. Rts. J. 69 (2003); *see generally* Ruti G. Teitel, Transitional Justice (2000).

[133] *See generally* Samuel Moyn, The Last Utopia: Human Rights in History (2010); Jenny S. Martinez, The Slave Trade and the Origins of International Human Rights Law (2011); *see generally* Philip Alston, *Does the Past Matter? On the Origins of Human Rights*, 126 Har. L. Rev. 2043 (2013) (book review).

[134] *See generally* Stiina Loytomaki, *The Law and the Collective Memory of Colonialism: France and the Case of Belated Transitional Justice*, 7 Int'l J. Transitional Just. 205 (2013) (examining slavery and indentured labor which have not been central themes of transitional justice projects); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion,* 17 Quinnipiac L. Rev. 99 (1997); David Kennedy, *Primitive Legal Scholarship*, 27 Harv. Int'l L.J. 1 (1986).

transitional justice model has ended up having a tepid gaze on the history of racialized violence before 1945.[135]

Temporal decentering or erasures are significant technologies of racism in transitional justice. It has ramifications for the mandates of transitional justice mechanisms, the envisaged remedial measures, and the accepted standards in the discipline.[136] There is the argument about inter-temporal law, which has implications regarding when we can say that a norm of international law that warrants obligations *erga omnes* has emerged. It also touches on the epistemologies of transitional justice and international law. As articulated by Max Huber in the *Island of Palmas Case*, the doctrine of inter-temporality requires that the law adjudge the legality of an act with the law in force when the event or act occurred. Equally, it considers any change in the law over time.[137]

This doctrine of inter-temporality has featured interestingly in cases of reparations, with some arguing that colonial violations will not require reparations because such crimes as genocide had not emerged in international law during the period of colonization.[138] The debate is rather curious considering the consistent condemnation of the violations of the rights of indigenous communities and other colonized peoples, which are contemporary with the acts and events.

Transitional justice has created divisions along colonial lines and between the North and South. These binaries are used to maintain the status quo and prevent any meaningful discussion of issues related to racism and social justice. Furthermore, time is often used as a tool to evade or downplay the importance of these issues—especially in mature democracies.

Part of it is the belief that issues of racism can be taken care of "with time," Not because of any concerted effort by the polity in issue but by the natural flow of things. This has been part of the attitude that has sustained racial inequity in transitional justice and international law. Dr. Martin Luther King Jr. noted how this commitment that racism will disappear with time because time is ultimately curative of ills in society does not stand any meaningful scrutiny.[139]

In many respects, the temporal disposition toward racism also creates a legislative gap that entrenches racism in both international law and the domestic

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135 Victoria Roman, *From Apology to Action: A Comment on Transitional Justice in the United States and Canada*, 37 Md. J. Int'l L. 122 (2022).

136 Tom Bentley, *A Line Under the Past: Performative Temporal Segregation in Transitional Justice*, 20 J. Hum. Rts. 598 (2021).

137 T. O. Elias, *The Doctrine of Intertemporal Law*, 74 Am. J. Int'l L. 285 (1980) (foundational insight regarding the doctrine of inter-temporality); Panos Merkouris, *(Inter)Temporal Considerations in the Interpretive Process of the VCLT: Do Treaties Endure, Perdure or Exdure?*, 45 Neth. Y.B. Int'l L. 12 (2014); Zhenni Li, *International InterTemporal Law*, 48 Cal. W. Int'l L.J. 342 (2018) (a doctrinal exploration of temporality).

138 *See generally* Andreas von Arnauld, *How to Illegalize Past Injustice: Reinterpreting Rules of Intertemporality*, 32 Eur. J. Int'l L. 401, 409 (2021); Jeremy Sarkin, Carly Fowler, *Reparations for Historical Human Rights Violations: The International and Historical Dimensions of the Alien Torts Claims Act Genocide Case of the Herero of Namibia*, 9 Hum. Rts Rev. 331 (2008); Ryan M. Spitzer, *The African Holocaust: Should Europe Pay Reparations to Africa for Colonialism and Slavery*, 35 Vand. L. Rev. 1313 (2021).

139 Dr Martin Luther King Jr., The Other America (Apr. 14, 1967) ("there are those […] often sincere people, who say […] only time can solve the problem"). Dr. King calls this a myth because time is neutral and can be used negatively or positively for human rights and so we must help time.

order, thereby frustrating transitional justice. The legislative gap can be seen, for instance, in the long-lasting struggle for the prohibition of lynching. It took more than a century to legislate federally against lynching in the United States.[140] The Congressional attempt to study enslavement and potential reparations is a case in point. It also fits into the element of epistemologies of transitional justice regarding what counts as appropriate subjects of transitional justice. This takes us to the issue of the place of the execution or implementation of transitional justice and its racialism in the next section.

B. Spatial Commitments and Geography

Racism in transitional justice has also authored the geography of transitional justice as more of a project for the global south.[141] For instance, over the past three decades, more than 40 countries have executed one form of Truth Commission or another.[142] These projects are also almost bound to arenas of recent conflicts and post-authoritarianism. Therefore, older democracies appear to have no need for transitional justice except in those limited circumstances, as we saw with the Canadian Truth Commission and the Australian Sorry Day.[143] This somewhat consolidates the mistaken duality of developed and uncivilized, which has been the foundation of several human rights violations, including race-based violence and prejudice.

Increasingly, scholars are recognizing the geographical commitment and its racial problems. Others have also argued that the universalist and liberal approaches of transitional justice without due regard to the histories of the place of execution constitutes an epistemic violence. Yet significant work remains to be done in weaning the foundations from its geographical binders. Complicating

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[140] Magdalene Zier, *Crimes of Omission: State-Action Doctrine and Anti-Lynching Legislation in the Jim Crow Era*, 73 Stan. L. Rev. 777 (2021).

[141] There are ongoing debates regarding the potential scope and normative foundations of transitional justice in the United States. *See generally* Fernando Travesí, *Repairing the Past: What the United States Can Learn from the Global Transitional Justice Movement*, International Center for Transitional Justice (July 15, 2021), https://www.ictj.org/news/repairing-past-what-united-states-can-learn-global-transitional-justice-movement; Colleen Murphy, *Transitional Justice in the United States*, Just Security (July 16, 2020), https://www.justsecurity.org/71236/transitional-justice-in-the-united-states/; *see generally* Ashley Quarcoo & Medina Husaković, Racial Reckoning in the United States: Expanding and Innovation on the Global Transitional Justice Experience (Oct. 26, 2021) (working paper, Carnegie Endowment for International Peace); Yuvraj Joshi, *Racial Transitional Justice in the United States*, *in* Race and Nation Security (Matiangi Sirleaf ed., 2023); Brianne McGonigle Leyh, *No Justice, No Peace: The United States of America Needs Transitional Justice*, Opinio Juris (May 6, 2020), https://opiniojuris.org/2020/06/05/no-justice-no-peace-the-united-states-of-america-needs-transitional-justice/; Sujaya Rajguru, *Fulfilling the Promises of Our Preamble: A Holistic Approach to Transitional Justice in the United States,* 58 Harv. Civ. Rts. Civ. Liberties L. Rev. 356 (2023); Coleen Murphy, *How Nations Heal*, Boston Review (Jan. 21, 2021), https://www.bostonreview.net/articles/colleen-murphy-transitional-justice/.

[142] Priscilla B. Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 22 J. World Peace 86, 87 (2005).

[143] *See* Kieran McEvoy et al., *Apologies in Transitional Justice (Invited report for UN Special Rapporteur on Transitional Justice)* (2019) (on inspirations for apologies in transitional justice); Robert R. Weyeneth, *History, Memory, and Apology: The Power of Apology and the Process of Historical Reconciliation*, 23 Pub. Historian 9, 14 (2001); Michael Murphy, *Apology, Recognition and Reconciliation*, 12 Hum. Rts. Rev. 47, 56 (2011); *see generally* Tom Bentley, *Colonial Apologies and the Problem of the Transgressor Speaking*, 39 Third World Q. 399 (2018).

the geographies of transitional justice has consequences for dismantling the pillars of racism for historically unjust problems such as slavery, lynching, and violent law enforcement regimes inspired by racism. It will also help international human rights law overcome some difficulties, such as the limited possibilities of human rights accountability against businesses.[144] The ability to place transitional justice elsewhere, especially in the global south and perhaps Eastern Europe, facilitates indifference since they often appear vague and disconnected.

Human rights violations that require transitional justice review are often not matters of distant lands. They are matters of human flourishing and resonate across national boundaries with implications such as population dislocations, forced migrations, refugees, and human trafficking. These also have global security implications, and we can only be as secure as our commitment to the security of others.

Equally, the places of transitional justice have been circumscribed—excluding certain colonial enclaves, such as the Chagos Archipelago, from the general principles of self-determination and human rights recognition, reparations, and remediation. The enclosure of these spaces, even when the historical injustices arising from them are noted, is an enduring legacy of racism and coloniality in international law. They have continued to limit the spatial dimensions of transitional justice. Although the International Court of Justice has since ruled on the matter in favor of the Chagossians, the imperial interests of the United Kingdom and the United States loom over the archipelago, and the forcefully ejected inhabitants are yet to return.[145] Indeed, many of the inhabitants who were ejected after 1965 are at different stages of incomplete compensation and resettlement in the United Kingdom.

C. Epistemologies and Logics

How we know a thing and the sources of knowledge are critical commitments of philosophy, law, politics, and general human learning.[146] What counts as knowledge can be dispositive in the design of policies, programs, institutions, and even constituting the public sphere. The methods for accessing and assessing

144 *See* Upendra Baxi, *Some Newly Emergent Geographies of (In)Justice: Boundaries and Borders in International Law*, 23 Ind. J. Glob. Legal Stud. 15, 24 (2016) (for a general critique regarding the geographical commitments that make human rights accountability difficult).

145 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius, Advisory Opinion, 2019, I.C.J. 169 (Feb. 25); *see generally* Douglas Guilfoyle, *The Chagos Archipelago Before International Tribunals: Strategic Litigation and the Production of Historical Knowledge*, 21 Melbourne J. Int'l L. 1 (2021); Patrick Wintour, *UN Court Rejects UK Claim to Chagos Islands in Favor of Mauritius*, The Guardian (Jan. 28, 2021), https://www.theguardian.com/world/2021/jan/28/un-court-rejects-uk-claim-to-chagos-islands-in-favour-of-mauritius.

146 Michel Foucault, Guardian Discipline and Punish: The Birth of the Prison 27 (Alan Sheridan, trans. 1975) (arguing amongst other things that "there is no power relation without a correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations").

knowledge can also make a difference in the community's life—individually and otherwise. Therefore, knowledge is a virtue and power.[147]

It is a virtue because those who possess knowledge are deemed cultivated and imbued with the fine traditions and ethos of the community. It is also invaluable because it generally inebriates the holder's life. Scholars such as Bertrand Russel have explored this subject.[148] It is power because it can assist the holder in navigating the muddles of life and society. Education unlocks the inner person by removing the shackles of ignorance. This is why civilizations, evolutions, and paradigm adjustments often depend on new ideas and knowledge.

Knowledge is the lynchpin of policy. The whole sphere of intellectual property law is a tribute to this reality. Knowledge sets the metrics, indicators, logics, and methodologies of transitional justice. Yet several factors affecting access to knowledge, who counts in knowledge making, and what counts as true knowledge are not evenly distributed. In international law and its tributaries, the flow of knowledge that counts has often traced the riverbeds and fountains of Europeanism.[149]

Hence, the modern history of international law has been the peripheralization of the ideas, ideals, practices, and views of minorities—often racialized others. Transitional justice has also fallen victim to this racialized international law. We see this in the privileging of global north voices on transitional justice knowledge-making even when the project is sited in global south communities.[150]

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147 Jose Maria Rodríguez García, *Scientia Potestas Est – Knowledge is Power: Francis Bacon to Michel Foucault*, 28 Neohelicon 109, 119 (2001).

148 Bertrand Russell, The Problems of Philosophy 1 (2009). Russel began his philosophical discourse by noting the puzzling nature of how we come to know things thus:
"Is there any knowledge in the world which is so certain that no reasonable man could doubt it? This question, which at first sight might not seem difficult, is really one of the most difficult that can be asked. When we have realized the obstacles in the way of a straightforward and confident answer, we shall be well launched on the study of philosophy—for philosophy is merely the attempt to answer such ultimate questions, not carelessly and dogmatically, as we do in ordinary life and even in the sciences, but critically, after exploring all that makes such questions puzzling, and after realizing all the vagueness and confusion that underlie our ordinary ideas."

149 The return to the history of international law has seen a more deliberate scholarly engagement with the eurocentrism of international law. Yet the epistemic space of international law is still disproportionately occupied by European voices. *See generally* Ntina Tzouvala, *The Specter of Eurocentrism in International Legal History*, 31 Yale J. L. & Human. 413 (2021); James Thuo Gathii, *The Promise of International Law: A Third World View*, 36 Am. U. Int'l L. Rev. 377, 385 (2021); Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 Nordic J. Int'l L. 335 (2005); Arnulf Becker Lorca, *Eurocentrism in the History of International Law*, *in* Oxford Handbook of the History of International Law (2012) (Bardo Fassbender & Anne Peters eds.); James Thuo Gathii, *International Law and Eurocentricity*, 9 Euro. J. Int'l L. 184 (1998); Anne-Charlotte Martineau, *Overcoming Eurocentrism? Global History and the Oxford Handbook of International Law*, 25 Euro. J. Int'l L. 329 (2014); Martti Koskenniemi, Histories of International Law: Dealing With Eurocentrism, Nov. 26, 2011 (Inaugural Lecture delivered on the occasion of accepting the treaty of Utrecht Chair at Utrecht University); Onuma Yasuaki, *When was the Law of International Society Born? –An Inquiry of the History of International Law from an Inter-Civilizational Perspective*, 2 J. Hist. Int'l L. 1 (2000).

150 Laurel E. Fletcher & Harvey M. Weinstein, *How Power Dynamics Influence the "North-South" Gap in Transitional Justice*, 37 Berkeley J. Int'l L. 1 (2018) (highlighting how local transitional justice practitioners are often peripheralized by international law scholars); Laurel E. Fletcher & Harvey M. Weinstein, *North-South Dialogue: Bridging the Gap in Transitional Justice, Workshop Transcript*, 37 Berkeley J. Int'l L. 29 (2018).

To surmise, the epistemologies and logics of transitional justice as it relates to racism in transitional justice can be explored from two positions: source of knowledge/voice and theories, themes, and philosophies. On the source of knowledge, the cooptation of transitional justice as part of liberal peacemaking and the privileging of voices from the global North is an example. This is reflected in how international law and governance institutions focused on personal violations while remaining ambivalent towards economic and social rights.[151] The issue of cultural heritage, cultural property expropriation, particularly regarding the intellectual resources of indigenous peoples, remains a topic of discussion. Unfortunately, our current intellectual property regimes do not easily recognize this problem, leading to a lack of prioritization of subjects like reparations for enslavement, repatriation of looted art, colonialism, and other forms of injustice to racialized peoples. This lockdown on what is considered proper subjects of transitional justice sustains the racialism of international law, even in the choice of experts who contribute to the reservoir of knowledge. Racism can manifest in subtle ways, where the subaltern is spoken to, and for in the evolution of international law, and in the barriers that prevent global South scholars from participating in epistemic communities and spaces.

The theories and philosophies that underpin transitional justice also exhibit racialism, with the exclusion of transformative theories from mainstream discourse. Consequently, transitional justice struggles to centralize issues like property, slavery, indentured labor, colonialism, sovereign debt, or the impunity of businesses regarding violations of the environment and destruction of indigenous communities' livelihoods.

Thus, power relations often dictate what is considered essential in international law, leading to compromised justice and an inability to achieve a deracialized international order. Additionally, transitional justice falls short in addressing subjects like the looting of artifacts and the appropriation of revenues arising from indigenous art objects due to the limitations of its epistemologies and logics.[152]

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[151] Amanda Cahill-Ripley, *Foregrounding Socio-Economic Rights in Transitional Justice for Violations of Economic and Social Rights*, 32 Neth. Q. Hum. Rts. 183 (2014). The privileging of individual rights decentralizes community rights. This stymies meaningful debate about community justice. Thus, subjects such as reparations are boiled down to whether there are individual survivors of enslavement to whom reparations can now be paid. Equally, it plays into the narrative that asking a for reparations is like holding individuals who did not participate in enslavements or such other historical injustices accountable. Individualized commitments therefore censor the epistemologies and potential deliberative commitments of transitional justice which can unlock restorative justice. *See* Eric A. Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 Colum. L. Rev. 689 (2003); Alfred L. Brophy, *Reconsidering Reparations*, 81 Ind. L.J. 811 (2006); Susan S. Kuo & Benjamin Means, *A Corporate Law Rationale For Reparations*, 62 B.C. L. Rev. 799 (2021) (giving a more robust review of reparations using such corporate law principles as unjust enrichment).

[152] Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 Euro. J. Int'l L., 49 (2011) (highlighting the difficulty in restituting looted art during the genocide. It is even more difficult in the case of looted colonial art); Franziska Boehme, *Normative Expectations and the Colonial Past: Apologies and Art Restitution to Former Colonies in France and Germany*, Glob. Stud. Q., Oct. 2022, at 2 (highlighting how the treatment of restitution of artefacts and apologies are treated as separated both from colonialism writ large and also from each other—thus frustrating and delaying the possibilities inherent in transitional justice engagement).

IV. Collective Just Security and Racial International Law

In our previous conversation, we discussed the basic details of the conflict in Ukraine, including violations and an overview of its implications. We also examined instances of racism according to international law. In this Part, we will explore how conflicts have racialized foundations, and how they contribute to ongoing tensions. By utilizing Critical Race Theory and Third World Approaches to International Law, we can demonstrate what is possible if we allow them to influence the increasingly dry canon of international law. This is especially important since theories of domination have proven to be unhelpful to humanity.

A. Conflicts and Racialized International Law Order

Although politics amongst nations continue to hold, international peace and security are not merely questions of real politick and relations of states amongst themselves. Other competing cannons of international law believe that there is a need to restrain force by law and justice—a rules-based international order.[153] This is traceable to many treaties, conventions, and practices, such as the UN Resolution on Friendly Relations Among States.[154] Other critical articulations in declarations and institutional frameworks show states' preference for an international law regime founded on self-determination and collective approaches to common problems such as conflicts, climate change resilience, and justice amongst peoples and nations.[155]

Nonetheless, while international law commits to these fine values of pacific settlement of disputes, it has the enduring problem of adopting taxonomies that are difficult, if not entirely belligerent, to make international norms and principles. At times it is a nothing to see or learn attitude towards certain groups and societies. This is with particular reference to marginalized groups. For instance, our idea of 'just war' has often come with very limited recognition of the inherent humanity of indigenous and marginalized groups: And thus, nothing for them to contribute to the evolution of canons of international law. Where international law recognized the inherent humanity of marginalized groups in international law history, it did so only to the extent that they were considered inferior to Europeans. So, international law taxonomies have this uncanny capacity to consistently do more violence to those marginalized based on race, religion, or region.

Thus, whether as "civilizing mission," "white man's burden," "indirect rule," "assimilation," "sphere of influence," "colony," "French interest," "United States interest," "Russian interest," "Chinese interest," or "British interest," there is a

153 Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Order*, 16 Euro. J. Int'l L. 369 (2005) (highlighting the complex oscillation of international law between the pursuit of justice and its instrumentation for power by powerful states).

154 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *supra* note 21.

155 Mortimer N.S. Sellers, *The Purpose of International Law Is to Advance Justice — and International Law Has No Value Unless It Does So*, 111 Am. Soc'y Int'l L. 301 (2017).

sense that we often do not lack taxonomies and theories that can justify our domination of the other.[156]

The ongoing conflict in Ukraine reveals a disposition towards domination and subjugation. Unfortunately, the human aspect of the war has been overlooked for too long, and its entanglements with collective security and international peace have not been given enough attention. This has significant implications for transitional justice, as racialized groups are often the ones who are dominated and colonized. To avoid conflicts and manage them effectively when they do happen, it is necessary to deracialize international law. Racism, along with its related phenomena such as racial prejudices and legal orderings, is deeply entrenched in our world. Conflicts and racism are intertwined in many ways. Firstly, racism justifies subjugating the other, which limits the opportunity for intergroup dialogue.

Secondly, racism is linked to cultural superiority, which eliminates the chance to learn about other cultures. In this sense, the perception of inherent inferiority of one culture justifies cultural superiority. Thirdly, positioning one race as superior over another eliminates the need for multicultural mutual respect and existence, and instead leads to forced assimilation or extinction of the other culture. Many wars have arisen due to this type of racial crucible.

The Constitution of the United Nations Education and Scientific Organization acknowledges that war begins in the minds of human beings. This can sometimes arise from ignorance and, at other times, spring from general suspicion or distrust.[157] Hence, it is worthy of note that what UNESCO enunciated many years ago is still a significant factor in the ongoing conflicts worldwide.[158]

Race, racism, and ethnically based prejudices persist in international law and have lasting impacts on wars and their externalities, including internal displacement, refugee problems, starvation, and human rights violations, war crimes, crimes against humanity, and genocide—as exemplified by the ongoing Ukrainian conflict. UNESCO was founded to combat racial superiority and promote cross-cultural dialogue through education to reduce prejudices, phobias, and hatreds that lead to conflicts between communities.

As a result, the United Nations Economic and Social Council recommended that UNESCO study the racial question. Subsequently, the 1969 Convention on the Elimination of All Forms of Racial Discrimination was adopted and ratified by member states. However, the convention failed to end the racialization of international law and its structures. At the time, international law had several inhibitions, including apartheid, segregation against natives and other racialized

156 *See* Samuel Garrett Zeitlin, *Francis Bacon on Imperial and Colonial Warfare*, 83 Rev. Pol. 196 (2021).

157 The Constitution of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Nov. 16, 1945.

158 UNESCO on the ideology of racism in the UNESCO report notes that:
"racism is a particularly vicious and mean expression of the caste spirit. It involves belief in the innate and absolute superiority of arbitrarily defined human group over other equally arbitrarily defined groups. Instead of being based on scientific facts, it is generally maintained in defiance of the scientific method. As an ideology and feeling racism is by its nature aggressive."
Id. at 3.

groups, and European states' colonial domination of other peoples. In 1969, many wars of decolonization struggles were still ongoing in parts of Africa. There were also concerns about the interventions of powerful states in the political evolution of states in Africa, Asia, and Latin America. For example, Mozambique, Zimbabwe, and Angola were still fighting for political independence from European colonizers when the UN Convention Against Racial Discrimination was adopted.[159]

The Unilateral Declaration of Independence in Zimbabwe by Ian Smith in 1969 heightened the struggle in that country and only ended in 1980. Thus, the work of deracializing international law and order did not stop with the Convention on the Elimination of all Forms of Racial Discrimination in 1969. Transitional justice has been unable to overcome the strategic commitments of frontline states in many of these hitherto hybrid settler colonial states, such as Zimbabwe and South Africa. For instance, in Southern Africa, transitional justice is still at a loss regarding how to embrace the land and other proprietary questions.[160] The failure of government policies and the evident over-politicization of the questions have equally contributed to the transitional justice gap.[161] The downside to this is the lopsided landholding structure based on racial lines. Equally, global economic structures make centralizing land questions in transitional justice an unwelcoming idea.[162]

The Cold War era brought about a reality where the permanent members of the Security Council could invade and destroy other territories in defiance of the UN Charter. This was done to protect one form of racial, economic, and political ideology or another. Even today, we witness nationalism, racialism, and cultural supremacy being mobilized to pursue wars of frontline states. The ongoing crisis in Ukraine is an example of this, with Russia seeking to reassert its dominance in the region and over states previously under its sphere of influence in the Soviet Union's heyday.

Unfortunately, international institutions that proclaim equality and equity continue to falter in the face of racialized immigration and refugee policies, climate change-induced disruptions, and the general securitization of the international movement of people. Persons from the global South are increasingly

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159 Mozambique became independent in 1974; Zimbabwe 1980; Angola 1974.

160 Bernadette Atuahene, *Property and Transitional Justice*, 58 UCLA L. Rev. 65 (2010); Helena Alviar Garcia, *Transitional Justice and Property: Inextricably Linked*, 17 Ann. Rev. L. & Soc. Sci. 227 (2021). For further examination of the subject of property and transitional justice, *see* Nashon Perez, *Property Rights and Transitional Justice: A Forward-Looking Argument*, 46 J. Pol. Sc. 135 (2013); Kezia Batisai & George T. Mudimu, *Revisiting the Politics of Land Recovery Among White Commercial Farmers in Zimbabwe: Implications for Transitional Justice*, 15 Int'l J. Transitional Just. 370 (2021); Ntina Tzouvala, *Invested in Whiteness: Zimbabwe, the von Pezold Arbitration and the Question of Race in International Law*, 2 J. L. & Pol. Econ. 226 (2022).

161 Edward Lahiff, *Willing Buyer, Willing Seller: South Africa's Failed Experiment in Market-Led Agrarian Reform*, 28 Third World Q. 1577 (2007); Edward Lahiff, *Stalled Land Reform in South Africa*, 115 Current Hist. 181, 181-87 (2016); Land and Agrarian Reform in Zimbabwe: Beyond White-Settler Capitalism (Sam Moyo & Walter Chambati eds., 2013).

162 *Zimbabwe Agrees to Pay USD 3.5 Billion Compensation to White Farmers*, Reuters (July 29, 2020, 6:22AM), https://www.reuters.com/article/us-zimbabwe-farmers/zimbabwe-agrees-to-pay-3-5-billion-compensation-to-white-farmers-idUSKCN24U1OM.

humiliated at international borders simply because of their nationality. During the COVID-19 pandemic, African states faced heightened quarantine measures from the global North, even though the disease's prevalence was significantly lower in Africa.

To achieve peaceful resolution of disputes and contentions amongst states, the blindness of international law to the color line must be addressed. This requires exploring alternative approaches to international law beyond legal formalism and claims of neutrality of the law, which can be exclusionary. Cultivating the international juridical mind is crucial to finding solutions to conflicts. The CRT canon and TWAIL are important to inebriate the mind of international law and open the eyes of its operators to the racialized foundations instigating conflicts such as the war in Ukraine. We need to recognize the right of all human communities, including indigenous and other marginalized communities, to exist. We must not prioritize the Westphalia order and progressivism without recognizing this fundamental right, which can lead to continued subjugation.

B. Critical Race Theory: Six Tenets, Four Ramifications

In this Section, I explore the six tenets of CRT and highlight their ramifications for international law—emphasizing its relevance to our search for global peace and collective just security. Critical Race Theory has complicated international law's sacred, universalist, and linear progressive narratives. It faults the liberal critique and peace without reparations and other forms of transformative just reckoning in the commitments of the transitional justice canon. Transitional justice, as a discipline, is in dire need of a Critical Race Theory upgrade. Critical Race Theory offers us a tool for analytical and historical examination of international law and its governance of many aspects of international society—including transitional justice accountability.

Thus, Critical Race Theory is a juridical canon developed in the US legal academy. The theory, amongst other things, commits to excavating and dismantling the racialized law structures in society. Unlike the liberal critic of the law, CRT is committed to changing the structures since they are racialized, and only their elimination—not superficial reordering—could guarantee the minimum content of justice, equity, and equal humanity promised by the law. CRT espouses six foundational principles.

First, Critical Race Theory contends that Racism is *not an aberration* in the law. Instead, racism is part of the law and reproduces itself through hierarchies and processes privileged by the dominating social order. Hence, it is structural and fundamental to sustaining the racialized hierarchy in society. The racialized *others* experience this racialized order in law in their everyday encounter with the law and its institutions, such as law enforcement and the administrative state.

In transitional justice, as it has been implemented, the hierarchy of imperial states has often made them seem untouchable in international law. For example, militaries from imperial states are scarcely subjected to post-war accountability or transitional justice. The principle of complementarity in international criminal law has not solved the problem. In peacekeeping, soldiers are also known

to violate the rights of minorities—often racialized communities—and the UN has been unable to provide effective accountability structures. The intergenerational continuities of this lack of reckoning are seen in teenage pregnancies and children who are also doubly victimized by the local communities because of the circumstances of their birth. This has yielded a duality of transitional justice structures, which all appear unable to rein in the capacities of powerful states to violate the rights of perceived inferior states despite the professed equality of states in international law.

Secondly, CRT commits to *interest convergence*. That is to say that although racism abounds in the legal structures of law, minor adjustments and reforms often occur to accommodate only those reforms that will support the dominant order. Changes are, therefore, allowed as long as they do not alter the established hierarchy and will advance other interests of the dominant racial group. This is also referred to as material determinism. It can be argued that interest convergence has shown itself in transitional justice in those respects, such as Nuremberg, where the imperial states had a common adversary: Nazi Germany. The inability of imperial states—especially through the Security Council of the UN—to find a common interest, whether during the Cold War or elsewhere since the end of the Cold War, has been to the detriment of transitional justice. Thus, powerful states can escape accountability. The Russian invasion is also evidence of a lack of interest convergence—especially on the part of the UNSC-P5 members—the guardians and guarantors of global peace and security as contemplated by Chapter 7 of the United Nations Charter.

Third, CRT propositions that race is *a social construct*—the result of social ideas and ideologies that portray one arbitrarily identified group, persons, or society as inferior to another yet arbitrarily predetermined group, persons, and society. It can metamorphose in the constructors' minds and adapt new taxonomies, especially in situations of war or repressive law enforcement, as we have continually seen in the less-than-generous portrayal of CRT in public discourse in some quarters.

Fourth, *Intersectionality:* CRT theorizes that there are overlapping identities in society, which can have ramifications for the way certain members of the community experience the law. These overlapping identities can attract different racialized treatment. For instance, a Black, Muslim, international Student in Ukraine may experience racism differently based on these three intersecting identities. The experience with law enforcement within the country and at border crossings may also differ. The case can also be complicated for a female, hijab-wearing, international student. These rough examples highlight the intersectionality cannon of Critical Race Theory, and it is crucial in understanding the embeddedness and ramifications of race in international law, the use of force, and conflict.

One of the insoluble difficulties of transitional justice as a discipline is how to convene and calibrate intergroup dialogues in communities with entangled yet different identities and ideological dispositions. Because the best forms of transitional justice efforts can only take place in an atmosphere of mutual recognition and respect for the dignity of all members of the community, in many

"post-colonial" states, the problem of diversity and identity management is a crucial factor in racialization and lack of transitional justice accountability. In Sudan, contesting national identity based on religion and race frustrated peaceable polity and ultimately separated the country.

Fifth, CRT *does not defer to the 'post-racial lingo.'* CRT does not think that racism is a historical relic, unlike the way it is often treated in mainstream legal literature. Sometimes, judicial deliberations also look at race and racism as something that was in the past and the light of the civil rights movements and judicial interventions in *Brown v. Board of Education*[163] and *Loving v. Virginia*.[164] Therefore, we have put behind the demon of racism as captured in *Scot v. Sanford*.[165]

Yet the daily experience of Blacks and other minorities in America does not give credence to a "post-racial" order.[166] This post-racial lingo has continued to factor in transitional justice's (im)possibilities. Thus, transitional justice must reimagine how to cultivate the many groups in any country to the end of justice.

As captured in their narratives, the ordinary daily experience of the racialized is that racism is a live issue, and the structures of domination in a society constantly inebriate it. This is evident in jury selection, zoning laws, and incarceration statistics.[167] The consequence of this is a reticence towards transitional justice in America. The cannon responds accordingly sometimes to avoid being seen to be causing division.

Thus, despite the lofty promises of law—especially international law through the Universal Declaration of Human Rights and other instruments—race is alive and well. The promises of equality, diversity, and inclusive prosperity are continuously deferred. It is still a racialized world, considering how the law and policy disposition towards Ukraine has unfolded. Although European states embraced Ukrainian refugees, there is still no strong assurance that Russia would be held to account beyond the economic sanctions that the Kremlin appears to be taking in its stride.

The sixth canon of the CRT is that it recognizes the uniqueness of the minority voice—the voice of the racialized is important, and any lasting effort to deracialize and enhance just peace must reckon with these voices. This voice is valid in

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163 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

164 Loving v. Virginia, 388 U.S. 1 (1967).

165 Dred Scott v. Sandford, 60 U.S. 393 (1857) (enslaved party), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

166 Daniel S. Harawa, *Lemonade: A Racial Justice Reframing of the Roberts Courts Criminal Jurisprudence*, 110 Cal. L. Rev. 681 (2022); Mario L. Barnes, *The More Things Change: New Moves for Legitimizing Racial Discrimination in a Post-Race World*, 100 Minn. L. Rev. 2043 (2016).

167 Jade A. Craig, *"Pigs in the Parlor": The Legacy of Racial Zoning and the Challenge of Affirmatively Furthering Fair Housing in the South*, 40 Miss. C. L. Rev. 5 (2022); Werner Troesken & Randall Walsh, *Collective Action, White Flight, and the Origins of Racial Zoning Laws*, 35 J. L. Econ. & Org. 289 (2019); A. Mechele Dickerson, *Systemic Racism and Housing*, 70 Emory L.J. 1535 (2021); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515 (2021) (highlighting—amongst other things—systemic racism in the prisons system); *see generally* Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Color Blindness (2010); Thomas W. Frampton, *The Jim Crow Jury*, 71 Vand. L. Rev. 1593 (2019); James Forman Jr., *Juries and Race in the Nineteenth Century*, 113 Yale L.J. 895 (2004).

curating ideas and norms of law—not as an afterthought or token of diversity but as a core piece of the legal architecture.

These six canons of CRT have solid ramifications for understanding the war in Ukraine and the (im)possibilities of transitional justice. Four solid CRT ramifications distillable from the ongoing war in Ukraine are also relevant to our search for enduring peace and collective just security. They are: The racialization of the other or their inferiorization to rationalize the war. Russia has tried to cultivate a legitimizing narrative for the war. In other words, the emblem of inferiority placed on the other, is a means of cultivating military and citizenship consensus. This narrative makes it less difficult to coopt international law and the language of international law to pursue their ends. Thus, showing the other as evil seems to be a generative foundation of war commitments and racialized violence.

The next ramification of the war is segregation, and disparate treatment, based on identities despite the promises of international law to the contrary. This is with particular reference to the processing of refugees escaping the war into neighboring European states.[168] The near-seamless access granted to Ukrainian refugees contrasts sharply with the pictures of Syrians assailed by border patrols and bodies on the shores of the Mediterranean.[169] In many other ways, it contrasts with the treatment of those with the intersecting identities of Black, poor, and religious minorities. Many observers of international law were puzzled at this different treatment.

For Black students studying in Ukraine at the onset of the war, the experience with the system of protection and processing, especially with border agencies, was also difficult—they were treated almost as disposables or general collateral losses of the pandemic and war. For these Black students' racism is not a thing of the past; it is their lived experience, even in the face of the war. In a world where some passports are considered more powerful than others, the implications of carrying a passport from a country deemed not in the peer of many European or North American states could mean the difference between life and death in times of conflict, pandemics, and possibilities for refugee status and asylum.[170]

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168 Transitional Justice is yet to explore the meaning of borders as sites of racialized violence. The deference to absolute sovereign discretion which is at the core of international law is a factor in this state of affairs. However, scholars are beginning to think of how to utilize transitional justice mechanisms for border related issues such as Asylum. *See* Katie Wiese, *Human Rights in Our Backyard: Utilizing a Truth Commission and Principles of Transitional Justice to Address Atrocities Committed against Asylum Seekers in the United States*, 36 Geo. Immigr. L.J. 461 (2021).

169 Whereas it would have been idea not to have a comparison of Refugees, the reality in the field shows different treatment accorded to refugees depending on their race, nationality, religion, and gender. Eileen Pittaway & Linda Bartolomei, *Refugees, Race, and Gender: The Multiple Discrimination Against Refugee Women*, 19 Refuge 21 (2001); Nicola Pocock & Clara Chan, *Refugees, Racism and Xenophobia: What Works to Reduce Discrimination?*, U.N. Univ.: Our World (June 20, 2018), https://ourworld.unu.edu/en/refugees-racism-and-xenophobia-what-works-to-reduce-discrimination; Philip Marcelo, *In US's Welcome to Ukrainians, African Refugees See Racial Bias*, Pbs News (Apr. 1, 2022, 1:49 PM), https://www.pbs.org/newshour/politics/in-u-s-s-welcome-to-ukrainians-african-refugees-see-racial-bias; *Europe's Different Approach to Ukrainian and Syrian Refugees Draws Accusations of Racism*, CBS News (Feb. 28, 2022, 8:34 PM), https://www.cbc.ca/news/world/europe-racism-ukraine-refugees-1.6367932.

170 This experience is something familiar to Global South scholars. They often have to navigate difficult immigration pathways to attend conferences or to participate in other potentially transforming training across their limited national spaces. Unlike their counterparts residing in the Northern Hemisphere. This affects agency and participation in knowledge production in their respective fields. Priya Dixit, *Encounters*

This, therefore, alters the proclaimed neutrality and equal application of international law. It is worth thinking about how many border detention facilities worldwide should be sites of racial and transitional justice reckoning?[171] Yet, the cloak of sovereignty covers borders and, by extension, immigration detention centers.[172]

The third ramification is that of fragmentation and lack of interest convergence, and this has frustrated the capacity of the United Nations Security Council to meet its obligations under *Chapter 7 of the UN Charter*. This is because all five permanent members have strategic interests regarding Ukraine, amongst other things. It is not easy to discountenance this confluence of interests because unless there is a convergence, the inertia in the multilateral systems for collective security will continue to flourish. Critical Race Theory offers a tool of analysis that can help rekindle multilateralism in the face of the global challenges that require common approaches as opposed to the unilateral and often war-prone approaches to security.

The other limb of the analysis on interest convergence is the fragmented interest convergence, which has shown how NATO countries are aligned with Ukraine, while some other states outside the NATO alliance are on the side of Russia or are generally non-aligned. In that regard, NATO's commitments to the membership of Ukraine, which appeared unsure previously, seem to have become more robust.[173] Yet, it is left to be seen what the processes will look like in the years ahead. What is clear is that the human consequences of the war have not diminished. An *interest convergence* analysis of the policy dispositions of the respective groupings and countries can help outline potential grounds for consensus building and diplomatic intervention for global peace and security, especially within the UN multilateral system.

Nonetheless, it is also a racialized issue since much of the third world is often the racialized other. Like Ukraine, third-world countries have often fought wars of self-determination while in the crosshairs of the competing interests of imperial structures. Thus, while not comparing the violations, many of these states often see some of the differential treatments of wars depending on the interest

with Border: A Migrant Academic's Experiences of the Visa Regime in the Global North, 14 Learning & Teaching 55 (2021).

171 Scholars are already interrogating immigration law and policy from a racial and social justice standpoint. This includes teaching and other activities regarding immigrations. *See generally* Kevin R. Johnson, *Teaching Racial and Social Justice in the Immigration Law Survey Course*, 67 St. Louis U. L.J. 473, 473 (2023); Karla M. McKanders, *Immigration and Racial Justice: Enforcing the Borders of Blackness*, 37 Ga. St. U. L. Rev. 1139,1139 (2021).

172 Achuime has explored how borders are sites of the racialized operation of international law. Often, the categories used are aimed to be selective, ensuring that only those that meet the expected class and racial prescriptions pass the process. *See*, E. Tendayi Achiume, *Racial Borders*, 110 Geo. L.J. 445, 445 (2022).

173 Tom Balmforth, *Ukraine Applies for NATO Membership, Rules Out Putin Talks*, Reuters (Sept. 30, 2021), https://www.reuters.com/world/europe/zelenskiy-says-ukraine-applying-nato-membership-2022-09-30/#:~:text=KYIV%2C%20Sept%2030%20(Reuters),had%20annexed%20four%20Ukrainian%20regions; Olafimihan Oshin, *NATO Leader on Ukraine's Fast-Track Into Alliance: Membership has to be Taken by Consensus*, The Hill (Oct. 2, 2022, 4:58 PM), https://thehill.com/homenews/sunday-talk-shows/3671189-nato-leader-on-ukraines-fast-track-into-alliance-membership-has-to-be-taken-by-consensus/ (Zelensky notes that Ukraine is de facto in alliance with NATO).

of the UNSC-P5 members and the geolocation of the conflict. Examples can be found in the Middle East, Asia, Latin America, and Africa. These have ramifications for potential accountability measures, whether through criminal tribunals, truth commissions, or reparations.

Thus, the potential impossibility of accountability for violations of international law by those guilty of the most egregious human rights violations is a common attribute of imperial wars, whether in colonial times or the post-1945 world. Except in those situations in the past where there has been a total defeat of the powerful state, and the extraction of reparations, it is often difficult to hold powerful states accountable.[174]

The Rome statute relies on the doctrine of complementarity, which entails that states have the primary responsibility to prosecute those guilty of war crimes, crimes against humanity, and genocide. Yet, the ICC may step in where the country has neither the capacity nor interest to prosecute the crimes.[175] A commencement of prosecution of the state on any of these crimes involving UNSC-P5 members could mean that the ICC is barred from moving forward with prosecutorial processes. However, these countries' policies and legal dispositions do not inspire much hope that they would abide by the international criminal law regime anchored on the Rome Statute.[176]

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[174] Here, the Treaty of Versailles 1919 (World War I), the Nuremberg Trials, and the Tokyo Tribunals (World War II) come to mind. The refusal of the UNSC-P5 states, such as the United States, China, and Russia, to subscribe to the International Criminal Court (ICC) also makes it difficult to hope for accountability under the Rome Statute. The United Kingdom and France are the only Permanent Security Council members that have acceded fully to the Rome Statute. The UK deposited her instrument of ratification on October 4, 2001, while France did same on June 9, 2000. The United States, China, and Russia are not state parties to the Rome statute. India, Pakistan, and North Korea are also not members of the ICC. Ukraine is not a state member of the ICC. Russia and the United States withdrew their signatures from the Rome Statute of the ICC. *See* Shaun Walker, *Russia Withdraws Signature From International Criminal Court Statute*, The Guardian (Nov. 16, 2016, 9:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute#:~:text=Russia%20withdraws%20signature%20from%20international%20criminal%20court%20statute,-This%20article%20is&text=Russia%20has%20said%20it%20is,of%20Crimea%20as%20an%20occupation (Russia withdraw shortly after the ICC published a report classifying the Russian annexation of Crimea as an occupation); *see* ICC Office of the Prosecutor, Report on Preliminary Examination Activities (2016); Ivan Nechepurenko & Nick Cumming-Bruce, *Russia Cuts Ties With International Criminal Court, Calling it 'One Sided'*, N.Y. Times (Nov. 16, 2016), https://www.nytimes.com/2016/11/17/world/europe/russia-withdraws-from-international-criminal-court-calling-it-one-sided.html. The US also withdrew its signature from the Rome Statute: *see* Jean Galbraith, *The Bush Administration's Response to the International Criminal Court*, 21 Berkeley J. Int' L. 683, 683-702 (2003).

[175] Linda E. Carter, *The Principle of Complementarity and the International Criminal Court: The Role of Ne Bis in Idem*, 8 Santa Clara J. Int'l L. 165 (2010).

[176] A recent effort by the ICC prosecutor to investigate allegations of violations in Afghanistan elicited a very strong response from the US government. *See generally United States Imposes Economic Sanctions and Visa Restrictions on International Criminal Court Officials*, 115 Am. J. Int'l L. 138, 138-40 (2021); Daphne Psaledakis & Michelle Nichols, *US Blacklists ICC Prosecutor Over Afghanistan War Crimes Probe*, Reuters (Sept. 15, 2020, 3:49PM), https://www.reuters.com/article/usa-icc-sanctions-int/u-s-blacklists-icc-prosecutor-over-afghanistan-war-crimes-probe-idUSKBN25T2EB; Lara Jakes & Michael Crowley, *US to Penalize War Investigations looking into American Troops*, N.Y. Times (June 11, 2020), https://www.nytimes.com/2020/06/11/us/politics/international-criminal-court-troops-trump.html; Julian Borger, *Trump Targets ICC With Sanctions after Court Opens War Crimes Investigation*, The Guardian (June 11, 2020, 12:37 PM), https://www.theguardian.com/us-news/2020/jun/11/trump-icc-us-war-crimes-investigation-sanctions; Evert Elzinga, *US Threatens to Arrest ICC Judges if They Pursue Americans for Afghan War Crimes*, France24 (Oct. 9, 2018), https://www.france24.com/

Ad hoc International Criminal Tribunals will only happen with the consensus of UNSC-P5 members. In many respects, accountability may be far-fetched.[177] The downside of this looming lack of accountability is that respect for the international rule of law is disincentivized. Such a perception of lack of accountability is a recipe for conflicts and violence.[178]

It is also important to look at the complimentary cannon of TWAIL and its ramifications for the war in Ukraine. CRT and TWAIL complement each other in many respects, and a careful synthesis of both genres is critical to our search for a deracialized and inclusive international law and, transitional justice. The next Section highlights TWAIL, its themes, and its ramifications for the enduring problem of racism in international law and transitional justice using the Ukrainian war as a point of intersection.

C. Third World Approaches to International Law: Three Themes, Two Ramifications

The War in Ukraine and what we can do in pursuit of global collective just security, peace, and equal accountability leads us to consider other important perspectives and what they can contribute to our current dilemmas. Thus, TWAIL is an attempt by other peoples of the world to assert their agency by speaking for themselves, and avoiding the erasure that the Eurocentric order of international law has often accomplished by purporting to speak for everyone and in a vocabulary that is universal, rational, and objective. For instance, a TWAIL critique of the ICC has arisen from this perception of power relations to the (im)possibilities of equal accountability in International Criminal Law.[179]

TWAIL is a response to the epistemologies of violence stemming from European foundations and conceptions of the nature and implications of international

en/20180910-usa-trump-threatens-arrest-icc-judges-american-soldiers-afghan-war-crimes. The US also issued Executive Order placing sanctions and visa restrictions on ICC personnel. The Executive Order has now been rescinded. *See* Antony J. Blinken, *Ending Sanctions and Visa Restrictions Against Personnel of the International Criminal Court*, US Department of State (Apr. 2, 2021), https://www.state.gov/ending-sanctions-and-visa-restrictions-against-personnel-of-the-international-criminal-court/.

[177] In a recent case involving a Navy Seal, the accused was pardoned despite the weight of evidence against him. *See* Thomas Wayde Pittman & Matthew Heaphy, *Does the United States Really Prosecute Its Service Members for War Crimes? Implications for Complementarity Before the International Criminal Court*, 21 Leiden J. Int'l L. 165 (2008); Richard Luscombe, *Navy Seal Pardoned of War Crimes by Trump Described by Colleagues as 'Freaking Evil'*, The Guardian (Dec. 27, 2019, 11:03 AM), https://www.theguardian.com/us-news/2019/dec/27/eddie-gallagher-trump-navy-seal-iraq; David Lapan, *War Crime Pardons Dishonor Fallen Heroes*, The Atlantic (May 24, 2019), https://www.theatlantic.com/ideas/archive/2019/05/trumps-pardon-of-war-crimes-erodes-trust-in-military/590197/.

[178] One can as well speculate that this state of affairs is a potential factor in the nuclear arms race because it seems violence or the capacity of violence is the dispositive factor for international respect, and recognition by imperial states.

[179] Makau Mutua, *The International Criminal Court: Promise and Politics*, 109 Am. Soc'y Int'l L. 269, 269-72 (2015) (highlighting some of the critique of the ICC especially in Africa including politicization); Charles C. Jalloh et al., *Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court*, 4 Afr. J. Legal Stud. 5 (2011); John Reynolds & Sujith Xavier, *The Dark Corners of the World*, 14 J. Int'l Crim. Just. 959 (2016); Obiora Chinedu Okafor & Uchechukwu Ngwaba, *The International Criminal Court as Transitional Justice Mechanism in Africa: Some Critical Reflections*, 9 Int'l J. Transitional Just. 90 (2015).

law, transitional justice and reparations. In the United States, enslaved persons who fought in the Civil War or their descendants who fought in World War II did not receive the same honors accorded to their European comrades in battle. Social benefits arising from their commitment to the service of liberty were also administered discriminately. Indeed, some Black (African American) war veterans were lynched for not knowing their place in society when they returned from the great war.[180]

TWAIL, as a project, therefore, seeks to unpack and deconstruct the methodologies, mythologies of universalisms and norm-making processes and the impact of international law on the global South. There is, therefore, an important intersection between TWAIL and CRT in that both are committed to excavating the foundations that affect the fate of the marginalized in law. These could be marginalized groups based on race and ethnicity, religion, economic standing, and power relations.

TWAIL opposes exploitation, colonization, and conquest, which is seared into the patterns of Eurocentric approaches to international law. Transitional justice will gain a lot from the TWAIL insight as it searches for the continued deracialization of its accountability mechanisms, including memorialization and the narratives that surround them. Thus, territorial expansion and forced assimilation through wars violate the primary canon of TWAIL.

To change this situation, TWAIL proposes three fundamental principles. First, TWAIL seeks to deconstruct international law as a medium for the perpetuation of the racialized hierarchy of international law norms and institutions that facilitate the subordination of non-Europeans to Europeans. Second, TWAIL seeks to present an alternative normative legal structure for international governance. Third, TWAIL aims through policy and politics to eradicate the conditions of underdevelopment in the third world.[181]

There are two broad ramifications of TWAIL to the war in Ukraine and the efforts to use multilateral platforms such as the United Nations to intervene in the conflict. The first is the evident disinclination of many third-world countries to take sides in the war.[182] The second is the seeming comparison regarding how the current war in Ukraine has been handled, the reactions and responses of the UN and the global North in general, and other situations of belligerence in the global South.

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[180] Peter C. Baker, *The Tragic, Forgotten History of Black Military Veterans*, New Yorker (Nov. 27, 2016), https://www.newyorker.com/news/news-desk/the-tragic-forgotten-history-of-black-military-veterans; Gillian Brockell, *A Black WWII Veteran Voted in Georgia in 1946. He Was Lynched for It*, Wash. Post (Sept. 13, 2020, 7:00AM), https://www.washingtonpost.com/history/2020/09/13/maceo-snipes-lynching-vote-all-in-stacey-abrams/; Alexis Clark, *Returning From War, Returning to Racism*, N.Y. Times (Sep. 8, 2020), https://www.nytimes.com/2020/07/30/magazine/black-soldiers-wwii-racism.html.

[181] *See generally* Makau Mutua, *What is TWAIL?*, 94 Am. Soc'y Int'l L. 31 (2000).

[182] David Adler, *The West v. Russia: Why the Global South Isn't Taking Sides*, The Guardian (Mar. 28, 2022), https://www.theguardian.com/commentisfree/2022/mar/10/russia-ukraine-west-global-south-sanctions-war; Elizabeth Sidiropoulos, *How do Global South Politics of Non-alignment and Solidarity Explain South Africa's Position on Ukraine?*, Brookings (Aug. 2, 2022), https://www.brookings.edu/articles/how-do-global-south-politics-of-non-alignment-and-solidarity-explain-south-africas-position-on-ukraine/.

V. Just Transitions and Peace in an (Un)Equal World: Pathways

Recall that the United Nations was founded especially to guarantee global peace and security at the end of World War II. The Charter of the UN highlighted, among other things, the equality of states and the need to prevent the recurrence of war because of its incalculable cost to humanity. This was further reinforced by the adoption of the UDHR and the Agreements on the Pacific Settlement of Disputes, which enjoined state parties to seek a peaceful settlement of contentions.[183]

Thus, the collectivization of global peace and security under the UN was to ensure, amongst other things, the peaceful settlement of disputes between states and to avoid the repetition of the human rights catastrophe of World War II—including genocide and the use of nuclear weapons. The provisions of Chapter VI of the UN Charter articulate the ways and means of pacific settlement of disputes, including conciliation, mediation, arbitration, negotiation, and a combination of processes. Chapter VII also established the UN Security Council as the plenary body charged with the primary responsibility for using force to secure global peace and security.

This duty hinged on collective peace and security and did not extinguish states' rights to use force in self-defense under *Article 51* of the UN Charter. While *Article 51* preserved states' rights to self-defense, jurisprudence in the field leans in favor of collective self-defense as opposed to unilateral actions by states. However, other opinions are often wedded to the permanent five members of the United Nations Security Council (UNSC), which seems to emphasize unilateral actions or a coalition of the willing unduly. Over the years, the practice of states on self-defense can be cataloged into three patterns. First, collective self-defense and security under the auspices of the United Nations and its organs. Second, collective self-defense and security by a coalition of states. Thirdly, there are those who view self-defense as an absolute prerogative that does not require collective security under the UN.

Beyond these approaches linked to the UN, regional organizations and aligned and non-aligned coalitions have also emerged in response to geopolitical realities within their specific regions. Therefore, this geopolitical specificity and the sometimes-institutional inertia within the UN have reinforced the congregation of states with similar ideologies, values, and interests for collective security and self-defense.

For instance, the North Atlantic Treaty Organization (NATO) has a full structure of governance and collective mobilization of finance and strategic resources in pursuit of their collective self-defense. Before the end of the Union of Soviet Socialist Republics, there was also the WARSAW group constituted by affiliate states to the Soviet Union as a counter system to NATO. There is also within the Economic Community of West African States (ECOWAS) the existence of a regional peacekeeping mechanism called the ECOMOG (Ecowas Monitoring Group), which came into being in response to the many civil wars and consequent

[183] On the global commitment to the peaceful settlement of international disputes, *see* Convention on the Pacific Settlement of International Disputes (Hague Convention 1), Jan. 26, 1910.

human rights abuses in the region in the 1990s. ECOWAS partners with the UN and other international organizations in peacekeeping in the region. The ECOWAS forces are contingent, and the states in the region contribute these forces as the need arises.[184]

The establishment of the powers of the Security Council and its functions under Chapter 7 of the UN Charter is a recognition of the *de facto* unequal power dynamic within our international law architecture. This is even more so if we consider that at the formation of the UN in 1945, many of the global South countries were still under colonial domination. India and Pakistan, two major regional powers in Asia, were still under colonial rule. Nigeria, Algeria, and many other African states were also under colonial rule—with some other states existed as trusts and non-self-governing territories. Nonetheless, the effort to forge global peace and the flourishing of all human societies cannot be accomplished if the relationship of states with one another is purely dependent on power and might, instead of justice and equitable application of the international rule of law. A rule-based international order cannot rely on domination as Russia tries to do with the current war in Ukraine.

Enduring peace can only be achieved when justice is prioritized through international rule of law. This means justice to all parties involved, and not the silencing of some of the parties while professing peace. Justice in conflict also means accountability and responsibility for violations of laws of human rights, international humanitarian law, and international criminal law. The *de jure* standard is that nobody should be immune from accountability for violating these standards—especially when the subject in issue includes crimes against humanity, genocide, and war crimes. Wars of expansion and aggression would ordinarily warrant the commencement of accountability processes, including criminal trials, truth commissions, and bodies of inquiries and collective security measures through the UN. The powerful position of Russia in the UN has rendered the UN processes unimpressive for the time being.

While it is necessary to view the war from the prism of expansionism and aggression, we must not lose sight of the economic aspects of the war, considering Ukraine's strategic position in the global food system.[185] Thus, global peace also entails designing and pursuing fair structures of economic governance that will give all people a fair chance of self-development and a dignified living. Otherwise, the economic factors of conflict will endure long after the last weapons would have been expended on the battlefield. Transitional justice processes must consider reparations for economic destruction and restoration of livelihoods at the end of the conflict. Hence the intervention in the next Section, on the need to centralize justice in the pursuit of global peace.

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[184] Ademola Adeleke, *The Politics and Diplomacy of Peacekeeping in West Africa: The Ecowas Operation in Liberia*, 33 J. Mod. Afr. Stud. 569 (1995); Erika De Wet, *The Evolving Role of ECOWAS and the SADC in Peace Operations: A Challenge to the Primacy of the United Nations Security Council in Matters of Peace and Security?*, 27 Leiden J. Int'l L. 353 (2014); Tatiana de Almeida Freitas R. Cardoso & Rafaela Steffen G. da Rosa, *ECOWAS' Operations Under International Law: A Matter of Common Goals to Bring About Peace or a Shield for States' Self-Interests*, 2 J. Glob. Peace & Conflict 19 (2014).

[185] Mohammed Behnassi & Mahjoub El Haiba, *Implications of the Russia–Ukraine War for Global Food Security*, 6 Nature Hum. Behav. 754 (2022).

A. Peace Through Justice

Although there are theories in law that seem to celebrate the rule of law and obedience to the law, even if the law has an unjust outcome, justice is indeed the surest foothold of law.[186] A law animated by the values of justice is central to peaceful co-existence. Perhaps this explains why we refer to our institutions of law as the Justice Department.[187] We refer to our *judex* by the same foundation as Justice Wendel Holmes, Chief Justice John Marshall, Justice L. Brandies, Justice Thurgood Marshall, Justice Ruth B. Ginsburg, and Justice Ketanji Brown Jackson.[188]

Hence, judicial oaths of office affirm commitment to do justice to all persons who come before the courts. In international law and the global encounter of people amongst themselves and across borders, the limited availability timely, reliable, and accessible justice-accomplishing mechanisms is a major contributor to the making of conflicts. It is also a contributor to racism in transitional justice because much of the encounter pivots around balance of power dynamics.

Arguably, global peace can only be accomplished through justice as a genuine consideration in the relationship among states. But that justice must be robust and dynamic beyond the formalist and liberal taxonomies that overlook the human condition across borders, races, creeds, cultures, and social associations. This is because the liberal and formalist creeds of justice we rehearse in international law have been unable to meet the core challenges of most of humankind.

So, we need justice, and that has to begin by retracing our steps from the famished road of an international order that racializes, excludes, dominates, fragments, excludes on economic grounds, and intervenes illegally. Transitional justice must explore these issues that create mass violence as a means towards prevention of violence. Transitional justice should not be an undertaking that always comes too late—only after the violations have happened.

Thus, we must talk about economic justice, social justice, fair trade, and the recognition and respect of the sovereign rights of others. Hence, pursuing those iterations of justice, which will also entail reparative, restorative, and redemptive justice, is crucial in our search for enduring just global peace and security. The transitional justice cannon that continually elides the interrogation of the socioeconomic concerns that inspire conflicts incentivizes impunity because winning at cost becomes the best deal.

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[186] *See generally* Samuel E. Stumpf, *Austin's Theory of the Separation of Law and Morals*, 14 VAND. L. REV. 117 (1960).

[187] An amalgamation of these institutions of law forms the Justice System. We also debate about access to justice and not access to law.

[188] It is neither for want of diction nor lack of mental perception that we prefix these names with the term 'justice.' Rather, it is a profound acknowledgment of their duty in the law and society. It is also because we recognize the value of taxonomies and rhetoric in shaping the evolution of just societies. Our addressing of judges as 'justices' is our foretelling that they are there not as tyrannical masters but servants of justice. In those moments when these juridical persons have failed to be faithful to justice, the stream of law and justice has been polluted and often to the detriment of people and segments of society. In a sense, these failures form the pathologies of our justice systems and contribute to our current dilemmas about enduring legacies of historical (in)justice.

In conflicts such as the ongoing war in Ukraine, justice includes justice for the dead and disappeared:[189] And justice for the society as a whole, hence the imperative to find and preserve mass graves—recognizing their legal personality and as sites of just reckoning, if not now, certainly later.[190]

It is on these foundations that accountability mechanisms are hinged. Such mechanisms may include criminal trials, truth commissions, reparations, and memorialization. Only effective accountability can ensure stable peace. Often, we see situations where states engage in a choreography of transitions based on minimal political negotiations without settling the problems that led to war. This approach is an easy way to miss an opportunity to lay the foundations of enduring peace. Therefore, the sure pathway to peace is to work for justice.[191] Justice may also mean adjusting approaches that are founded on racism, and this is one area where international law has had limited success. The next Section, examines how we can destroy racism and thus enshrine a safer international order and transitional justice.

B. Destroying Racism

Global just peace in an unequal world is impossible without a deliberate effort to destroy the racialized foundations of international law. Anghie, Achuime, Carbado, and many others have explored these themes of race and the third world in extenso. That history of racialized international law has produced many humanitarian disasters, especially for the marginal groups of international law, such as Blacks, indigenous peoples, and communities of color worldwide. The temporal commitments of transitional justice have made it difficult to have a reckoning regarding these racial historical (in)justice questions.

Critical Race Theory (CRT) is a significant development in twentieth-century legal theory. Its application to international law can help to dismantle the racialized foundations of international law and improve transitional justice's ability to address questions of racial and historical injustice.

The universal and neutral principles of international law create inherent exclusion, limiting its operation individual harms. To make international law more inclusive, we need to move away from its performative objectivism and

189 Charlotte Mohr, *Transitional Justice and the "Disappeared" of Northern Ireland: Silence, Memory, and the Construction of the Past*, 102 Int'l Rev. Red Cross 457 (2020) (reviewing Lauren Dempster, Transitional Justice and the "Disappeared" of Northern Ireland: Silence, Memory, and the Construction of the Past (2019)).

190 Melanie Klinkner et al., *What is Mass Grave? Why Protect Mass Graves? How to Protect Mass Graves?*, Opinio Juris (July 11, 2022), http://opiniojuris.org/2022/07/11/what-is-a-mass-grave-why-protect-mass-graves-how-to-protect-mass-graves/; Melanie Klinkner, *Towards Mass-Grave Protection Guidelines*, 3 Hum. Remains & Violence 52, 52-70.

191 Pope Paul V1, Message: Celebration of Day of Peace (Jan. 1, 1972). In Ukraine and other wars around the world, what we have seen is more of power and the effort to annihilate and dominate. Accountability measures now and appears to be our surest foothold for restoring Ukraine and achieving peace through justice. However, we must not miss the lessons which Ukraine has revealed about racism and its inherently violent nature. *See also* Martin Luther King Jr., The Other America (Apr. 14, 1967). (Dr. King noted that "in the final analysis, racism is evil because its ultimate logic is genocide…racism is not based on some empirical generalization; it is based rather on an ontological affirmation").

approach it with a deliberate commitment to recognizing the nuances of racialized categories.

Committing to liberal taxonomies can be problematic in many ways, as they often focus on the ideal claims of international law and overlook concrete facts. They also exclude epistemologies that are not based on empiricism and legal formalism, support Westphalian nationalism.

C. Equal Treatment and the Ideal of Balance of Power

Ensuring collective just security, peace, and sustainable development require concrete efforts to guarantee equal humanity through equal treatment. Despite the inequality in the world due to states having different economic and military capacities, the main goal should be to emphasize the equality of nations, as stated in Article 2 of the United Nations Charter. Many other global instruments also emphasize the equality of all peoples, including the United Nations Convention Against Racial Discrimination.

The importance of equality is not only recognized and protected in our domestic legal systems but also in constitutional courts and written constitutions worldwide. Prioritizing equal treatment and incorporating it into our policies and governance efforts would be crucial to achieving global peace. This means holding all people and nations to the same standards, especially in times of conflict and collective use of force.

Furthermore, equal treatment must be linked to accountability, even for those who commit heinous atrocities during conflicts. A lack of accountability in international law has caused significant fragility in the system. The United Nations has failed to hold perpetrators accountable for violations, leaving victims without justice. UN peacekeeping forces have been unaccountable for their violations, as seen in the Haitian cholera outbreak.

The UN and its officials must review immunity doctrines to ensure accountability for human rights violations in peacekeeping. States contributing contingents to UN programs must be committed to accountability. While contributing countries have primary responsibility, the UN can use its good offices to hold them accountable to international human rights and operation standards. If foreign policy and international law continue to prioritize the balance of power over human dignity, the path to peace and equal treatment will remain uncertain.

Remembering that all human beings are entitled to dignity and equality, regardless of location, is crucial. Human dignity is inherent and cannot be bought or measured in financial terms. Transitional justice policies must be built on this foundation, as it is central to any meaningful search for global peace and security in an unequal world. Protecting human dignity requires removing all obstacles to its meaningful enjoyment across nations and societies. War and its atrocities often infringe on human dignity, so we must democratize economic opportunities for marginalized groups. A world prioritizing wealth accumulation over others cannot guarantee peace and security. To achieve global peace, we must pursue human dignity by combating poverty, inequality, pollution, and lack of access to education, clean water, healthcare, and shelter.

War erodes human dignity and decency. It sets aside the value and intrinsic worth of the human person. It is even worse when the war is out of the imperial expedition of powerful states: that is why the history of international law and order founded on the imperial expedition is a cartography of one human rights violation.[192] Often, the racialized other is the victim of these imperial atrocities. The several atrocities (including rape as a tool of war, genocide, crimes against humanity, starvation in war, and destruction of water resources to cause the dependents of these resources to famish and die) debase human dignity.

Yet, many are wedded to the ideologies of violence founded on racism, conquest, and other zero-sum approaches. Restoring human dignity requires a new vision of international law that centers on the human being. Transitional justice needs to explore these foundations and grow in that direction as an aspect of humanity law. This will entail restorative and reparative justice that promotes human well-being and assures inclusive prosperity and recognition of the inviolability of all people as full beings and co-equals of the earth.

It requires new epistemologies of international law and transitional justice beyond the formalist and belligerent nationalism of imperial states. It will also mean avoiding the ambivalent and diminutive 'development goals' often set out by the UN and other international organizations for the world to pursue without commensurate commitments to real changes that will facilitate the actualization of these goals. It is, thus, worthy of continuing the interrogation of these structures of international law. Global peace and security can only be enduring when international law and policy awaken to the recognition, respect, protection, and promotion of the intrinsic worth and dignity of all human beings.

Suppose we understand these values and integrate them into our encounters within and across communities, we may avoid the belligerent vocabularies of the balance of power and contentions of states in international law.[193] That will be a great pathway to peace and global justice because the balance of power foundations of international peace and security do not centralize the human condition and are also uncertain. They are also opposed to accountability and any form of transitional justice. Three readily perceptible reasons exist for this fragility of international peace and just security founded on the balance of powers.

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[192] Christopher Szabla, *Civilizing Violence: International Law and Colonial War in British Empire,1850-1900*, 25 J. Hist. Int'l L. 70 (2023) (highlighting the nature of imperial punitive expeditions and how it is entangled with human rights violations and international law); Reed L. Wadley, *Punitive Expeditions and Divine Revenge: Oral and Colonial Histories of Rebellion and Pacification in Western Borneo, 1886-1902*, 51 Ethnohistory 609 (2004); Alonso Gurmendi, *Leticia & Pancho: The Alleged Historic Precedents for Unwilling or Unable in Latin America, Explored*, Opinio Juris (Nov. 8, 2018), http://opiniojuris.org/2018/11/08/leticia-pancho-the-alleged-historic-precedents-for-unwilling-or-unable-in-latin-america-explored-part-ii-pancho-villa/.

[193] Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 AM. J. Int'l L. 555 (1979) (highlighting the history of the idea and its relationship with international law); Quincy Wright, *International Law and the Balance of Power*, 37 Am. J. Int'l L. 97 (1943); Ernst B. Haas, *The Balance of Power: Prescription, Concept, or Propaganda*, 5 World Pol. 442 (1953); *see generally* John J. Mearsheimer, The Tragedy of Great Power Politics (2014) (highlights the theory of offensive realism because states are often uncertain of the intensions of other state); *see generally* Hans Morgenthau, Politics Among Nation: The Struggle For Power And Peace (2006); Lauri Malksoo, *The Annexation of Crimea and Balance of Power in International Law*, 30 Eur. J. Int'l L. 303 (2019).

First, the balance of power dynamic is an easy pathway to militarism in international law, and taxonomies of war on the grounds of the balance of power and imperial conquests are ubiquitous. 'Just war' and 'holy war' are known vocabularies and have been with us since Gentili, Bacon, and Grotius—with woeful consequences.[194] It is paramount that we begin to lend an ear to the voices of those who have been marginalized and discard the oppressive strategies that have caused extensive harm to humanity for centuries. The principle of power balance often stems from the notion of dominance, which does not place emphasis on equity, reverence for human rights, and integrity. Instead, it relies on methods that entail coercion and suppression.

The world's armies operate like well-oiled machines, constantly moving and adapting to different environments, whether on land, sea, air, or the internet—or, indeed, outer space.[195] Each action taken by one army impacts others, creating new scenarios of aggression and requiring constant preparedness. This relentless pursuit of power for international peace and security fuels a continuous investment in warfare strategy and methods to eliminate perceived threats. However, true transitional justice cannot exist in a world dominated by violence and militarism. Instead, we must strive for solidarity among communities and nations, or else transitional justice will become merely a tribute to imperial ambitions.[196]

The balance of power model is a commonly used framework for analyzing international relations. However, it can be criticized for neglecting the importance of human well-being. This model treats people as expendable resources in the pursuit of power, advantage, and dominance. It prioritizes the national interest over the welfare of individuals, even if that interest is being promoted by an authoritarian, fascist, or colonizing state. Moreover, the balance of power model tends to undermine accountability as it may interfere with the pursuit of national interests. Finally, this model reinforces the false belief that domination is the only way to achieve peace and prosperity. It perpetuates this myth through cultural commitments, claims of historical destiny, and a desire for power.

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194 *See generally* Samuel Garrett Zeitlin, *Francis Bacon on Imperial and Colonial Warfare*, 83 Rev. Pol. 196 (2021) (highlighting the epistemic endorsement of conquest and domination in the scholarship of Bacon). Today many scholars are still excited about the "good" that empire did to the rest of the world. Yet these are not based on the voices of the subalterns. *See also* Gayatri Chakravorty Spivak, Can The Subaltern Speak? Postkolonialität Und Subalterne Artikulation (2008); Can The Subaltern Speak?: Reflections On The History Of An Idea (Rosalind C. Morris ed.) (2010).

195 Although the international law regarding the outer space is still developing many frontline states are already strategizing on its potential military uses. International law forbids non-pacific use of the outer space no matter the state involved. A non-pacific use of the outer space could also have ramifications for the environment. The outer space is also the common heritage of humankind. The subject therefore requires more scholarly inquiry and policy articulation. *See generally* Press Release, G.A., 'We Have Not Passed the Point of no Return', Disarmament Committee Told, Weighing Chance Outer Space Could Become Next Battlefield, GA/DIS/3698, (Oct. 26, 2022); Matthew T. King & Laurie R. Blank, *International Law and Security in Outer Space: Now and Tomorrow*, 113 Am. J. Int'l L. Unbound 125 (2019); *The Potential Human Cost of the use of Weapons in Outer Space and the Protection Afforded by International Humanitarian law: Position Paper Submitted by the International Committee of the Red Cross to the Secretary-General of the United Nations on the Issues Outlined in General Assembly Resolution 75/36, 8 April 2021*, 102 Int'l Rev. Red Cross 1351 (2020).

196 If imperial states are always unaccountable and determine when, and what situations deserve transitional justice engagement, then we have lost the capacity to guard the guardians.

Allott proposes that America has an "imperial responsibility" to offer global stability and order in order to achieve international security.[197] He asserts that this "imperial responsibility" is the United States' "historical destiny" and should be pursued with resolute determination. Allott maintains that the "Kantian Myth" is "a consoling myth" and thus insufficient to serve as an effective law in international society. It is noteworthy that a highly respected European scholar, such as Allott, would advocate for the notion of imperial responsibility and the view of other people as subjects of this responsibility. Allott does not mention any other tradition outside of the West, except for a brief reference to a "rag-bag of peoples" with "ancient traditions."[198]

However, the idea that international law and society should be founded on the folklore of a single state's "historic destiny" is problematic for several reasons.[199] First, it is precarious because it encourages imperial attitudes that disregard the fate of other individuals, and communities, who are viewed as a "*ragbag of peoples*." Such an attitude cannot promote comprehensive humanity and fair transitions because its rationale is based on exclusion and "othering." It reinforces supremacy as the norm, which is incompatible with fairness and inclusion.

Furthermore, Allott later suggests constructing multilateralism to address the issues facing humanity, which contradicts his earlier argument that pays tribute to the "historic destiny" of one state as the bearer of an imperial responsibility for all of humanity.[200] This recommendation echoes Kipling's "Whiteman's Burden" and is worrying.'[201] It rings like an afterthought or the universalism of international law, which has historically produced ambivalence and the legal transplant of European ideals across the globe regardless.

The Berlin West Africa Conference was presented as a way to promote free trade, but it actually led to the partitioning of African lands and peoples among European powers. This imperialistic mindset sees other cultures as inferior, leading to numerous violations, including current conflicts such as Russia's intervention in Ukraine. Such thinking fosters a culture of disorder and irresponsibility. If taken to its logical conclusion, it could permit nations like Russia and China to pursue their "historic destinies" and imperialistic obligations in relation to their neighbors. This is perilous and must be challenged by international legal scholars. If only some nations are allowed to conceive themselves as possessing an "imperial responsibility", then why not others? This will inevitably lead to further strife and less global stability, security, and fairness. If nations are expected to demonstrate their civilization and humanity through warfare, then true peace will forever elude us.

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197 Philip Allott, *The True Function of Law in the International Community*, 5 Ind. J. Glob. Legal Stud. 391, 391 (1998).

198 *Id.* at 392.

199 Allott, *supra* note 197, at 407.

200 See *id.* at 413 ("The great task of the coming decades is to imagine a new kind of international social system, to a new role for the United Nations in the new kind of world …to imagine at last a new kind of post-tribal international law...").

201 Rudyard Kipling, The Whiteman's Burden, (1899) (written in support of the US to take up the imperial mantle over the Philippines).

The Berlin West Africa Conference was supposed to promote free trade, but it ended up dividing African lands and peoples among European powers. This imperialistic mindset views other cultures as inferior and leads to numerous violations, such as Russia's intervention in Ukraine. This kind of thinking fosters a culture of disorder and irresponsibility, allowing nations like Russia and China to pursue their "historic destinies" and imperialistic obligations towards their neighbors. This is dangerous and must be challenged by international legal scholars. If only certain nations are allowed to see themselves as having an "imperial responsibility," why not others? This will inevitably lead to more conflict and less global stability, security, and fairness. If nations are expected to demonstrate their civilization and humanity through warfare, then true peace will always be out of reach.

Thus, it is imperative to cultivate a brand of internationalism predicated upon collective ethics, multilateral consensus, and shared humanitarian principles rather than embracing the idea of a Hobbesian Leviathan vested with untrammeled power to coercively unify disparate populations. It is salient to acknowledge that paradigms that celebrate militarism and dominion as conduits to international greatness risk ossifying into ideological cornerstones with an elevated tendency for engendering violence, as evinced by the doctrinal footings of Nazi Germany and the Rwandan genocide. Within the Rwandan context, dehumanizing rhetoric—classifying one segment of the populace as "cockroaches"—served as a precursor to orchestrated mass killings.

This particular mindset invariably sustains the status quo as an inviolable dogma, thus precluding constructive evolution in international legal structures. The inadequacy of international law in transcending this paradigm is poignantly illustrated by the conflict in Ukraine, which exposes the epistemological and scholarly limitations ingrained in the balance-of-power methodology as a vehicle for global peace and stability. Even esteemed legal scholars have occasionally capitulated to this reductive and dehumanizing narrative within international law and security, which glorifies conquest, containment, exclusion, annihilation, and extermination as the purported avenues to global harmony.

I propose a new approach to international law that prioritizes the human condition. This shift would counteract the aggressive tendencies that currently dominate international legal norms, foreign policy decisions, and the practice of transitional justice. By placing the human condition at the center of international legal frameworks, we can challenge the belief that military endeavors are the main way for states to progress.

This humanistic approach would challenge the idea that military supremacy is the ultimate measure of the success of civilizations or sovereign entities. Maintaining a geopolitical landscape that is based on the hierarchical dominance of one state over another only fuels conflict. The "us versus them" mentality fails to recognize justice as a key component of lasting peace.

Focusing on the collective human condition would require reallocating resources to address global challenges, such as social inequality, economic disparities, healthcare access, and education opportunities. This would promote prosperity and development beyond national borders, encouraging a more inclusive and universal ethos.

This proposed framework is not merely a Kantian derivative; it transcends both constitutional integration and market-oriented considerations to underscore justice as the overarching principle that should govern human interactions on the international stage.[202] It is also not a benevolent imperial order of international law. Indeed, it is not enough to rely solely on a benevolent imperial international law that involves the offering of gifts and charitable actions to colonies, vassals, or subordinated sovereigns. What is truly necessary is an international law that prioritizes humanity and actively works towards restoring it on a global scale. This requires the elimination of the factors that perpetuate apathy and racial segregation while simultaneously ensuring equal opportunities, fair treatment, and capabilities for all.

VI. Conclusion

The ongoing conflict in Ukraine is a reminder of the failure of the global community to achieve peace and equitable security. International law has often been used to perpetuate hierarchical relations between states, resulting in systemic imbalances and the audacity of powerful nations to flout legal norms without fear of reprisal. To address these issues, a reconceptualization of the approach to global peace is necessary, which entails holding all stakeholders accountable for Ukraine's current plight.

The article argues for the decolonization of the foundational structure and evolution of international law and policy, which can be achieved by adopting theoretical frameworks like Critical Race Theory and Third World Approaches to International Law. To achieve lasting peace, multilateral structures must prioritize inclusivity and equity over balance-of-power, which perpetuates discriminatory application of international law. Recognizing the impact of war on individuals, democratic processes, and mental health is essential to addressing the issues of transitional justice faced by racialized communities.

Equally, subaltern ideals of recognizing our common humanity across lands and climes can inspire new hopes of peace, global justice, accountability, and security for all peoples in an unequal world in the second decade of the 21st century and beyond.[203] Racism directly affronts our common humanity and humanity law, which transitional justice promises. Therefore, a deracialized and people-oriented approach to international law holds a better promise for peace in our world.[204]

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[202] *See* Immanuel Kant, Perpetual Peace: A Philosophical Essay (G. Allen & Unwin Ltd. eds., 1915).

[203] These ideas are trans-civilizational as strands of them are found around the world. John Donne, Devotions Upon Emergent Occasions, Meditations XVII (1624) ("No Man is an Island […] the death of any man diminishes me for I am involved in Mankind").

[204] In a recent message to the International law Associations Conference in Lisbon Portugal, the UN Secretary General had this to say: "international law is not only for States – it should serve people. A people-centered vision for the rule of law can ensure that institutions remain strong and accountable, and that justice and fair remedies are accessible to all." *See Secretary-General's Video Message to the 80th Biennial Conference of the International Law Association: "International law: Our Common Good"*, U.N. (June 22, 2022), https://www.un.org/sg/en/content/sg/statement/2022-06-20/

Hence, we cannot be indifferent to the plight of others or assume that we are too distant from the problems of conflict and impunity because parts of our societies are committed to the pathways of domination and violence. These are spaces where we should work to make a difference through transitional justice projects and deliberations—because there are "deaf republics" everywhere.[205]

secretary-generals-video-message-the-80th-biennial-conference-of-the-international-law-association-%E2%80%9Cinternational-law-our-common-good%E2%80%9D.

[205] Ilya Kaminsky, *We Lived Happily During the War*, *in* DEAF REPUBLIC (2019). Reflecting on the poem, the Ukrainian-American Poet, has this to say:
"The poem is meant to serve as a wakeup call; to prevent people from reading "Deaf Republic" as a tragedy elsewhere. Deaf Republics, with their hopes, protests, and complicities are everywhere. We live in the Deaf Republic."
See Dan Kois, *"The Poem is a Warning" Ilya Kaminsky on his Viral Poem, "We Lived Happily During the War" and Ukraine Resistance*, SLATE (Mar. 4, 2022), https://slate.com/culture/2022/03/interview-ilya-kaminsky-poet-ukraine.html.

Due Regard as the Prime Directive for Responsible Behavior in Space

Andrea J. Harrington*

Abstract

As the proliferation of space activities has rapidly accelerated, states are increasingly concerned about the lack of clear guidance for responsible behavior in space. Risks due to accident, miscalculation, or misperception abound. Thus, there have been increasing calls for the development of 'norms of behavior' for space at both the international and domestic levels. The principle of due regard, enshrined in Article IX of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies ("Outer Space Treaty" or "OST"), is an underutilized space law tool that could, if embraced, play a significant role in establishing such norms and creating a more secure, safe, and sustainable environment for space activities.

This paper appraises the value of the due regard principle to international space law from both a legal and international relations perspective, viewing norm development through a constructivist lens. It then provides an interpretation of the due regard principle in accordance with the rules articulated in the Vienna Convention on the Law of Treaties. Two specific examples of gaps in international space law that would benefit from application of the due regard principle are addressed, namely the protection of space science and the applicability of 'safety zones' in space. Finally, the paper concludes with an assessment of why due regard is the thread that holds the tapestry of international space law together, the prime directive of international space.

Table of Contents

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I. Introduction

The Outer Space Treaty emphasizes the freedom of states to use and explore outer space as the most basic underlying principle of the international space law regime.[1] It plainly encourages the further development of peaceful activities in space, as does Resolution 1962, which preceded it.[2] The freedom of use and exploration of outer space is one that has crystallized into customary international law in parallel with the Outer Space Treaty.[3] Following the establishment of a right to use and explore, the Outer Space Treaty subsequently addresses limitations and restrictions on such use and exploration; in other words, it creates obligations to which space-faring states must adhere. Surely, the totally unlimited use and exploration of space would create conflict, increase risk, and ultimately stifle further development of space activities for any but the most ambitious and technologically advanced states. The due regard principle, an underutilized legal mechanism first articulated for space in paragraph 6 of Resolution 1962 and made binding in Article IX of the Outer Space Treaty, is a useful tool that can be employed to minimize conflict, reduce risk, and create optimal conditions for space development.

Though the primary subject of this article is found in Article IX of the Outer Space Treaty, several other provisions bear directly on the discussion of due regard. Article III acknowledges that international law still applies in space.

[1] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Jan. 27, 1967, 610 U.N.T.S. 205 [hereinafter Outer Space Treaty].

[2] G.A. Res. 1962 (XVIII), Declaration of Legal Principles Governing the Activities of States in the Exploration and Use of Outer Space (Dec. 13, 1963).

[3] Ram S. Jakhu & Steven Freeland, *The Relationship Between the Outer Space Treaty and Customary International Law*" (59th Int'l Astronautical Cong., 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3397145.

So, while the Outer Space Treaty represents *lex specialis* for space, general international law is used to supplement specialized space law.[4] Additionally, Article VI establishes that states are responsible for their "national activities in outer space," including those activities carried out by corporations and other non-governmental entities.[5]

Under Article VI of the Outer Space Treaty States incur an obligation to authorize and supervise their national space activities; states must ensure their national actors comply with international space law and they are directly responsible under international law if they do not.[6] This rule is a significant departure from general international law, in which the state would otherwise be held responsible only for its own activities or the activities of agents acting on its behalf.[7] As the commercial space industry continues to develop apace, the significance of this rule cannot be overstated. Thus, when applying the due regard principle to space activities, we use the tools of international law and apply the obligation to act with due regard to the behavior of commercial space entities through their respective states.[8]

Article IX of the Outer Space Treaty contains three primary obligations.[9] These are: an obligation to act with due regard, an obligation to avoid harmful contamination, and an obligation to consult in circumstances of potentially harmful interference.

In the exploration and use of outer space, including the moon and other celestial bodies, States Parties to the Treaty shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space, including the moon and other celestial bodies, with due regard to the corresponding interests of all other States Parties to the Treaty. States Parties to the Treaty shall pursue studies of outer space, including the moon and other celestial bodies, and conduct exploration of them so as to avoid their harmful contamination and also adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter and, where necessary, shall adopt appropriate measures for this purpose. If a State Party to the Treaty has reason to believe that an activity or experiment planned by it or its nationals in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, including the moon and other celestial bodies, it shall undertake appropriate international consultations before proceeding with

[4] Alan Boyle & Christine Chinkin, The Making of International Law 23-24, 252-253 (Oxford Univ. Press eds., 2007).

[5] For a detailed discussion of Article VI, *see* Bin Cheng, *Article VI of the 1967 Space Treaty Revisited*, 26 J. Space L. (1972).

[6] Outer Space Treaty, *supra* note 1, at Art. VI.

[7] G.A. Res. 65/19, Responsibility of States for Internationally Wrongful Acts, (Jan. 10, 2011), at 4-11.

[8] While the *Barcelona Traction* rule has bearing here in international law, each state has its own domestic rules to determine which space activities are permissible, and which actors must seek authorization. *See* Barcelona Traction Light and Power Company Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5, 1970).

[9] For the distinction between primary and secondary obligations in international law, *see* Robert Kolb, *The International Law of State Responsibility: An Introduction* 6-8 (Northampton: Edward Elgar Publishing ed., 2018).

any such activity or experiment. A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space, including the moon and other celestial bodies, would cause potentially harmful interference with activities in the peaceful exploration and use of outer space, including the moon and other celestial bodies, may request consultation concerning the activity or experiment.[10]

While this paper is primarily concerned with the first such obligation, due regard, there is also a relationship with the consultation obligation.[11] The act of consultation can be a means to demonstrate regard for the interests of another State.

Article IX is the treaty provision that does the heavy lifting to balance the Article I.2 freedom of exploration and use for all states, maximizing the potential for space development and creating metaphorical room for access to space by those countries that may be less economically or technologically developed, as contemplated in Outer Space Treaty Article I.1. While practical application of the due regard principle in space law has been limited, scholars have recognized the close, balancing relationship between Article I rights and Article IX obligations.[12]

II. Context: Why Does Due Regard Matter?

In a six-year span from 2014-2020, the catalogue of operational space objects increased more than twofold and is continuing to grow at a high rate.[13] If we consider the application filings for new satellites to national regulators by early 2021, the number of new objects in orbit could be over 100,000 by 2030.[14] For space professionals, those numbers are both exhilarating and terrifying; exhilarating because of the increasing importance and viability of space development, but terrifying because the consequences and likelihood of disaster, accidental or otherwise, increase in parallel. The number of new actors and new objects in space has created a renewed push for *norms of responsible behavior* that will help to create stability in space activities and reduce the risk of mishap or misperception.

In late 2020, the UN General Assembly adopted a resolution titled "Reducing Space Threats Through Norms, Rules, and Principles of Responsible Behaviours."[15] The resolution called for states to submit their views on issues

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[10] Outer Space Treaty, *supra* note 1, Art. IX.

[11] *See infra, Ordinary Meaning: Due Regard and Disregard* below.

[12] *See*, for examples, Manfred Lachs, The Law of Outer Space: An Experience in Contemporary Law-Making 43-45 (Leiden: Martinus Nijhoff Pubishers ed., 2010 reprint; originally 1972); George D. Kyriakopoulos, *Security Issues with Respect to Celestial Bodies*, *in* Handbook of Space Security: Policies, Applications and Programs 2nd Ed Vol II 344 (Kai-Uwe Schrogl ed., 2020),); Sergio Marchisio, *Article IX of the Outer Space Treaty*, *in* Cologne Commentary on Space Law Vol. I: Outer Space Treaty 568 (Hobe, Schmidt-Tedd, Schrogl eds., 2010).

[13] Carmen Pardini & Luciano Anselmo, *Evaluating the Impact of Space Activities in Low Earth Orbit*, 184 Acta Astronautica 11, 11 (2021).

[14] *Id.*

[15] G.A. Res. 75/36, Resolution adopted by the General Assembly on 7 Dec. 2020, Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours (Dec. 16, 2020).

articulated in the resolution. Thirty states, the European Union, and other entities and non-governmental organizations submitted their views, which were summarized in a report of the Secretary-General.[16] The report addresses naturally occurring and human-generated threats to space activities, including a broad definition of 'threat,' encompassing both intentional threats and threats created as by-products of space activities in general, such as debris and congestion. The responses of the member states address the utility of legally binding or voluntary norms, with the majority conceding that a binding treaty is unlikely at this time. States may prefer soft law instruments because they incur fewer consequences, avoid a domestic ratification process, offer a more flexible model, and/or are easier to change or supplement.[17] In a space context, the relative failure of the Moon Agreement as compared to the relative success of non-binding instruments such as the Remote Sensing Principles and Debris Mitigation Guidelines likely also contributes to the hesitancy to develop new treaties.[18] While the Moon Agreement was introduced and opened for signature on a consensus basis, it has to date only accrued 18 ratifications, none from the major spacefaring states. In concluding observations, the United Nations Secretary-General ("UNSG") states that "[T]he normative and legal framework governing outer space is not sufficiently developed" and finds it "encouraging that Member States reaffirm that voluntary norms, rules and principles, including non-binding transparency and confidence-building measures, can form the basis for legal measures."[19]

An Open-Ended Working Group ("OEWG") on reducing space threats through norms, rules and principles of responsible behaviors was subsequently convened in 2022.[20] The OEWG concluded on 1 September 2023.[21] The OEWG draft report recognized that "all activities by States in outer space are carried out in accordance with international law including with due regard to the corresponding interests of other States."[22] Unfortunately, due to political circumstances, though the OEWG recognized the importance and relevance of the duty of due regard, "[t]he working group considered that this matter should be further discussed in the relevant forums."[23] Though the OEWG was unable to further

16 U.N. Secretary General, *Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours*, U.N. Doc. A/76/77 (July 13, 2021) [hereinafter Report of The Secretary General].

17 Boyle & Chinkin, *supra* note 4, at 214.

18 Status of International Agreements Relating to Activities in Outer Space as at 1 January 2020, COPUOS, U.N. Doc. A/AC.105/C.2/2020/CRP.7 (2020). Executive Order on Encouraging International Support for the Recovery and Use of Space Resources. White House, https://www.whitehouse.gov/presidential-actions/executive-order-encouraging-international-support-recovery-use-space-resources/ (April 6, 2020) [hereinafter Status of International Agreements].

19 Report of the Secretary General, *supra* note 16, at ¶ 47.

20 G.A. Res. 76/231, Reducing space threats through norms, Space Threats Through Norms, Rules and Principles of Responsible Behaviours (Dec. 30, 2021); UN. Of for Disarmament Affairs, Open-Ended Working Group on Reducing Space Threats (2022), https://meetings.unoda.org/open-ended-working-group-reducing-space-threats-2022.

21 *Id.*

22 U.N.G.A., Draft Rep. of the Open-ended Working Group on Reducing Space Threats Through Norms, Rules and Principles of Responsible Behaviours, ¶ 18, A/AC.294/2023/CRP.1/Rev.1, 31 (Aug. 13, 2023).

23 *Id,* at ¶ 21.

develop a plan for implementation of the due regard principle, its recognition of the principle's importance is a valuable first step toward dusting off the underused OST Article IX provision.

States must not only agree on the substance of the norms themselves, but determine what form they will take, and establish their relationship with the existing body of international space law. I argue that the due regard principle is the underutilized tool that enables states to tie substantive, agreed-upon norms to an existing legal rule, which therefore increases their legal significance and moves toward formation of binding standards of behavior. This paper establishes both why and how due regard is an ideal mechanism for states to establish norms of responsible behavior for space.

A. What is a Norm?

In the social sciences, norms are typically "defined as rules or expectations that are *socially* enforced."[24] Thus, norms are distinct from legally enforced rules or laws. Certainly, a rule can be both legally and socially enforced and thus be both a law and a norm, such as a prohibition on theft, for example. In an international law context, "[n]orms are legally binding which fit within one of a series of doctrinally elaborated categories,"[25] namely those articulated in Article 38(1.a-c) of the International Court of Justice ("ICJ") Statute. So, if a norm does not fit into one of those categories, it can be a social norm but will not rise to the level of a legal norm.

Within the definition of norms, there is a recognition that some norms are more strictly enforced than others. Expectations would be a softer form of norms than rules. Doctrinally trained lawyers seek hard rules to analyze or interpret, but in the international space law context, legal doctrine alone is insufficient to achieve practical objectives within the limitations of the international system. Former ICJ President Rosalyn Higgins acknowledged that "international law has to be identified by reference to what the actors (most often states)…believe normative in their relations with each other" generally without confirmation by the ICJ or other judicial body.[26]

The International Law Commission (ILC) has been charged with a mission of codification and progressive development of international law; in other words, establishment of legal norms. Through the history of the ILC, there has been a consistent tension between the codification and progressive development objectives.[27] It can be challenging to identify which norms have moved beyond the realm of social expectations and crystallized into customary legal rules and those

[24] Christine Horne, "Norms", Oxford Bibliographies, https://www.oxfordbibliographies.com/display/document/obo-9780199756384/obo-9780199756384-0091.xml.

[25] David Kennedy, *The Sources of International Law*, 2 Am. U. Int'l L. Rev. 1, 88 (1987).

[26] Rosalyn Higgins, Problems and Process: International Law and How We Use It 18 (Oxford: Clarendon Press ed., 1994), based on her lectures to the Hague Academy General Course in International Law.

[27] Int'l L. Comm'n, *Statute of the International Law Commission*, art. 1 (1947), https://legal.un.org/ilc/texts/instruments/english/statute/statute.pdf; Boyle & Chinkin, *supra* note 4, at 174-175.

that still remain in the realm of aspiration or *lex ferenda*. Of course, on its face, the clarifying question is simple: has there been consistent state practice and is there evidence that states believe they are legally bound to that practice?[28] Though the ILC primarily deals with questions of customary international law as articulated in this section of the paper, the issues surrounding establishment of consistent state practice are also relevant to understanding state practice in a treaty interpretation context,[29] and thus also relevant to our formulation of due regard conduct expectations under the Outer Space Treaty.

To better understand how consistent state practice develops, it is helpful to reach beyond legal scholarship and into the international relations toolbox. By providing a context based in international politics, international relations theory can add normative thinking to an otherwise narrowly constrained doctrinal approach.[30] Though international relations theory cannot itself claim to be a legal method, it can aid in the understanding of the relationship between law and governance.[31] In the context of this paper in particular, the constructivist school of thought focuses on norm creation and development and its relationship to the identities of states.[32] In the frame of constructivist theory, norms are intersubjectively developed through the interaction of states. States interests are not static and can evolve through interaction.[33] States and the international system "construct or constitute each other."[34]

International relations theory is an aid to assist in the progressive development of international law, assessing how the behavior of states can be affected toward the development of state practice.[35] This progressive development is relevant both in the context of customary international law and in treaty interpretation. Thus, when lawyers become frustrated by the state preference for soft norms rather than laws, it is helpful to look to constructivist theory to understand that the interaction between states during the development and application of norms allows an intersubjective shift in preferences so that legally binding rules become possible, regardless of which form they take in international law. To start with the due regard principle as the basis for additional norms, is starting with a foundation that has already been agreed upon since at least 1967 in the interactions between states. Thus, norms can be built upon the Outer Space Treaty, which has already been internalized by states as fundamental to responsible behavior in space.

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28 I.C.J., *Statute of the International Court of Justice*, art. 38(1)b, 59 Stat. 1031 (Apr. 18, 1946); *see also* Continental Shelf (Libyan Arab Jamahiriya v Malta), ICJI.C.J. Reports, p. 29 ¶ 7 (1985).

29 See *infra, State Practice* section below.

30 Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 363, 93 Am. J. of Int'l L. 361 (1999).

31 *Id*. at 379.

32 *See* Ted Hopf, *The Promise of Constructivism in International Relations Theory,* 23 Int'l Security 171-172 (1998).

33 Abbott, *supra* note 30, at 367.

34 Gavan Duffy & Brian Frederking, *Changing the Rules: A Speech Act Analysis of the End of the Cold War,* 53 int'l stud. q. 325, 330 (2009) (*citations omitted*).

35 Abbott, *supra* note 30, at 363 (*citations omitted*).

B. What Value Can Norms Add in an International Law Context?

In both a practical and constructivist sense, international law "is what states make of it."[36] Recent decades have seen an upswing of views that erode the value of international law even beyond narrowly construed positivism. This shift is grounded in a New Realist theory of international relations that sees international law simply as another expression of the interests of powerful states.[37] In this view, rules of international law can only be found and applied where there is incontrovertible evidence of state consent, and even then, sufficiently powerful states will break these legal 'rules' when they no longer serve the state's interest.[38] In this view, "rational self-interest and *opinio juris* are mutually exclusive" because states are justifying their self-interest in a guise of obligation, but will ultimately change their behavior if it suits their interests.[39] Though it is unfortunate, this weakening of international law as illusory or "not real law" is a striking example of law professors having a tangible effect on the practice of states.[40] It is a both a stark warning about the power of the legal academy and a heartening demonstration that those of us in this profession have a role to play beyond mere theoretical applications.

With the political realities of the 21st century, a scholar wishing to influence state policymakers cannot abandon legal positivism. That said, it is possible to take what is called an "enlightened positivism" approach that maintains focus on formal sources of international law and seeks proof of state commitment, but recognizes "changes in patterns of state behavior and wider methods of determining state consent and evidence of that consent."[41] It is from that perspective that this paper tackles the due regard principle as a tool for implementing norms of responsible behavior.

States wishing to reinforce or develop identities as space powers can be induced to take a significant role in the formulation of norms in accordance with that identity. When a norm comes into practice, prior negotiation means the state is less likely to detract from that rule because its national interests have become entangled with it.[42] Of course, in reality state interactions do not always play out this way – for example, the U.S. played a key role in the negotiating the Moon Agreement, but never ratified the treaty and have since spoken out against it.[43]

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[36] *See* Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992).

[37] JACK L. GOLDSMITH & ERIC A. POSNER THE LIMITS OF INTERNATIONALINT'L LAW (Oxford Univ. Press 2005) at 3; JENS DAVID OHLIN, THE ASSAULT ON INT'L LAW (Oxford Univ. Press 2018) at 8-10, 12-14, 189.

[38] Abbott, *supra* note 30, at 365; *Citing* HANS MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR PEACE AND POWER (New York Knopf 5th ed. 1978); Ohlin, *supra* note 37, at 9-10.

[39] Ohlin, *supra* note 37, at 145, 147.

[40] *Id*. at 43 *generally citing* Goldsmith & Posner, *supra* note 37.

[41] Boyle & Chinkin, *supra* note 4, at 12 *citing* Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View* 93 AM. J. OF INT'L LAW 302, 302-303 (1999).

[42] *See* Hopf, *supra* note 32, at 176.

[43] Status of International Agreements, *supra* note 18.

A state is much less likely to take a norm seriously if it does not participate in the norm's development, as it will likely identify as an outsider with regard to that norm. The Artemis Accords[44] frequently receive the criticism that they were unilaterally developed by the United States and therefore are less likely to become accepted among all significant space powers.[45]

For rule-oriented constructivists, communicatively rational agents interact within an intersubjective structure of social rules. Agents perform speech acts that convey validity claims, including evaluations of the validity claims of others. As actors repeat sequences of speech acts, regularities emerge. Over time, actors come to consider these regularities to be practices, for which they might eventually develop norms and even codify rules.[46]

Additional opportunities to perform such speech acts, such as participating in a negotiation and drafting process, provide additional opportunities for intersubjective development of rules.

As an obligation of conduct, the due regard rule provides unique opportunities to create supplemental conduct norms that can become legally binding through the intersubjective development of the due regard principle itself.[47] In this sense, it is important to give appropriate substance to any future norms crafted as representations of responsible behavior carried out with due regard to ensure a "norm-creating character."[48] Thus, norms that are codified should use language that demonstrates commitment, such as 'must.'[49] These supplemental norms may begin only as social norms, but as states apply them in their interactions, a legally binding character can be acquired if states come to internalize them as obligatory, thus satisfying the *opinio juris* requirement of a customary law. In this sense, intersubjective norm development and practice under Article IX of the Outer Space Treaty can be two sides of the same coin. Norms in the form of guidelines can be used to help interpret binding commitments, this application of norms is addressed in more detail in the *Subsequent Agreements* section below.[50]

In addition to their potential relationship to treaty law, soft law instruments can be valuable methods driving the codification of customary international law, even though they are not themselves binding.[51] These instruments can focus consensus without the need for complex domestic ratification processes that can take years. Citation to and reliance on these instruments can be seen as a form of *opinio juris*. An example of a soft law instrument that may be more valuable

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44 Artemis Accords, NASA (Oct. 13, 2020), https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf.

45 Rahul Chaudhary, *Preventing Space Warfare: The Artemis Accords and What It Means for Australia*, United States Studies Center (Feb. 7, 2022), https://www.ussc.edu.au/analysis/preventing-space-warfare-the-artemis-accords-and-what-it-means-for-australia.

46 Duffy & Frederking, *supra* note 34, at 327.

47 *See* Kolb, *supra* note 9, at 41-45, *citing* Roberto Ago.

48 *North Sea Continental Shelf* (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands) I.C.J. Rep. at 43 ¶ 72 (1969).

49 Kal Raustiala, *Form and Substance in International Agreements,* 99 A.J.I.L. 581 (2005).

50 Boyle and Chinkin, *supra* note 4, at 183; see *infra, Subsequent Agreements* section below.

51 *Id*. at 182.

in its form than it would have been as a treaty is the *Articles on Responsibility of States for Internationally Wrongful Acts*.[52] While conceived as a mix of codification and progressive development of international law within the ILC's mandate, they have come to be relied upon by the ICJ as legally binding. A similar phenomenon can be observed with respect to the Vienna Convention on the Law of Treatises ("VCLT"), discussed in more detail in the section *Interpreting and Applying Due Regard* below. Certainly, norms of responsible behavior for space would not rise to the level of either of these instruments crafted by the ILC, but they provide striking examples of intersubjective norm development resulting in a new *lex lata*.

III. Interpreting and Applying Due Regard

A. Pacta Sunt Servanda

Arguably the most fundamental rule in the application of treaty law, *pacta sunt servanda*, was codified in Article 26 of the Vienna Convention on the Law of Treaties, stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[53] This rule reinforces the binding nature of treaties and the requirement that exercise of rights granted by the treaty and performance of obligations established by the treaty must be carried out in good faith; essentially without purpose for manipulation, malfeasance, and/or trickery. In other words, parties to the treaty must carry out actions under the treaty in accordance with an interpretation of its terms reached in good faith.[54] *Pacta sunt servanda* rises to the level of "a constitutional norm of superior rank" in international law and thus must not be ignored.[55] Indeed, *pacta sunt servanda* is the tool invoked by legal positivists to bind states in circumstances where they may not have expressly consented.[56]

The ICJ has affirmed that trust and confidence play a role in good faith.

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential.[57]

Thus, the efficacy of treaties is reliant on the trust and confidence of states that their counterparts will act in good faith with respect to their obligations, even if those obligations may vary significantly in both form and substance.

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[52] Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 7; Boyle & Chinkin, *supra* note 4, at 182-185.

[53] Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 26.

[54] James Crawford, Brownlie's Principles of Public International Law (Oxford Univ. Press, 8th ed. 2012) at 377.

[55] Oliver Dorr & Kirsten Schmalenbach, eds., Vienna Convention on the Law of Treaties: A Commentary, Springer Nature, Berlin (2nd. ed. 2018) at 475.

[56] Kennedy, *supra* note 25, at 25; Boyle and Chinkin, *supra* note 4, at 14.

[57] *Nuclear Tests* (New Zealand v. France) (1974) I.C.J. Rep. 457 ¶ 49.

As the due regard principle articulated in Article IX of the Outer Space Treaty is both part of a treaty and phrased as a direct obligation "*shall* conduct all their activities…with due regard for the corresponding interests of all other States Parties" (emphasis added), it is binding.[58] The related obligation that a state "shall undertake appropriate international consultations" in the event it has reason to believe its activities "would cause potentially harmful interference with the activities of other States Parties…" is likewise binding.[59] Both inherently come with a requirement to act in good faith. It is important to note the qualified nature of the consultation obligation, however, which is not overly broad. To phrase it another way, an activity that would (*not* may) cause interference, in which that interference could potentially rise to the level of *harmful* (not simple interference), would trigger the consultation obligation. Likewise, there is no obligation to avoid the harmful interference in actuality, but merely to consult in a good faith effort to resolve it.

B. Rules of Treaty Interpretation

The purpose of treaty interpretation is to arrive at a common understanding of treaty terms that is at once obvious, logical, and effective.[60] The text of Article 31 of the VCLT has established itself as the primary tool for treaty interpretation and is widely considered to have crystallized into customary international law.[61] Though only a subsidiary source, and thus persuasive rather than dispositive, the ICJ has repeatedly confirmed the customary international law status of these interpretive rules.[62] In fact, it has been asserted that there is no instance in which the ICJ has found the VCLT does not represent an accurate depiction of customary international law in this regard.[63]

To summarize and paraphrase Article 31, treaty interpretation is conducted:

- In good faith
- In accordance with the terms' ordinary meaning
- In their context, which includes:

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58 Raustiala, *supra* note 49.

59 Outer Space Treaty, *supra* note 1, at Art. IX.

60 Olivier Corten & Pierre Klein eds, The Vienna Convention on the Law of Treaties: A Commentary, Vol. I, (Oxford Univ. Press 2011) at 808.

61 *Id*. at 817-823, 826; Boyle & Chinkin, *supra* note 4, at 191; Crawford, *supra* note 54, at 380.

62 Territorial Dispute (Chad v. Libya), Judgement, 1994 I.C.J. Rep. 22, ¶ 41 (Feb. 3); *see also* Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), Judgement, 1993 I.C.J. Rep. 50, ¶ 26 (June 14); Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgement, 1995 I.C.J. Rep. 18, ¶ 33 (Feb. 15); Oil Platforms (Islamic Rep. of Iran v. U.S.), Judgement, 1996 I.C.J. Rep. 812, ¶ 23, (Dec. 12); Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. ¶ 94 (July 9); Sovereignty Over Pulau Ligitan and Pulau Sipadan, 2022 I.C.J. Rep. 645, ¶ 37 (Dec. 17); Avena and Other Mexican Nationals (Mexico v. U.S.), Judgement, 2004 I.C.J. Rep. 12, ¶ 47 (Mar. 31); Application of the Conv. on the Prevention and Punishment of the Crim of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgement, 2007 I.C.J. Rep. 43, ¶ 109-110 (Feb. 26).

63 Anthony Aust, Modern Treaty Law and Practice (Cambridge Univ. Press 2000) at 11.

- The full treaty text, including preamble and annexes
- Agreements relating to the treaty by all parties connected with the treaty's conclusion
- Instruments made by one or more parties in connection with the conclusion and accepted by other parties

- In light of their object and purpose
- Taking into account
  - Subsequent agreements between the parties regarding interpretation or application of provisions
  - Subsequent practice in application that establishes interpretive agreement
  - Relevant applicable international law rules.

Here again, we see the emphasis of good faith employment of treaties re-emphasized, harking back to *pacta sunt servanda*. Good faith in treaty interpretation requires the application of a standard of reasonableness.[64] By its nature, the due regard principle relies on good faith and must be applied consistent with a reasonable assessment of a state's own national interests as well as other states' corresponding interests in space activities. Here, we see that the concerns of realists focused on state interests can be effectively addressed. The provision expressly takes state interests into account. States must consider the interests of other states and make a good faith assessment as to whether their own activities unduly infringe on the rights of those other states to exercise freedom of exploration and use of outer space. The delimitation of which interests may be considered "corresponding" under Article IX of the Outer Space Treaty is beyond the scope of this article.

C. Ordinary Meaning: Due Regard and Disregard

The prominence of ordinary meaning within Article 31 emphasizes the primacy of textual interpretation, first taking the terms used by the party at their face value.[65] The ordinary meaning in question is "what a person reasonably informed on the subject matter of the treaty would make of the terms used."[66] In the case of *due regard*, the dictionary definition a layperson might use is not markedly dissimilar from a legal application. Miriam-Webster defines 'due regard' as "with the proper care or concern for."[67] Black's Law Dictionary defines the term to mean "to give a fair consideration to and give sufficient attention to all of the

[64] Dorr & Schmalenbach, *supra* note 55, at 587.

[65] Corten & Klein, *supra* note 60; Dorr & Schmalenbach, *supra* note 55; Crawford *supra* note 54, at 379.

[66] Dorr & Schmalenbach, *supra* note 55, at 581.

[67] *Due Regard*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/with%20due%20regard%20to.

facts."[68] It is important to note that the level of diligence required is qualified in both definitions – *proper* care, *fair* consideration, or *sufficient* attention. Thus, there is no requirement for total or complete regard, due regard is a level of regard that is reasonable under the circumstances.

According to the *Cologne Commentary on Space Law*, due regard "refers to the performance of an act with a certain standard of care, attention or observance. The requirement of 'due regard' is indeed a qualification of the rights of States in exercising the freedoms in outer space…"[69] Scholars of international environmental law have contributed to the discussion of the ordinary meaning of due regard. One approach taken has been to contrast due regard with disregard. For example, "Disregard evinces disrespect; due regard promises respect, tempered by the reality that respect for all inevitably involves tradeoffs and judgments."[70] Thus, acting with due regard inherently implies acting without unjustified disregard.[71] The consultation provisions also provided in Article IX provide an opportunity to demonstrate *prima facie* avoidance of unjustified disregard.

Consultations are neither a "mere formality" nor a "right of veto" by the affected state.[72] If consultations are conducted in good faith and a determination is made that the harmful interference cannot be avoided, those consultations can serve as evidence that the ensuing activity would be conducted with due regard, thus the harmful interference caused could be considered justified disregard. That said, we must differentiate between the two individual obligations to act with due regard and to conduct consultations and must also understand that due regard and harmful interference can coexist in conformity with the treaty, even in a circumstance where consultations have not occurred.[73] That said, it is useful to consider the distinct but related obligations when analyzing responsible behavior.

Inherent in the principle of due regard is a balancing test that maximizes the rights of states to use and explore space while attempting to minimize – but not completely eliminate – harmful interference. Put more simply, due regard is *optimal* regard; an optimized standard to allow the overall maximal use and exploration of space by all parties.

Some scholars have characterized the due regard principle to be too vague or ambiguous to constitute a binding obligation. Professor Bin Cheng stated that "[t]he duties and rights involved amount hardly to even *obligatio imperfecta*."[74] Professor Stephan Hobe refers to it as the "so-called" due regard principle, says "[i]t is hard to regard this as a stringent obligation of a State[,]" and instead characterizes it as a "general notion."[75] By comparison, however, the due regard

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[68] *Due Regard*, Black's Law Dictionary (2nd ed. 1910).

[69] Marchisio, *supra* note 12, at 176.

[70] Jonathan B. Weiner, *Disregard & Due Regard,* 29 N.Y. Env. L. J. 437, 440 (2021).

[71] *Id.*

[72] Marchisio, *supra* note 12, at 180.

[73] John S. Goehring, *Can We Address Orbital Debris with the International Law We Already Have? An Examination of Treaty Interpretation and the Due Regard Principle*, 85 J. Air L. & Com. 309, 337 (2020).

[74] Bin Cheng, Studies in International Space Law (Oxford: Clarendon Press, 1997) at 403.

[75] Stephan Hobe, Space Law (Chicago: Hart Publishing, 2019) at 89, 108.

principle is not on its face any more ambiguous, imperfect, or difficult to evaluate than the rule of *pacta sunt servanda*, which blends the binding nature of treaties with good faith.[76] *Pacta sunt servanda* is also a conduct rule that is context specific, but is instead lauded as a cornerstone essential to the functioning of international law.[77] The distinction in applicability is illusory.

D. Analogous Contexts

While there is danger in overreliance on analogies for the development of space law, carefully used analogies can be helpful.[78] The due regard principle also exists in international environmental law, maritime law, air law, and other contexts. Indeed, the Cologne Commentary on Space Law recognizes that "Article IX is clearly related to other branches of international law, such as the legal regime of the high seas and international environmental law."[79] In the absence of significant practice on the application of due regard in space, we can turn to analogous contexts where due regard is conceptually the same though may be practiced differently.

Due regard has been interpreted in a maritime context by courts and tribunals. While the same term can have different meanings in different treaties and different applications of *lex specialis*, it is reasonable to assume that the ordinary legal meaning of the term itself is broadly similar in maritime law and space law. Thus, we may turn to these decisions as subsidiary sources in accordance with paragraph 1.d. of Article 38 of the I.C.J. Statute.[80]

The clearest and most helpful explanation of the term 'due regard' comes from the *Chagos Marine Protected Area Arbitration* decision by the Permanent Court of Arbitration: "…the ordinary meaning of 'due regard' calls for the [State party] to have such regard for the rights of [another State party] as is called for by the circumstances and by the nature of those rights. The Tribunal declines to find in this formulation any universal rule of conduct."[81] The *Chagos* formulation of the due regard principle helpfully clarifies that it does not apply the same way in all contexts.

This formulation indicates that any particular action or failure to act can be evaluated in its context to determine conformity with the legal rule. Additionally, a reasonable interpretation of the principle allows us to identify specific behaviors as being carried out with or without due regard in certain contexts. Those contexts may be, for examples, based on orbital regime, type of celestial body, or category of activities in question. Thus, if states so agree, the due regard principle can require a higher level of regard to other states' scientific activities when compared to commercial or other non-exploratory purposes. With this

[76] Kennedy, *supra* note 25, at 43.

[77] *See supra* note 55, *Pacta Sunt Servanda* section above.

[78] Lachs, *supra* note 12, at 21.

[79] Marchisio, *supra* note 13, at 170.

[80] I.C.J Acts & Docs., 18 April 1946, 59 Stat. 1031, art 38(1).

[81] The Chagos Marine Protected Area Arbitration (Mauritius v. U.K), Award, ¶ 519 (Perm. Ct. Arb. 2015).

understanding, the due regard principle lends itself especially well to intersubjective norm development, providing opportunities for states to iteratively act and interact in a variety of contexts.

E. State Practice in Space

Though the due regard principle has largely been ignored by states, "it is out of the question to envisage an amendment or termination of the treaty by lapse."[82] It is appropriate to consider evolving state practice under the principle, enabling flexibility for the treaty to grow and develop alongside the activities it is meant to regulate.[83] It is not too late to breathe new life into the due regard principle that is, in point of fact, really the due regard rule.

According to Article 31 of the VCLT, the practice in question must establish subsequent agreement by the states parties,[84] though such agreement may be confirmed by the silence of some parties constituting acceptance of the practice.[85] If such an agreement is not established by the practice, then it can be taken into account under Article 32 of the VCLT.[86] It is important to note that one can establish state practice through the behavior of those states engaging in the regulated activity, even if not all relevant states engage in said activity.[87] The practice "of [s]tates whose interests are specially affected," however, is essential.[88] There is "probative value" in the practice of individual states,[89] though in this context VCLT Article 32 may relegate.

As state practice with respect to the due regard principle has not risen to the level of subsequent agreement, it is not at this stage of development directly relevant to the interpretation of the provision itself. That said, due regard has been referenced and identified in such documents as the *NASA Recommendations to Space-Faring Entities* and the *Artemis Accords*.[90] The *NASA Recommendations* are particularly noteworthy in the space science context, given the scientific value of studying the equipment left behind on the Moon more than fifty years ago during the Apollo missions. These demonstrations of state practice can help to put the community of states on a path toward evidence of interpretive agreement in the future, if other states are also willing to make due regard a cornerstone of their practice. Likewise, it will be essential for states to use the principle

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[82] Corten & Klein, *supra* note 60 at 828 (citing *Gabčíkovo–Nagymaros Project (Hungary v Slovakia)* I.C.J. Rep 1997 p. 7).

[83] Georg Nolte, Treaties and Subsequent Practice (Oxford: Oxford University Press, 2013) at 86.

[84] Dorr & Schmalenbach, *supra* note 55, at 596-601.

[85] ILC Report, 68th Session (2016) U.N. Doc. A/71/10.

[86] *Id*.; Dorr & Schmalenbach, *supra* note 55, at 603.

[87] *See generally*, *Legality of the Threat or Use of Nuclear Weapons Advisory Opinion* I.C.J. Rep. 1996 at 226.

[88] *North Sea Continental Shelf*, *supra* note 48, at 43 ¶ 74.

[89] Crawford, *supra* note 54, at 382.

[90] *NASA's Recommendations to Space-Faring Entities: How to Protect and Preserve the Historic and Scientific Value of U.S. Government Lunar Artifacts* (20 July 2011), https://www.nasa.gov/pdf/617743main_NASA-USG_LUNAR_HISTORIC_SITES_RevA-508.pdf at 6.

to differentiate behavior that does and does not conform with the principle of due regard and therefore the Outer Space Treaty.

It is regrettable that very few responses to the November 2021 direct assent anti-satellite weapon test by the Russian Federation invoked the language of regard. Interestingly, those that did so came from the defense community – particularly General Dickinson, the United States Space Command Commander and from the United Kingdom Minister of Defense.[91] The United States Department of Defense has been particularly forward leaning both in terms of norms of responsible behavior and application of the due regard principle.[92]

It does, however, appear that that the test may have generated a focus point for action on consensus-building and norm development with the objective of banning precisely the type of test Russia carried out.[93] On 18 April 2022 the U.S. Vice President announced that the U.S. committed they would not "conduct destructive, direct-ascent anti-satellite (ASAT) missile testing."[94] The US then worked to build consensus around this commitment and subsequently introduced a resolution at the U.N. First Committee, which spurred states to communicate their positions on the subject. By the end of the year, the U.N. General Assembly adopted the U.S. draft resolution calling on states not to conduct such tests, entitled "Destructive -direct-ascent anti-satellite missile testing" in a vote of 155 in favor to 9 against with 9 abstentions.[95] While the resolution unfortunately does not tie the ASAT test ban to the due regard principle, this series of events does provide an example of intersubjective norm creation.

F. Subsequent Agreements

Subsequent agreements can be a means of interpretation in accordance with Article 31 of the VCLT. The term 'agreements' does not have definition under Article 31, and it is notable that if the intent were to limit the scope of such agreements to treaties or conventions, the drafters could have employed one or both of those terms instead. Additionally, Article 31 specifies that subsequent practice can also be demonstrated through an 'agreement' thus indicating that the term used throughout the VCLT is not limited to legally binding conventions

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[91] James Dickenson (@US_SpaceCom), Twitter (Nov. 15, 2021) https://twitter.com/US_SpaceCom/status/1460366530122686466.

[92] Secretary Lloyd Austin, *Tenets of Responsible Behavior in Space*, U.S. Department of Defense, (2021), https://media.defense.gov/2021/Jul/23/2002809598/-1/-1/0/TENETS-OF-RESPONSIBLE-BEHAVIOR-IN-SPACE.PDF. Though there has been some criticism of the "unless otherwise directed" language in this memorandum (see Goehring, *supra* note 71), it is this author's view that the language was included to account for a situation of armed conflict in which peacetime obligations would be suspended with respect to the belligerents.

[93] Abbott, *supra* note 30, at 377.

[94] *FACT SHEET: Vice President Harris Advances National Security Norms in Space*, The White House (Apr. 18, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/18/fact-sheet-vice-president-harris-advances-national-security-norms-in-space/.

[95] Meeting Coverage, *Gen. Assembly Adopts over 100 Texts of First, Sixth Comm. Tackling Threats from Nuclear Weapons, Int'l Sec., Glob. Law, Transitional Justice*, U.N. General Assembly (Dec. 7, 2022), https://press.un.org/en/2022/ga12478.doc.htm.Meetings Coverage, U.N. Gen.

or treaties.[96] That said, States Parties must author subsequent agreements in whatever form.[97] Therefore, a United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) resolution adopted by consensus or another agreement authored by representatives of State Parties and adopted on behalf of those State Parties might constitute subsequent agreement for the purposes of treaty interpretation, even though the instrument is itself of a non-binding character.[98]

Though the Hague Building Blocks could be used as a basis for States Parties to author an agreement, the Building Blocks themselves could not constitute "subsequent agreement" because States Parties did not author them.[99] In contrast, however, UNCOPUOS negotiated and adopted the Remote Sensing Principles and thus could constitute subsequent agreement for the purposes of interpreting the Outer Space Treaty.[100] Interestingly, Principle IV implicates Outer Space Treaty Article IX due regard when addressing "the rights and interests…of other States and entities under their jurisdiction" in the context of the "full and permanent sovereignty of all States and peoples over their own wealth and natural resources."[101] The Long-Term Sustainability Guidelines would fall into the same category for potential applicability as a subsequent agreement, as they were likewise negotiated and adopted in UNCOPUOS. They limit their reference to due regard by reiterating that the guidelines are to be implemented in accordance with Article IX, rather than holding up sustainability as a specific subject area for further development of the principle.[102] The inclusion of the due regard language, however, is still important in reinforcing the role of due regard in the conduct of space activities.

In order to be useful in this context, norms articulated in a subsequent agreement should be of a fundamentally norm-creating character.[103] They should employ language that presents obligations (such as 'shall' or 'must') rather than creating open-textured pledges.[104] The Remote Sensing Principles are a good example of obligatory language in an otherwise soft law document.[105] In the absence of such language, even agreements expressly recognizing a link to Article IX of the Outer Space Treaty will be of an aspirational nature and will fail to add teeth to the existing due regard requirement.

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96 Hartmut Hillgenberg, *A Fresh Look at Soft Law*, 10 Eur. J. Int'l. L. 499 (1999).

97 Dorr & Schmalenbach, *supra* note 55, at 594.

98 Boyle & Chinkin, *supra* note 4, at 212.

99 Hague Int'l Space Res. Governance Working Grp., *Bldg. Blocks for the Dev. of an Int'l Framework on Space Res. Activities*, Int'l Inst. of Air and Space Law (2019), https://www.universiteitleiden.nl/binaries/content/assets/rechtsgeleerdheid/instituut-voor-publiekrecht/lucht--en-ruimterecht/space-resources/bb-thissrwg--cover.pdf [hereinafter Building Blocks].

100 *Principles Relating to Remote Sensing of the Earth from Outer Space*, UN Doc A/RES/41/65 (1986) at Principle IV [hereinafter Principles Relating to Remote Sensing].

101 *Id.*

102 Rep. of Comm. on the Peaceful Uses of Out Space, U.N. Doc. A/74/20, at I.16 (2019).

103 Cheng, *supra* note 74.

104 Raustiala, *supra* note 49.

105 G.A. Res. 41/65, *supra* note 100.

While tying norms of responsible behavior to the due regard obligation in the Outer Space Treaty is not as strong a mechanism as creating a new binding treaty with specific responsible behavior rules, it is stronger than stand-alone soft law mechanisms. "[O]nce soft law begins to interact with binding instruments its non-binding character may be lost or altered."[106] As such, agreed upon due regard duties can serve as a helpful intermediary measure between binding law and traditional concepts of soft law.[107]

G. A Note on VCLT Article 32

It is unnecessary to resort to the additional tools provided within the text of VCLT Article 32, even though they are considered customary and potentially available for use. Article 32 is specifically articulated as *supplementary* means of interpretation, used only in the case that a provision remains ambiguous or obscure, or where an Article 31 interpretation leads to a manifestly absurd result. In such cases, it would be appropriate to seek the preparatory work of the treaty and circumstances of its conclusion as interpretative tools.

While the term 'due regard' itself may be imprecise, Article 31 provides a clear guide for how it can be applied in varied contexts. The results of that Article 31 analysis do not yield ambiguous or manifestly absurd results, and thus it is unnecessary to rely on the drafting history of the treaty. As former I.C.J. Judge Manfred Lachs articulated of the co-operation and due regard provisions in Article IX of the Outer Space Treaty

These principles may have been couched in very general and broad terms and supplemented with only a few specific rules, some of which themselves lack precision. Be this as it may, the provisions in question can hardly be regarded as nominal or devoid of substantive meaning. Nor could the rights arising out of them be viewed as imperfect, for they have become *vincula juris*, thus it can hardly be suggested that they were not intended to become effective. It may have been premature to enter into any more detailed specification of them or of the corresponding obligations. But the need for this will grow in confrontation with practice, while adequate interpretation will be called for in concrete situations. It is, however possible even now to estimate the broad consequences of these principles and rules.[108]

Thus, a lack of precision does not either remove their effectiveness nor render them so obscure that they cannot be interpreted and applied effectively with the tools offered in the primary rules of treaty interpretation.

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[106] Boyle & Chinkin, *supra* note 4, at 213.

[107] Daly, Rees, & Curtis, *Enhancing the Status of UN Treaty Rights in Domestic Settings*, University of Liverpool School of Law and Social Justice (2018), https://www.liverpool.ac.uk/media/livacuk/law/2-research/ilhru/EHRC,Enhancing,the,Status,of,UN,Treaty,Rights.pdf.

[108] Lachs, *supra* note 12, at 108.

IV. Examples

While there are a significant number of potential applications for the due regard principle in modern space activities, this paper endeavors to provide examples of current issues in international space law that the due regard principle could help to resolve.

A. Space Science

'Exploration' and 'use' are used in conjunction throughout the Outer Space Treaty, including in its full title "Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies."[109] While commercial activities are implied rights within the term use, it is not clear how scientific activities that fall within the realm of exploration are treated vis-à-vis such commercial activities.[110] Should both activities be treated with equal respect? Should participants in both types of activities be subject to the same level of restrictions? While there may be valid reasons to protect exploratory scientific activities to a greater extent than other uses of space, it is not clear on its face that the Outer Space Treaty offers such heightened protection.

Freedom of scientific investigation is a specifically and independently granted right in Article I of the Outer Space Treaty, and an emphasis is placed on international cooperation particularly with regard to scientific endeavors in the preamble. Neither of those facts, however, would be sufficient to indicate an inherent predisposition to treat scientific activities in space with a higher standard of care than other activities. While Judge Lachs suggested the scientific investigation provision "indicates an intention to extend to it a special legal protection" he also recognized that doing so would "require further elaboration in detail" beyond anything offered in the Outer Space Treaty.[111] This provision calls to the attention of states the particular importance of scientific investigation within the context of exploration.[112] Thus, it is a good candidate for elaboration within the context of the due regard principle.

B. Planetary Protection and COSPAR

The Committee on Space Research (COSPAR) is comprised of national scientific institutions and international scientific unions, and therefore agreements emerging from COSPAR themselves cannot be considered subsequent agreements for the purposes of treaty interpretation.[113] However, to the extent that they contribute to the development of such subsequent agreements or result in state

[109] Outer Space Treaty, *supra* note 1, at 205.

[110] Stephan Hobe, *Article I of the Outer Space Treaty*, *in* Cologne Commentary on Space Law Vol. I: Outer Space Treaty 176 (Hobe, Schmidt-Tedd, Schrogl eds., 2010).

[111] Lachs, *supra* note 12, at 44.

[112] Hobe, *supra* note 110, at 36.

[113] *Supra*, see *Subsequent Agreements* section above.

practice utilized to interpret the terms of a treaty, they can still be highly valuable. They can, and have, also contributed to the intersubjective development of contamination norms for celestial bodies.

COSPAR "advises, as required, the UN and other intergovernmental organizations on space research matters or on the assessment of scientific issues in which space can play a role[.]"[114] The objectives of the organization are to "promote on an international level scientific research in space, with emphasis on the exchange of results, information and opinions, and to provide a forum, open to all scientists, for the discussion of problems that may affect scientific space research."[115] Therefore, COSPAR plays an important role in our evolving understanding of the role of space science.

In particular, COSPAR is well-known for its Policy on Planetary Protection, specifically for the categorization of forward contamination risk and procedures that should be taken to mitigate such risk depending on the relevant categorization.[116] The Policy expressly ties itself to the contamination language in Article IX of the Outer Space Treaty and articulates the purpose of the Policy "as an international standard on procedures to avoid organic-constituent and biological contamination in space exploration, and to provide accepted guidelines in this area to guide compliance with the wording of the UN Outer Space Treaty and other relevant international agreements."[117] On its face, it creates a clear relationship between the guidelines it proposes and the legal obligations agreed to by States Parties to the Outer Space Treaty.

While the Planetary Protection Policy has largely been well-respected, at least to a level of practicability in the course of state activities in space, it is not directly applicable to private actors unless states take steps to implement the Policy domestically. It is not itself a binding legal document, and thus does not incur an obligation for states to enforce it (on public or private actors) unless state practice is considered to rise to the level of an interpretation of the contamination provisions under Article IX or if an argument can be made that the rules articulated within the Policy have crystallized into customary international law (for the purposes of this paper, it is not necessary to reach either conclusion).

With the promulgation of private activities involving celestial bodies, space science is in jeopardy unless specific guidelines can be implemented by States Parties to the Outer Space Treaty to protect such endeavors from harmful forward contamination. Those guidelines need not be identical to those offered in COSPAR's policy. It is worth noting that there does not appear to be agreement that private actors should be held to the same standard as space agencies, as private parties themselves are not necessarily engaged in space science, and thus do not necessarily risk harm to their own activities by contamination. That said,

114 *About*, COSPAR (June 29, 2023), https://cosparhq.cnes.fr/about/./.

115 *Id.*

116 *COSPAR Policy on Planetary Protection*, COSPAR (Aug. 29, 2022), https://cosparhq.cnes.fr/cospar-policy-on-planetary-protection/./.

117 *Id*.

in the United States, the FAA incorporates the planetary protection rules when conducting payload review.[118]

One infamous instance of potential contamination was hidden from the regulators in question (the US and Israel) by the private foundation carrying out the space activity. In that instance, dormant tardigrades crashed into the lunar surface along with the Beresheet lander.[119] Given the relatively low risk related to contamination on the lunar surface, if used the Policy would have only required the execution of a relevant mission planning documentation. However, they did not carry out that step, given the avoidance of regulatory oversight. Though the incident is unlikely to have any significant effect on space science, it highlights uncertainties that exist around protection of future scientific endeavors.

These uncertainties could be resolved with the help of the due regard principle. A consensus adopted UNCOPUOS resolution that expressly created nexus with both the due regard principle and the contamination provisions of Article IX would have significantly more legal influence than a document without such nexus, particularly if UNCOPUOS members agree that that the norms stated in the document represent an interpretation and implementation of Article IX. Though negotiations are likely to be difficult, the conversations about both planetary protection and the relationship between space science and other space activities are essential to address before it is too late and valuable discoveries are lost.

Even in the absence of such a negotiated document, states should invoke the obligations articulated in Article IX when discussing the planetary protection measures implemented on both public and private space activities. These invocations help to demonstrate state practice moving forward as a potential treaty interpretation tool, in accordance with the articulated treaty interpretation rules in Article 31 of the VCLT.[120] One significant contaminating event can render a plethora of space science activities moot and damage humanity's potential understanding of the history of the universe.

C. China's Article V Submission

Crewed space missions, particularly crewed space science missions, are arguably the activities in need of the strongest protections. The emphasis on the well-being of astronauts and personnel of a spacecraft is apparent in both Article V of the Outer Space Treaty and in the Return and Rescue Agreement.[121] That said, the additional duties expressly imposed when human lives in space are implicated are quite limited: inform of phenomena dangerous to life or health

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[118] Johnson, Porras, Hearsey, & O'Sullivan, *The Curious Case of the Transgressing Tardigrades (Part 1)*, The Space Review, (Aug. 26, 2019), https://www.thespacereview.com/article/3783/1

[119] Loren Grush, *Why stowaway creatures on the Moon confound international space law*, The Verge (Aug. 16, 2019), https://www.theverge.com/2019/8/16/20804219/moontardigrades-lunar-lander-spaceil-arch-missionfoundation-outer-space-treaty-law.

[120] *Supra*, see *Treaty Interpretation* section above.

[121] Agreement on the rescue of astronauts and the return of objects launched into outer space, *opened for signature* Apr. 22, 1968, 672 U.N.T.S. 119 [hereinafter Rescue and Return Agreement].

of astronauts, inform of the discovery of astronauts in distress, provision rescue efforts in circumstances of distress/emergency, and safely and promptly return of astronauts/personnel upon their rescue.[122] The latter three obligations are only triggered when specific personnel are already in circumstances of distress, so do not govern behavior leading to those circumstances.

In perceiving a threat from the proximity of Starlink satellites, China opted to rely on the Article V call to inform the Secretary General of discoveries of phenomena dangerous to the life or health of astronauts. Though an initial reading might prompt one to assume that the language contemplates natural phenomena, China interpreted the language to include human-made phenomena. In December of 2021, they filed a note verbale explaining the potential danger Starlink posed to their personnel aboard the China Space Station.[123] In so doing, China failed to invoke Article IX, either for the due regard principle or to request international consultations. Of course, there are likely political reasons for that choice that have little to do with the interpretation of Article IX.

D. Application of Due Regard to the Protection of Space Science

Clearer guidelines for due regard are needed when involving human lives in space. Particularly, there is also a need to determine whether there are different categories of human activity warranting different protections. The ongoing debate regarding space tourists hints at obligations to tourists if they are not "personnel of a space object."[124] Regardless of the permutations, it seems clear that more regard is required to reach 'due' regard when operating in proximity to human lives in the hostile environment of space. Without further interpretive efforts, such standards do not exist, and States are left to their own devices to figure out how to communicate about the dangers to their personnel and how to protect them.

Further guidance is necessary for implementing the due regard principle for space science. While scientific activities in space enjoy a protected status as exploration and use, and any activities that contribute to development of scientific knowledge about the universe are beneficial for humankind,[125] there is no clarity regarding the status of space science vis-à-vis other space activities. Is a higher standard of regard appropriate to protect current scientific endeavors (framed in terms of the reciprocal obligation of due regard owed to other States Parties engaged in space activities)? What about future potential scientific missions (framed in terms of the *erga omnes* obligation to preserve high value celestial bodies or regions for scientific investigation)? Do crewed space endeavors warrant more regard than uncrewed ones? Within the scope of crewed activities, does space science call for more regard than space tourism? These questions can

122 Outer Space Treaty, *supra* note 1, Art. V; Rescue and Return Agreement, *supra* note 121.

123 Information furnished in conformity with the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, U.N. A/AC.105/1262 (Dec. 3, 2021).

124 *See, e.g.*, Lyall Franics & Paul Larsen, Space Law: A Treatise, 129 (2009).

125 Hobe, *supra* note 75, at 74-75.

all be engaged through the lens of the due regard principle. The principle can be used to add legal significance to guidelines that may emerge as the proliferation of public and private space activities continues.

E. Safety Zones

At what point does the universal right to use and explore space result in circumstances of congestion under which further development of space activities becomes onerous? With the proliferation of space activities, does the safety of space objects get called into such significant question as to risk the viability of investment in commercial space companies? At what point is the security of government-owned space objects at significant risk of miscommunication and misperception that could lead to dangerous and destabilizing escalation? Of course, the objective should be to avoid having to ask these questions at all, and instead to rely on the development of norms of responsible behavior in space to mitigate these risks.

Normalizing safety zones and creating parameters for their implementation is one obvious and oft discussed method to reduce risk to the safety and security of space objects. The topic of such zones has been under discussion at least nominally since the 1960s and in a more significant manner since at least the late 1980s.[126] These zones have previously gone by several names, such as keep-out zones, operational zones, safety zones, identification zones. Safety zones is currently the most often used term. While there may be a more suitable name – coordination zones, perhaps? – 'safety zones' have become a recognized term in the literature, and thus will be used here. The 'safety zone' formulation is in line with the Outer Space Treaty, mitigating concerns regarding appropriation, aggression, and inequitable treatment. 'Keep out zones' in particular would present problematic optics, calling into question freedom of access in space (on a non-discriminatory basis) in Article I as well as potentially running afoul of a non-appropriation smell-test based in Article II. It is also worth noting that the connotation of 'keep out zones' as a speech act could have detrimental results preventing the intersubjective development of a norm relating to their use. 'Safety zones,' however, invokes a response that sounds in due regard.

To the extent that the due regard principle is an underlying fundamental limitation on the right to freedom of use held by all states, safety zones are a logical and reasonable conclusion. It is much easier to act with due regard for another state's space activity if that state articulates clearly, either individually or as part of a normative agreement, what a safe distance from that object might be. Therefore, safety zones expressly formulated as expectations for due regard are a potential solution to help avoid those pesky 'at what point' questions that we hope to avoid.

While states have various interests that would call for the creation of a safety zone, these interests must be balanced with the interests of other states and their

[126] Kenneth F. Schwetje, *Protecting Space Assets: A Legal Analysis of "Keep-Out Zones"*, 15 J. Space L. 131 (1987).

right to free access and use of space.[127] The Outer Space Treaty creates other limitations on free use of space, which "demonstrate that the freedom of exploration and use of outer space for which the [Outer Space Treaty] provides is not absolute, but must be balanced against the legitimate interests of other States[.]"[128] By some interpretations, there is a 200 kilometer 'keep out' zone around the International Space Station (ISS), though its articulation is essentially contractual in nature.[129] It is possible that the lack of controversy around the ISS safety zone is due to its contractual nature or the heightened importance of humanitarian considerations for crewed objects, or a combination of these and other factors.

There have been several justifications given for the application of safety zones, particularly "on the basis of space law concepts of harmful interference and due regard."[130] Safety zones have also been tied to the quasi-territorial jurisdiction offered to space objects under Article VIII of the Outer Space Treaty.[131] A formulation under Article VIII, however, does not preclude a complementary application of Article IX. Of course, a state holds an interest in the safety and security of any object for which they hold quasi-territorial jurisdiction.[132] Therefore, the preservation of a space object is the state's interest under Article IX.

The purpose of this paper is not to address other specific justifications for safety zones, such as those for ongoing military operations in a conflict, but rather to address how the due regard principle can be used broadly in the application of safety zones. It is interesting to consider, however, whether there could be a possible relationship between the customary international law right to self-defense and the creation of a zone requiring operators of a spacecraft to identify themselves prior to a close approach to a specific space object or constellation. Acting with due regard in the case of a high-value military asset, such as a missile warning satellite, might require a heightened level of communication to avoid misperception of hostile intent or imminent armed attack and potentially dangerous escalation. Of course, for such a justification of a safety zone to be reasonable, a state would have to be willing to disclose that the object in question is just such a high value military asset.

F. In Orbit

Safety zones for objects in orbit or otherwise keeping station in the void of outer space, for example in a LaGrange point, will operationally be treated

127 Matthew Stubbs, *The Legality of Keep-Out, Operational, and Safety Zones in Outer Space*, *in* War and Peace in Outer Space: Law, Policy, and Ethics 203 (Cassandra Steer & Matthew Hersch, eds., Oxford Univ. Press 2021).

128 *Id.* at 206.

129 Melissa de Zwart, *To the Moon and Beyond: The Artemis Accords and the Evolution of Space Law*, *in* Commercial and Military Uses of Outer Space 75 (Melissa de Zwart & Stacey Henderson, eds., Springer 2021); Stubbs, *supra* note 127.

130 de Zwart, *supra* note 129.

131 Outer Space Treaty, *supra* note 1; Stubbs, *supra* note 127, at 205.

132 *See generally* Outer Space Treaty, *supra* note 1, Art. VIII.

distinctly from safety zones that would apply to celestial bodies.[133] The physical considerations of relevance for orbital activities are fundamentally different. Objects in orbit are traveling at incredibly high rates of speed, and the possibility of collision risks the creation of debris that could cause a cascade and damage other objects and/or make operations in that orbital plane more difficult.

Even among different orbital regimes, different norms with respect to safety zones will need to apply. Take for example, the Geostationary Orbit ("GEO"). GEO is a congested limited resource, where operators employ fleet management including frequent movement of space objects.[134] To reduce the risk of collision or harmful interference, "the satellite telecommunications operators have established a shared and common database of technicalities associated with each satellite they operate, which can facilitate safe movements and close locations[,]" a practice which could be developed into a GEO norm, to reduce the size of any needed safety zones and ensure safe operation.[135]

The flexibility of the due regard principle means that norms could be articulated to apply a differing due regard standard dependent on context. Context could include factors such as orbit, purpose or function (are some activities accorded more regard than others?), and whether the object is crewed or uncrewed. It is likely that the question of some activities requiring more protection than others through larger safety zones or heighted requirements for communication and coordination in those safety zones could be particularly contentious.

While it is unlikely that offering heightened protection to crewed objects would be contentious, at least in the short term, the idea of offering certain military satellites heightened protection would likely illicit a contentious response. On the one hand, while the GPS constellation is a Department of Defense asset, on the other it provides essential navigation signals that can be a critical factor in survival of patients being transported on Earth, as well as timing signals that maintain the functioning of our international banking system.[136] The example of missile warning satellites in the section above would be another potentially contentious consideration. A granular set of norms may not be desirable from the perspective of states who wish maintain relative secrecy around the specific functions or purposes of some of their assets.

It would be helpful for these questions to be articulated and the discussion started by an international group of experts, who can make recommendations to policymakers as to how to address these questions on the basis of their particular interests. Only then can progress toward consensus begin. It is heartening that such topics are within the scope of the OEWG established last year.[137]

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133 *What is a Lagrange Point? NASA: Solar System Exploration* (Mar. 17, 2018), https://solarsystem.nasa.gov/resources/754/what-is-a-lagrange-point/.

134 Constitution of the International Telecommunication Union, art. 44.2, Dec. 22, 1992, 1825 UNTS 390, 1996 UKTS 24.

135 Jean Francois Bureau, *Space Security and Sustainable Space Operations: A Commercial Satellite Operator Perspective*, *in* Handbook of Space Security: Policies, Applications and Programs Vol II at 1067, (Kai-Uwe Schrogl ed., 2nd ed. 2020).

136 10 U.S.C. § 2281(a); Andrea J. Harrington, *Regulation of Navigational Satellites in the United States, in* Routledge Handbook of Space Law (Ram S. Jakhu & Paul S. Dempsey, eds., 2016).

137 *See supra Context: Why Does Due Regard Matter?* section above.

G. On Celestial Bodies

Celestial bodies pose different potential considerations. Of course, the crewed versus uncrewed issue remains the same, as does the potential heightened value for science missions that would contribute to human understanding of the universe. That said, however, the high velocities of orbit and potential for debris cascade do not exist on celestial bodies. Instead, the risks are more likely risks of contamination, other interference with scientific endeavors, or damage caused by regolith displaced in other operations. Accusations of appropriation, however, are likely to play out differently in the application of safety zones on celestial bodies, given the likelihood that installations will be established in locations that provide good access to physical resources that can be used for fuel or 3-D printing, access to solar power resources, and access to good visibility for communication relays.

Possession and/or ownership of physical resources severed from celestial bodies complicate the question of safety zones, though the extraction and use of those resources is largely accepted as compliant with the Outer Space Treaty.[138] Both the Artemis Accords and the Hague Building Blocks have endeavored to normalize the use of safety zones and establish the permissibility of safety zones in accordance with the Outer Space Treaty. In the case of the Accords, such zones are intended to protect operations generally, as well as specifically with respect to the space resource sites contemplated in the same document.[139] The Hague Building Blocks expressly address resource utilization as their fundamental purpose.[140]

The preservation of humanity's heritage in outer space has already been raised as a concern.[141] Notably, the non-governmental organization *For All Moonkind* has elevated this issue both in the media and in UNCOPUOS discussions. How should safety zones be established around heritage sites that are, by their very nature, no longer in use? The *NASA Recommendations* provide one clear example of technical parameters to protect the scientific value of heritage sites, in that instance, the Apollo lunar landing sites.[142] If safety zones for heritage sites are normatively established, however, it will be necessary to establish parameters for determining additional heritage sites in the future. Such parameters will need to balance the equity of "space firsts" with the interests of developing countries only later venturing into space.

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138 *See*, e.g., Stephan Hobe et al, Does International Space Law Either Permit Or Prohibit The Taking Of Resources In Outer Space And On Celestial Bodies, And How Is This Relevant For National Actors? What Is The Context, And What Are The Contours And Limits Of This Permission Or Prohibition? (2016), https://iislweb.org/docs/IISL_Space_Mining_Study.pdf.

139 Artemis Accords, *supra* note 44.

140 Building Blocks, *supra* note 99.

141 *See* Andrea J. Harrington, *Preserving Humanity's Heritage in Space: Fifty Years After Apollo 11 and Beyond*, 84 J. AIR L. & COM. 299 (2019).

142 NASA Recommendations, *supra* note 90, at 6; *see also* Michelle Hanlon, *"Due Regard" for Commercial Space Must Start with Historic Preservation*, 9 Global Bus. L. Rev. 130, 151-152 (2021).

H. Application of Due Regard to Safety Zones

The goal of Article IX has been stated as "to build trust and informal coordination of space activities as a way to avoid ambiguity and miscommunication in the space domain that could lead to conflict."[143] Publicly stated safety zones would offer a means to avoid exactly such ambiguity and miscommunication. Ideally, those safety zones would be formulated on a broad consensus basis to apply to a range of space activities under varying circumstances. In the absence of such agreements, however, states can still provide data on how much area around their objects is necessary to ensure safety and security. That data should be communicated expressly in connection with Article IX as a formulation of how to act with due regard for the particular space activity in question. This behavior would not only increase safety and security of space operations but would also have the benefit of strengthening the due regard principle in a broader range of contexts and offering states opportunities for iterated interactions to build trust and confidence.

V. Due Regard as the Prime Directive

Though 'due regard' is a broad term, one cannot consider it to lack substantive meaning or binding force. Rather, it requires the implementation of a balancing test rooted in a reasonableness standard, reliant on the good faith of States Parties. None of these are unfamiliar concepts in either international or domestic legal systems. Those who would argue that due regard is too vague a requirement to be implemented on its own should consider that *pacta sunt servanda* is not considered to be too indeterminate.

Writing in 1972, Judge Lachs posed that the interests of states recognized in the due regard principle of Article IX "are to be construed on a basis of a reasonable interpretation of those rights. They constitute the limits of the freedom of action of States in outer space."[144] He further expounded that, while states have a right to freedom of access to all areas of celestial bodies that provides a right to establish installations, these rights shall only be exercised in a manner compatible with due regard.[145] This early analysis offered by one of the parents of international space law aligns with the idea that due regard is the thread that holds the tapestry of international space law together, the prime directive of international space law.

While some have discussed at conferences and workshops that due regard should be considered the "golden rule" of space law, that moniker introduces more challenges to the application of the principle. The golden rule is widely understood to be some formulation of "do to others as you would have them do to you."[146] First, this standard is an entirely subjective one. In a world of different

[143] Tanja Masson-Zwaan & Mahulena Hofmann, Introduction to Space Law 68, (4th ed. 2019).

[144] Lachs, *supra* note 12, at 43.

[145] *Id.* at 45.

[146] *Golden Rule*, Encyclopedia Britannica, https://www.britannica.com/topic/Golden-Rule (last visited Oct. 17, 2023).https://www.britannica.com/topic/Golden-Rule.

states with different cultures, forms of government, legal systems, and interests, such mirror imaging is not only unhelpful but downright dangerous, increasing the risk of misperception and escalation. Second, the rule is the basis of an ethical framework, rather than a legal regime.[147] The conflation of law and ethics is a pervasive problem that weakens the strength of existing legal regimes.

Though "prime directive" evokes *Star Trek*, it is a more reasonable title for the status of the due regard principle, even in that context. There is also precedent for applying the cultural context of *Star Trek* in discussions of actual space activities. Take, for example, the *Star Trek* exhibit offered by the Smithsonian National Air and Space Museum or the naming of the Space Shuttle prototype "Enterprise" in homage to the series that inspired so many people who subsequently dedicated their lives to space.[148] Also known as General Order One, the *Star Trek* prime directive can be characterized as a legal requirement with an objective interpretive lens.[149] While the obligation not to interfere with the development of pre-warp civilizations is certainly not itself relevant to modern international space law, the broader underlying rule "prohibits interference with the normal development of any society."[150] Thus, it can be understood that both the due regard principle and *Star Trek*'s General Order One are predicated on concepts of autonomy and sovereignty, maximizing freedom of action within reasonable limitations to avoid curtailing the freedom of action of others. Both also face challenges to their application (in their respective contexts) from those actors with a mindset akin to New Realism.[151]

The due regard principle calls for respecting the activities and interests of others, without needing to look deeper at the intent of those activities or the underlying reasons for the interests, reducing the risk of misperception or mirror imaging. It also inherently acknowledges the importance of individual state interests, a key sticking point for devotees of realist international relations theory. "There can be no doubt that the freedom of action of States in outer space or on celestial bodies is neither unlimited, absolute or unqualified, but is determined by the right and interest of other States."[152] This formulation aligns with Star Trek's "Prime Directive [that] reflects both a consequentialist commitment to reducing harm and a Kantian commitment to respecting the autonomy of others."[153] While evoking ethical philosophers, the directive presents objective rather than subjective standards, specifically harm reduction and maximized autonomy. Finally, a

147 *Id*.

148 Richard J. Peltz, *On a Wagon Train to Afghanistan: Limitations on Star Trek's Prime Directive*, 25 UALR L. Rev. 635, 636-37 (2003).

149 Andrew Steele, Interfering in a Non-Interference Policy: Defining Star Trek's Prime Directive (Aug. 2016) (Master's Thesis, Loyola University Chicago) (eCommons).

150 *Id*. at 14 (citing Okuda et al., Star Trek Encyclopedia: A Reference Guide to the Future: Updated and Expanded Edition at 385 (1999)).

151 For comparisons specifically relating to Star Trek's General Order One, see Peltz *supra* note 148, at 649-650.

152 Lachs, *supra* note 12, at 108.

153 Janet D. Stemwedel, The Philosophy Of Star Trek: Is The Prime Directive Ethical? (Aug. 20, 2015, 10:53 AM), https://www.forbes.com/sites/janetstemwedel/2015/08/20/the-philosophy-of-star-trek-is-the-prime-directive-ethical/?sh=62c3fbbb2177.

"catchy" name with relevance in popular culture can help to both raise the profile of the due regard principle and internalize the norm through repeated interactions, causing it to become a more well-known part of the constructed reality of international space law.

VI. Conclusion

In a system of due regard, unjustified disregard is what failure looks like. The community of states can determine whether behavior is responsible by its impact on the freedom of action of other individual states *and* the international community of states *erga omnes*.[154] In so doing, this formulation of responsible behavior manages both negative externalities (consequences on specific activities and actors) and potential inequity in uses of space overall.[155] It allows for taking into consideration the intergenerational and intertemporal interests that states (and all of humanity) have in the exploration and use of space.

Though it may satisfy positivist international law scholars who wish to see binding legal rules expressly agreed by states, beginning with intentional norm development is a rational choice in the reality of the international system as we know it today. This view of due regard assumes that states comply with international law both because of a sense of legal obligation and because that compliance is in their rational self-interest.[156] Due regard provides an adaptive legal system that can develop in accordance with changing technology, proliferation of human-made space objects, and entry to the space domain of a wider range of actors. As a binding treaty rule, due regard enables the use of existing *lex lata* to get to *lex ferenda*, law as it should be.

Due regard itself is an intermediary measure – weaker than specific binding obligations, but stronger than stand-alone soft law. It can be used to harden specific norms (add teeth to the interpretation of Article IX of the Outer Space Treaty) through subsequent agreements between States Parties. That said, states must be willing to commit to use of the tool and articulate that use in both contexts: responding to individual instances of irresponsible behavior demonstrating unjustified disregard and formulating new norms of behavior for different activities and contexts.

Meaningful behavior, or action, is possible only within an intersubjective social context. Actors develop their relations with, and understandings of, other through the media of norms and practices. In the absence of norms, exercises of power, or actions, would be devoid of meaning.[157]

It cannot be overemphasized that the onus rests with policy makers, diplomats, and other state officials to actively participate in the development of international space law in the social context of the international system, broadly conceived. Without such interactions, norm development will fall short and the likelihood

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154 *See* Barcelona Traction, *supra* note 9 (for *erga omnes* obligations), at ¶ 33.

155 Masson-Zwaan & Hofmann, *supra* note 143, at 68.

156 *See* Ohlin, *supra* note 37, at 147-153 for a discussion of the relationship between legal obligation and rational self-interest.

157 *See* Hopf, *supra* note 32, at 173.

of impending crisis or disaster in space as a result of miscommunication, misperception, or accident will increase. Active, intentional application of the due regard principle as the prime directive of international space law would allow such actors to skip ahead on the path to norm development and build on the firm foundation of the Outer Space Treaty.

Looted Heritage: An Examination of the HEAR Act as a Model to Address the Repatriation of African Art

Marguerite D. Fisher-Heath*

Abstract

Restitution claims for looted artwork are often limited to Western Art. Legislative acts supporting the return of artwork or items of cultural heritage place particular emphasis on the return of Nazi-looted artwork to European families. In 2016, the United States passed the Holocaust Expropriated Art Recovery Act ("HEAR Act") which created a uniform, federal six-year statute of limitations on civil restitution claims in the United States for the victims of Nazi-era persecution and their heirs to make a legal demand for the return of artwork or other cultural property. In this article, I argue that the HEAR Act is a promising model for international civil restitution claims and that the Act serves as a guide for the international artwork and heritage communities to engage with the cultural looting of the African continent as a result of colonization. I follow two pieces of artwork that are both involved in heritage disputes: one from Europe (*Rue Saint-Honore, apres-midi, effet de pluie*, Pissarro) and one from Africa (*Rosetta Stone*). In this Comment, I discuss the history of each object and the disputes that arose from attempts to get them back to their rightful owner. Through this discussion, I argue that the cultural theft that took place over centuries due to the colonization of the African continent merits the same consideration as stolen European works.

Table of Contents

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I. Introduction

Once completed, the Grand Egyptian Museum in Giza, Egypt will be the largest museum in the world devoted to a single civilization.[1] The museum will cover over 5 million square feet with an estimated price tag of more than one billion U.S. dollars.[2] In a museum of this size, located in a nation with history as rich as Egypt's, one would assume curators have access to an endless supply of inventory. However, much of Egypt's archeological and cultural property currently reside abroad in countries that also claim its ownership.

Unfortunately, Egypt's position is not unique, nations around the world find themselves in this exact position.[3] Due to decolonization and globalization, the importance surrounding the repatriation of cultural heritage and property to origin countries has grown.[4] People around the globe from Australian Aboriginal, Iraqi, Hawaiian, Māori, and Greek Cypriot heritage have implored museums for the return of their nation's artifacts.[5] Accompanying their requests for the return of artifacts is the underlying sentiment that restitution of these items would recognize the historic violence committed against their peoples as well as recognizing the spiritual importance of the items.[6]

African states are the leaders in the repatriation movement.[7] African states have asked the West to return cultural property taken unjustly since the end of World War II.[8] Most recently Nigeria, Mali,[9] and Egypt have led the fight. In June 2022, Nigeria successfully negotiated the return of items looted from the Benin Kingdom during the Benin Massacre of 1897[10] residing in Germany[11]

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[1] Aimee Dawson, *Grand Egyptian Museum '99%' Ready*, The Art Newspaper (Mar. 1, 2022), https://www.theartnewspaper.com/2022/03/01/grand-egyptian-museum-in-cairo-99percent-ready-as-designers-promise-theatrical-tutankhamun-gallery.

[2] *Id*.

[3] Becky Little, *Will the British Museum Ever Return These Stolen Artifacts?*, History (Oct. 3, 2023), https://www.history.com/news/british-museum-stolen-artifacts-nigeria.

[4] Elizabeth A. Klesmith, *Nigeria and Mali: The Case for Repatriation and Protection of Cultural Heritage in Post-Colonial Africa*, 4 Notre Dame J. Int'l & Compar. L. 45, 47 (2014).

[5] Naomi Polonsky, *Hundreds Attend Guerrilla, Activist-Led Tour of Looted Artifacts at the British Museum*, Hyperallergic (Dec. 10, 2018), https://hyperallergic.com/475256/hundreds-attend-guerrilla-activist-led-tour-of-looted-artifacts-at-the-british-museum/.

[6] *Id*.

[7] Klesmith, *supra* note 4, at 47.

[8] Elif Hamutcu, *Illicit Trade of Cultural Property: Who Owns African Art?*, Colum. Undergraduate L. Rev. (May 23, 2019), https://www.culawreview.org/journal/illicit-trade-of-cultural-property-who-owns-african-art.

[9] *Id.*

[10] Klesmith, *supra* note 4, at 47.

[11] Vittoria Benzine, *Concluding a Slate of Negotiations, Germany and Nigeria Plan to Sign an Agreement on the Return of Benin Bronzes From Berlin*, Artnet News (June 29, 2022), https://news.artnet.com/art-world/nigeria-germany-negotiations-benin-bronzes-2138851.

and the Smithsonian.[12] In August 2022, renowned Egyptologist, Zahi Hawass, announced his plan to petition European museums for the return of the Rosetta Stone.[13] By November 2022, the petition accumulated more than 100,000 signatures.[14] However, the restitution of African cultural property remains even more challenging because of the Eurocentric, Americentric, and colonialist undertones[15] that pervade these cases.

This challenge is exacerbated by the fact that there is currently no specific international protection regarding the theft of African heritage, other than general repatriation laws.[16] As this comment will discuss, general repatriation laws are dramatically outdated and nearly impossible to enforce. This limited protection in combination with the undercurrent of colonialism places the continents' most precious pieces in a disadvantaged position regarding their return to their place of origin. As one Cameroonian academic put it, "[t]his is not just about the return of African art, when someone's stolen your soul, it's very difficult to survive as a people."[17]

This Comment traces the legal protection for African cultural property, specifically Egypt's claim for the Rosetta Stone, and offer consideration of the HEAR Act as a promising model for international civil restitution claims. The Background section explores the history of looting and repatriation efforts, the definition of cultural heritage and its importance, an explanation of the HEAR Act, and the current state of the Rosetta Stone. The Discussion section examines the current international law, including its benefits and flaws. The Analysis section discusses the effect of the HEAR Act on European artwork and then analyzes its hypothetical impact on the Rosetta Stone. The Proposal examines current efforts of repatriation as well as the backlash toward it and suggests the global sentiment surrounding African Art must be treated with the same reverence as European artwork: without specificity in the global framework for the reparation of artwork in all continents, repatriation efforts will be ineffective. Finally, the Conclusion offers that the cultural looting which occurred during the colonization of Africa deserves its place of recognition on the global art and heritage stage. The HEAR Act offers a useful model to begin repatriating African Art.

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[12] Taylor Dafoe, *In a Landmark Vote, the Smithsonian Institution Officially Approves the Return of 29 Benin Bronzes to Nigeria*, Artnet News (June 15, 2022), https://news.artnet.com/art-world/smithsonians-board-votes-to-return-benin-bronzes-2131098.

[13] Francesca Aton, *Renowned Egyptian Archaeologist Calls for British Museum to Return the Rosetta Stone*, ARTnews (Aug. 22, 2022, 2:37 PM), https://www.artnews.com/art-news/news/what-rosetta-stone-return-egypt-british-museum-1234637096/.

[14] *Egyptians Call on British Museum to Return the Rosetta Stone*, PBS News Hour (Nov. 30, 2022, 6:58 PM), https://www.pbs.org/newshour/world/egyptians-call-on-british-museum-to-return-the-rosetta-stone; Taylor Dafoe, *More Than 2,500 Archaeologists Have United to Demand the British Museum Return the Rosetta Stone to Egypt*, Artnet News (Oct. 6, 2022), https://news.artnet.com/art-world/new-campaign-return-rosetta-stone-2187676.

[15] Hamutcu, *supra* note 8.

[16] Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

[17] Farah Nayeri, *Return of African Artifacts Sets a Tricky Precedent for Europe's Museums*, N.Y. Times (Nov. 27, 2018), https://www.nytimes.com/2018/11/27/arts/design/macron-report-restitution-precedent.html?searchResultPosition=2.

II. Background

A. The History of Cultural Looting

As Bonaventure Soh Bejeng Ndikung, a Cameroonian biotechnologist and founder of Berlin's Savvy Contemporary articulates, "recognizing repatriation calls for an of understanding the context in which it happens."[18] He explains:

Museums in the West assign economic and maybe a bit of epistemic value to these so-called 'objects.' But in the cases where these things come from, the value assigned to them is of a communal, spiritual nature. They have subjectivities. They have agencies. They determine people's destinies, but, when they end up in museums in the West, they become objects.[19]

Cultural heritage is defined as the "legacy of physical artifacts (such as buildings, monuments, landscapes, books, works of art, and artifacts) of a group or society that are inherited from past generations, maintained in the present, and bestowed for the benefit of future generations."[20] Cultural heritage carries a rare history that must place its security with future generations to conserve, safeguard, and protect this history.[21] For purposes of this comment, "cultural heritage" and "cultural property" will be used interchangeably. The United Nations Educational Scientific and Cultural Organization ("UNESCO") defines heritage as "the product and witness of the different traditions and of the spiritual achievement of the past and this an essential element of the personality of peoples."[22] As such, cultural heritage and property holds an invaluable role in cultural groups.

The popularity and news coverage around repatriation can blur the reality that demands for cultural property are new; however, some demands for cultural property span decades.[23] Art looting developed from wartime conquering and pillaging, expanding from the idea that conquerors have "right to booty".[24] Discussions surrounding art looting and theft frame this as solely a problem of the past.[25] Unfortunately, art looting remains a contemporary issue as evidenced by recent lootings in Afghanistan, Iraq, and Syria.[26]

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[18] Robin Scher, *Back to Where They Once Belonged: Proponents of Repatriation of African Artworks Take Issue with the Past*, ART NEWS (June 26, 2018, 10:00 AM), http://www.artnews.com/2018/06/26/back-belonged-proponents-repatriation-african-artworks-take-issue-past-present-future/.

[19] *Id.*

[20] Leila Amineddoleh, Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions, 24 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 729, 731 (2020).

[21] *Id.*

[22] UNESCO General Conference 15th Session, Recommendation Concerning the Preservation of Cultural Property Endangered by Public or Private Works (Nov. 19, 1968).

[23] *Id*.

[24] JIŘÍ TOMAN, THE PROTECTION OF CULTURAL PROPERTY IN THE EVENT OF ARMED CONFLICT 3 (1996).

[25] *See generally* Kanchana Wangkeo, *Monumental Challenges: The Lawfulness of Destroying Cultural Heritage During Peacetime*, 28 YALE J. INT'L L. 183 (2003).

[26] *Id*.

Originally the act of looting aimed to impoverish a conquered peoples of riches or food.[27] However, after the Napoleonic Wars looting started to include goods that were not necessities.[28] In the case of looting cultural heritage, "the Napoleonic, Nazi and Soviet regimes were all adept, the artworks or treasure had no intrinsic value, but an immense perceived value for the status of those regimes."[29] During World War II, cultural goods were looted on an unprecedented level.[30] Post-war records show that several million objects were looted, including museum quality works of art, furniture, books, religious objects, and other culturally significant works.[31] Cultural looting was so established that the Nazis formed a special department for seized objects.[32]

The magnitude of lootings by the Nazis highlights how the "right to booty" contorted into a sanctioned theft of cultural property. Eventually, the international community took action and incorporated principles of the 1863 Lieber's Code into international treaties.[33] The principle that neither public, nor private properties may be seized, destroyed, or taken during war was then included in subsequent international treaties:[34] first, the Annex attached to the Second Convention on the Laws and Customs of War on Land (1899 Hague II),[35] second, the Annex attached to the Fourth Convention concerning the Laws and Customs on Land (1907 Fourth Hague Convention).[36] While these Conventions prohibited seizure and destruction, they did not address the *restitution* of cultural property.[37] Many scholars wrote off this omission, a duty to restitute, as a customary international rule of which states would inherently abide.[38] This hypothesized customary international rule was affirmed in 1927 in *Mazzoni v. Finanze dello Stato*, where the Court of Venice affirmed the obligation of restitution.[39] Conclusively,

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27 *See generally* Ivan Lindsay, The History of Loot and Stolen Art: from Antiquity until the Present Day (2014).

28 *Id*.

29 *Id*. at 1.

30 *Id*.

31 *Id*.

32 *Id*.

33 Angela Saltarelli, *Restitution of Looted Art in Europe: Few Cases, Many Obstacles*, 25 La Propriedad Inmaterial 141, 142 (2018).

34 *Id*.; *see generally* War Dep't, General Orders No. 100: The Lieber Code Art. 38, (1863) [hereinafter Lieber Code]

35 Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land art. 28, 46, 57, July 29, 1899, 32 Stat. 1803, Hague Convention of 1899.

36 *Id.* (Art. 28 "The pillage of a town or place, even when taken by assault, is prohibited."; Art. 56(2) "All seizure of, destruction or willful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.")

37 Saltarelli, s*upra* note 33, at 142-43.

38 *Id.* at 143.

39 *Id.*; *see also* Corte di Venezia, 8 Gennaio 1927, Foro it. 1927, I, 961 (It.) (this decision stated that "the legal concept of war booty and plunder does not involve the inclusion of anything that is taken by the occupying army. According to the principles of international law booty is only taking possession of war object abandoned by the belligerent enemy and therefore it cannot be extended to include the looting that, while in ancient times was allowed to reward the zeal of troops, today is absolutely forbidden.").

in 1945, in the Charter of the International Military Tribunal of Nuremburg art looting was deemed a war crime encompassing the "plunder of public or private property."[40]

World War II was the catalyst for post-war treaties and the accompanying sentiment that possessor States were obliged not only to return looted property to origin States, but also to prevent and prohibit any illicit export of the cultural property.[41] State parties adopted laws to implement this obligation, recognizing a "presumption in favor" of the original, rightful owner.[42] For instance, under the First Protocol of the 1954 Hague Convention, State parties agreed to return cultural property without condition and without a time restriction.[43] Accordingly, States were the "custodians of looted property and not owners of it."[44] Today, however, these agreements have lapsed leaving no international convention specifically focused on the repatriation of cultural heritage stolen during World War II.[45]

The idea that States are custodians of looted property rather than owners of it, is a charged topic. A central obstacle inherent in the battle for the return of cultural property is "tension in the international community between acquisitive nations and source nations over a range of issues concerning protection and repatriation of cultural property."[46] One large issue is that cultural property is distinct from traditional property, in that it can be owned by more than one person.[47] As such, "[c]ultural property is integral to the esteem that people hold for themselves and their past. It is . . . also integral to their identity."[48] Because cultural property can be owned by more than one person, repatriation becomes a harder task.

Another unique characteristic of cultural heritage is that its ownership is not cleanly defined among state lines.[49] Culture is rarely confined to national borders. Africa is a perfect example of this differentiation, where much cultural heritage belongs to groups that existed before the national borders drawn during the Berlin Conference of 1884.[50] Thus, conversations surrounding reparation

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40 Charter of the International Military Tribunal art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 251.

41 Saltarelli, s*upra* note 33, at 143.; Convention for the Protection of Cultural Property in the Event of Armed Conflict art. 1, 4, May 14, 1954, 249 U.N.T.S. 3511. [hereinafter Convention]; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict art. 9(1)(a), Mar. 26, 1999, 2253 U.N.T.S. 3511.

42 Annamaria Manganaro, Restitution of Looted Art in International Law (May 18, 2017), (Master's thesis, Luiss University) (https://tesi.luiss.it/18617/1/114643_MANGANARO_ANNAMARIA.pdf)

43 Convention, *supra* note 41.

44 Manganaro, *supra* note 42; Saltarelli, *supra* note 33, at 143.

45 Saltarelli, *supra* note 33, at 143.

46 Roger W. Mastalir, *A Proposal for Protecting the "Cultural" and "Property" Aspects of Cultural Property Under International Law*, 16 Fordham Int'l L.J. 1033, 1037-39 (1993).

47 *Id*. at 1039.

48 *Id*.

49 Klesmith, *supra* note 4, at 50.

50 Scher, *supra* note 18.

"shouldn't be happening between nation states but, rather, on the level of the people to whom these so-called objects belong."[51]

B. What is the HEAR Act?

In 2016, the United States passed the HEAR Act.[52] The goal of Act is to provide a means for Holocaust survivors and their families to pursue ownership claims to works stolen from them by the Nazi regime, without the limitation of time-barred defenses.[53] Signed into law by President Barack Obama on December 16, 2016, the Act creates:

A uniform, federal six-year statute of limitations on civil restitution claims in the United States for the victims of Nazi-era persecution and their heirs to make a legal demand for the return of artwork or other cultural property that was seized, confiscated or wrongfully taken as a result of the policies of the Third Reich.[54]

In essence, the HEAR Act enables claimants with a possessory interest in the property to bring claims within six years of their discovery of the identity and location of the artwork or cultural property taken, rather than having the clock for the statute of limitations begin to run when the work was stolen.[55]

C. HEAR Act Legislation

A recent claim under the HEAR Act involves a piece of artwork by French painter, Camille Pissarro, *Rue Saint-Honore, apres-midi, effet de pluie (Rue Saint-Honoré, in the Afternoon, Effect of Rain).*[56] The piece is part of a fifteen work series Pissarro painted in Paris from his hotel during the winter of 1897-1898.[57] The piece currently resides at the Thyssen-Bornemisza Foundation in Madrid, Spain, however, David Cassirer, a retired 67-year-old musician living in San Diego also claims ownership.[58] Cassirer, the sole living descendant of the first owners of the painting, is determined to take a battle which "started 23 years ago" by his father "to its conclusion."[59] Cassirer wants the Thyssen-Bornemisza Foundation in Spain to remove the painting from display at its museum in Madrid

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[51] *Id*.

[52] Rachel Sklar, *Holocaust-Era Art Restitution Claims: Is the HEAR Act a Game Changer?*, 12 Cardozo Int'l L.J. 159, 161; 183 (2017).

[53] *Id*. at 162.

[54] *Id*.

[55] *Id*. at 183.

[56] Martha Lufkin, *US Supreme Court Sends Dispute Over Nazi-Looted Pissarro Back to California Court*, The Art Newspaper (Apr. 22, 2022), https://www.theartnewspaper.com/2022/04/22/us-supreme-court-decision-cassirer-camille-pissarro-nazi-loot-museo-nacional-thyssen-bornemisza.

[57] Camille Pissarro, Rue Saint-Honoré in the Afternoon. Effect of Rain (1897).

[58] Iker Seisdedos, *The Thyssen's Disputed Pissarro: A Masterpiece that Symbolizes the Ongoing Struggle to Return Nazi-looted Art,* El País (May 21, 2022, 11:57 AM), https://english.elpais.com/culture/2022-05-21/the-thyssens-disputed-pissarro-a-masterpiece-that-symbolizes-the-ongoing-struggle-to-return-nazi-looted-art.html.

[59] *Id*.

and return the artwork, looted from his great-grandmother, Lilly Cassirer, by the Nazis in 1939, to his family.[60]

The Cassirer family lost in Superior Court in Los Angles and again on appeal in the Court of Appeals for the Ninth Circuit, but the Supreme Court granted cert.[61] In 2022, the Supreme Court ruled in favor of Cassirer.[62] Though the ruling did not grant the painting to Pissarro, Cassirer celebrated the Supreme Court ruling as a victory: "It is very encouraging, and it sends a message to Spain and to museums around the world: it is not right to profit from the Holocaust. This painting was stolen from Holocaust victims by the Nazis. Spain should return it instead of carrying on with this costly litigation."[63]

D. The Rosetta Stone

Egypt faces a similar challenge in its efforts to repatriate the Rosetta Stone. The Rosetta Stone is a 2,200-year-old granodiorite stele inscribed with hieroglyphs, Ancient Greek, and cursive Egyptian letters, known for helping archaeologists to decipher ancient hieroglyphs.[64] The British Museum received the stone in a treaty from France during the Napoleonic Wars in 1802.[65] Napoleon's troops allegedly found the Stone in Rosetta (Rashid, Egypt) while constructing a fort.[66] The Rosetta Stone was a key to cross-cultural translation that yielded unprecedented insights into ancient civilizations.[67] The French surrendered the stone when they surrendered to the British in 1801.[68] The stone was then moved to the British Museum where is has remained since.[69]

Now, Egypt requests its cultural heritage back. Though the Egyptian government has never officially requested the return of the stone, others in the country and abroad have. Hawass' campaign garnered immense support, the petition encourages, "History cannot be changed, but it can be corrected, and although the political, military, and governmental rule of the British Empire withdrew from Egypt years ago, cultural colonization is not yet over."[70]

III. Discussion

Egypt's largest challenge in its request for the return of the Rosetta Stone will be the lack of international protection surrounding African cultural heritage. Currently the theft of African artwork and heritage does not have specific

60 *Id*.
61 *Id.*
62 *Id*.
63 *Id*.
64 Aton, *supra* note 13.
65 *Id*.
66 *Id*.
67 Dafoe, *supra* note 12.
68 *Id.*
69 Aton, *supra* note 13.
70 *Id.*

international protection other than general repatriation laws. Accordingly, Egypt faces an uphill battle.

A. State of the Current Law

The international community first cooperated to protect cultural heritage after the substantial loss of art resulting from the World Wars.[71] The agreement that followed was the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict ("The 1954 Hague Convention").[72] The agreement prohibited wartime looting and destruction.[73] However, the 1954 Hauge Convention proved ineffective in the prevention and return of cultural heritage loss.[74]

The main purpose of the 1954 Hague Convention was to require the protection of cultural property through "the safeguarding of and respect for cultural heritage" by addressing wartime looting and destruction.[75] This "safeguarding" reflected the sentiment of the 1954 Hauge which considered all cultural products to belong to the culture of humankind.[76] The Convention aimed to provide comprehensive protection which would address the rights and duties of States prior to, during, and following an armed conflict.[77] A critical factor of the Convention is that these protections were triggered by conflict, and it did not outline how these protections functioned outside of conflict.[78] Because this comprehensive protection plan included safeguarding cultural property *during* armed conflict, the protective measures in the convention required an impossible balance of military interests and the protection of cultural property.[79] Accordingly, ideal protections for cultural heritage yielded to ensure the participation of states with large and possibly active militaries.[80] Further, due to the chaotic nature of war, the convention has been unsuccessful in the protection of cultural property.[81]

Though most of the 1954 Hague Convention protections of cultural heritage are limited in scope during times of war, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Expert, and Transfer of Ownership of Cultural Property of 1970 ("1970 UNESCO Convention") provides more

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71 Lisa J. Borodkin, *The Economics of Antiquities Looting and a Proposed Alternative*, 95 Colum. L. Rev. 377, 388 (1995).

72 *Id.*

73 *Id.*

74 Craig Forrest, International Law and the Protection of Cultural Heritage 80 (2010).

75 Convention, *supra* note 41.

76 Erich H. Matthes, *Repatriation and the Radical Redistribution of Art*, 4 Ergo J. of Phil. 931, 932 (2017).

77 Forrest, *supra* note 42.

78 *Id.*

79 *Id.*

80 *Id.* at 79.

81 Leila Amineddoleh, *Protecting Cultural Heritage by Strictly Scrutinizing Museum Acquisitions*, 24 Fordham Intell. Prop. Media & Ent. L.J. 729, 740 (2015).

extensive protection.[82] The 1970 UNESCO Convention represents the second global effort to protect cultural heritage and included a provision that broadened the definition of "cultural property."[83]Additionally, the convention enabled nations to seek the repatriation of cultural heritage in foreign jurisdictions.[84]

B. Flaws within Current International Law

The 1970 UNESCO Convention provided a means for *nations* to seek repatriation under its terms, however the Convention does not provide the same guidance for individuals and groups not recognized as nations. Further, the convention is not self-executing, meaning that state parties must change their domestic laws to fulfill their treaty obligations.[85] The convention also enables parties to pick and choose which portions of the agreement to implement[86] and allows states to further narrow the definition of cultural property.[87]

Thus, the 1970 Convention's broad guidelines do not require signatory states to follow stringent guidelines to protect cultural heritage. For example, to enact the convention the United States passed the Cultural Property Implementation Act (CPIA).[88] The CPIA enables the United States to enter into agreements with other UNESCO signatory states.[89] The United States added further restrictions that items must be examined on a case-by-case basis, the property must be of "cultural significance; and at least 250 years old," and a state party must submit a formal request to the President.[90] The Convention allows signatory states to create their own definition of cultural property meaning individual state definitions are not always geared toward repatriation. In its definition of cultural property, the United States determined that "objects do not become cultural property until they have been removed from or are threatened with removal from their cultural context."[91] This means that if a museum exhibits cultural property among other items with the same history, the property is not technically removed from its "cultural context."[92]

Despite its shortcomings the 1970 Convention provides some help to those attempting to return their cultural heritage. Critically, Article 9 of the Convention provides that "a state whose cultural patrimony is in jeopardy from pillage of archaeological or ethnographical materials may call upon [other parties to the Convention] to participate in a concerted international effort to determine and to

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82 *Id*.

83 Hamutcu, *supra* note 8.

84 *Id.*

85 UNESCO Convention, *supra* note 16.

86 *Id.*

87 Hamutcu, *supra* note 8.

88 *Id.*

89 *Id.*

90 Klesmith, *supra* note 4, at 56-57.

91 *Id.* at 55.

92 *Id.*

carry out the necessary concrete measures" to prevent the destruction and loss of cultural heritage.[93] For example, in states like Afghanistan where there is a threat of destruction to cultural heritage by invading forces, they may call on the United States for aid. Further, simply by participating in the 1970 Convention the United States sends a message to the global community that the protection of cultural heritage is important.[94]

However, wealthy nations take limited action to support the message that protecting cultural heritage is important.[95] In 2018, French President Emmanuel Macron promised to repatriate twenty-six objects residing in the Quai Branly Museum to Benin.[96] Macron made this statement after receiving a report he commissioned for proposals regarding the return of African cultural heritage.[97] The statement signified a positive step toward cultural heritage repatriation, as the Quai Branly Museum houses over 70,000 objects from sub-Saharan Africa.[98] Notably, after Macron's announcement, the British Museum stated the return of the Benin objects "does not change the policy of the British Museum, or legislation on Great Britain."[99] France's announcement is a heartening move, however Britain's statement reflects the inconsistent view surrounding cultural repatriation.

IV. Analysis

Inconsistent views among the countries who are at the center of repatriation efforts are bolstered by the vague international laws that guide cultural heritage return.[100] The absence of specific laws that require or even implore the return of cultural heritage to origin counties, leave the decision of repatriation in the hands of those who currently possess the objects.

The 1970 UNESCO Convention represented the second global effort to protect cultural heritage enabling nations to seek the repatriation of cultural heritage in foreign jurisdictions.[101] But how does the process of repatriation unfold? The underlying attitude surrounding repatriation that actually occurs generally falls into two categories: repatriation as reparation or repatriation as the fair distribution of cultural goods.[102]

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93 Jeanette Greenfield, The Return of Cultural Treasures 224 (2007); Convention, *supra* note 41.

94 Klesmith, *supra* note 4, at 57.

95 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, *supra* note 16.

96 Farah Nayeri, *Museums in France Should Return African Treasures, Report Says*, N.Y. Times (Nov. 21, 2018), https://www.nytimes.com/2018/11/21/arts/design/france-museums-africa-savoy-sarr-report.html.

97 *Id.*

98 *Id.*

99 UNESCO Convention, *supra* note 16.

100 Matthes, *supra* note 76, at 932.

101 Hamutcu, *supra* note 8.

102 Matthes, *supra* note 76, at 935-38.

Repatriation as reparation focuses on the return of cultural heritage to "establish an obligation to correct an historical injustice, establish an appropriate form of correction, and establish an appropriate means of reparation."[103] Under this view, the "appropriate form of correction" is reparation, and the "appropriate means of reparation" is repatriation.[104] Establishing an obligation to correct historical injustice can be quite challenging.[105] Karin Björnberg identifies two primary reasons for this hurdle: those who experienced the injustice are not available to be fairly compensated and those asked to award the compensation did not carry out the historical injustice.[106] While the 1970 UNESCO Convention required accuracy and detail regarding documenting cultural heritage, this only applies to objects taken after 1970.[107] Accordingly, the 1970 UNESCO Convention fails to provide clear guidelines for cultural heritage taken before 1970.[108] Without clear provenance identifying a record of pillaging, looting, or stealing, it is unlikely an artifact is determined to be unjustly acquired.[109] As such it is often impossible to return the cultural property to its rightful owner.[110] This is also particularly tricky when the property belongs to a group rather than a single person.[111] In addition, the view of repatriation as reparation is commonly met with backlash regarding the preservation of cultural property.[112]

Repatriation as the fair distribution of cultural goods is most closely related to the sentiment established in the 1954 Hague Convention – cultural products are goods universal to mankind.[113] Many museums and the cultural institutions that currently house cultural heritage align with this viewpoint.[114] For example, the British Museum identifies itself as a "unique resource for the world" due its central location, expansive collections, and free admission.[115] Regarding the Elgin Marbles, the missing sculptures from the Parthenon which currently reside at the British Museum, Prime Minister Boris stated "it would be a grievous and irremediable loss if they left the British Museum."[116] Britain continues to evade commitments to return cultural heritage based on the idea that they are the best caretakers of the objects, however the British Museum's Board of trustees stated they are "open to lending our artifacts to anywhere who can take good care of

103 *Id*. at 935.

104 *Id*.

105 Karin Edvardsson Björnberg, *Historic Injustices and the Moral Case for Cultural Repatriation*, 18 Ethical Theory & Moral Prac. 461, 461-74 (2014).

106 *Id.* at 462.

107 Matthes*, supra* note 76, at 936.

108 *Id*.

109 *Id*.

110 *Id*.

111 *Id*.

112 Matthes*, supra* note 76, at 938.

113 *Id*. at 939.

114 *Id*.

115 Polonsky*, supra* note 5.

116 Alex Marshall, *As Europe Returns Artifacts, Britain Stays Silent*, N.Y. Times (Dec. 20, 2021), https://www.nytimes.com/2021/12/20/arts/design/parthenon-marbles-restitution.html.

them and ensure their safe return."[117] Ndikung, the Cameroonian biotechnologist and art collector, states that this loan model perpetuates "colonial arrogance."[118] He furthers, "You steal [artifacts], put them in your museum, and then want to tell those same people they don't know how to preserve these things even though they have done it in the past for hundreds of years?"[119]

In addition to colonialist undertones, repatriation under this fair distribution attitude presents challenges including identifying the legitimate descendants of the cultural property, whether the cultural property was acquired unjustly, and whether the return of the cultural property aligns with the values of the institutions that currently house them.[120] Moreover, the restitution of African Art is not simply a legal question.[121] The international conventions previously identified shone a light on the repatriation of cultural heritage globally, but have done little to effectuate a significant return of cultural property to African countries.[122]

I address these challenges, as well as those set forth in repatriation as reparation, in the following section through the proposal that components of the HEAR Act can serve as a potential model for a more specific international law, expediting the return of African cultural heritage.

V. Proposal

A. Can the HEAR Act Help?

The purpose of the HEAR Act was to mold international law into an actionable framework within the United States.[123] While the United States enacted the 1970 UNESCO Convention by passing the CPIA,[124] the HEAR Act represents the United States first legislation contributing to actionable cultural heritage repatriation globally. The Act allows claims commenced within the six years following the claimant's actual discovery of the identity and location of the artwork or cultural property and information or facts sufficient to indicate that the claimant has a claim for a possessory interest in the artwork or cultural property that was unlawfully lost.[125] The Act applies to claims or causes of action that are currently pending or filed after December 16, 2016,[126] but before January 1, 2027.[127] Such claims may include those that were dismissed before enactment of the HEAR Act based on the expiration of a federal or state statute of limitations

117 *Id*.

118 Scher*, supra* note 18.

119 *Id*.

120 Matthes, *supra* note 76.

121 Hamutcu, *supra* note 8.

122 *Id*.

123 Sklar, *supra* note 49, at 162.

124 Hamutcu, *supra* note 8.

125 S. Res. 2763, 114th Cong. § 4(1), (5), § 5(a), (c)(2)(B), (2016).

126 *Id.* § 5(c)(1)(2).

127 *Id.* § 5(d)(2).

or any other defense at law or in equity relating to the passage of time, as well as claims in which a final judgment has not been entered.[128] Notably these claims may be brought by individuals and groups, not just nations.

Additionally, the Act follows the "demand and refusal rule" rather than the "discovery rule" of property law.[129] Legislatures have traditionally let courts determine when accrual occurs, meaning states determine which rule they follow.[130] The "discovery rule" was established in the seminal case *O'Keefe v. Snyder* and holds that "a cause of action will not accrue until the injured party discovers, or by exercise of reasonable diligence and intelligence should have discovered, facts which form the basis for a cause of action."[131] In short, the "discovery rule" states that the statute of limitations begins to run once the true owner knows, or should have known, of the correct person to bring the claim against. This rule requires the true owner to pursue their property diligently, placing the burden on the owner.[132] In contrast the "demand and refusal rule" states that the statute of limitations begins to run once the true owner demands the return of the artwork, but is refused.[133] By adopting the "demand and refusal rule" the Act provides a greater leeway for rightful owners to receive their property. For example, a person who has knowledge of the current possessor of their property but has not made a demand for its return is granted the six-year limitation period to bring a claim. This comment argues that the demand and refusal, if adopted internationally, could be helpful in repatriating cultural heritage.

Opponents of the Act argue that it simply does not do enough to ensure Holocaust victims have the opportunity to reclaim their cultural property stolen by the Nazis.[134] The Act caters to wealthy individuals who have the means to research provenance and take subsequent legal action, rather than enabling those without museum quality works to recover their property.[135] This mirrors the challenge many African peoples and groups face in the return of cultural heritage, as they commonly oppose institutions and museums with countless resources at their disposal. Further the Act has an expiration date of January 1, 2027.[136] This not only limits the time to bring a claim but may also suggest the United States' attitude surrounding the return of cultural heritage. All eyes will be on the United States in four years anticipating its decision to pass a similar law.

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128 Holocaust Expropriated Art Recovery (HEAR) Act of 2016, Pub. L. No. 114-308, 130 Stat. 1524, 1526–28 (Dec. 2016).

129 Stephen A. Bibas, *The Case Against the Statute of Limitations for Stolen Art*, 103 YALE L.J. 2437, 2446 (1994).

130 *Id*.

131 O'Keeffe v. Snyder, 416 A.2d 862, 869 (N.J. 1980).

132 Stephan Schlegelmilch, *Ghosts of the Holocaust: Holocaust Victim Fine Arts Litigation and a Statutory Application of the Discovery Rule*, 50 CASE W. RSRV. L. REV. 87, 108 (2000).

133 Bibas, *supra* note 129, at 2445.

134 Sklar, *supra* note 64, at 184-85.

135 *Id.* at 184.

136 S. Res. 2763, 114th Cong. § 5(g) (2016).

B. The HEAR Act in Action

As discussed, the most recent claim under the HEAR Act involves *Rue Saint-Honore, apres-midi, effet de pluie (Rue Saint-Honoré, in the Afternoon, Effect of Rain).* The piece currently resides at the Thyssen-Bornemisza Foundation in Madrid, Spain however, David Cassirer, is trying to return it to his family.[137] The "demand and refusal rule" implemented in the HEAR Act enable the Supreme Court rule in favor of Cassirer.[138] Though the ruling did not grant the painting to Pissarro, Cassirer celebrated the Supreme Court ruling as a victory.[139]

Zuckerman v. The Metropolitan Museum of Art represents another instance where the HEAR Act was employed as a tool to attempt the return of cultural property. The Zuckerman case surrounds the efforts of the family to recover "The Actor," a famous work by Pablo Picasso.[140] The painting was originally owned by Paul Leffmann, who sold the painting in 1938 to finance their flee from occupied Germany.[141] The Metropolitan Museum of Art acquired the painting as a donation in 1952.[142] Zuckerman, the great-grandniece of Leffmann, attempted to return the painting to her family through a claim under the HEAR Act, and argued the Leffmann's sold the painting under duress such that the sale was void, but the Second Circuit ruled against her.[143] The Second Circuit held the doctrine of laches barred Zuckerman's claim and that the HEAR Act did not preclude an application of laches defense to the claim.[144] Zuckerman petitioned the Supreme Court to grant a writ of certiorari, but was denied.[145] Zuckerman's petition argued the Second Circuit's decision misapprehended the HEAR Act's text and its decision "countermanded the Act's fundamental purpose."[146] This comment agrees.

The Zuckerman petition argued the Second Circuit undermined the fundamental purpose of the HEAR Act in two ways: the decision overrides the Act's purpose to ensure courts do not dismiss claims by Holocaust survivors and their heirs as untimely and that Holocaust-era claims are decided on the merits.[147] The petition stated, "if laches is a valid exception to the HEAR Act, it will become the exception that swallows the rule, upending the Act's fundamental purpose of eliminating time-bar defenses."[148] This comment agrees that the Second Circuit's

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137 Martha Lufkin, *US Supreme Court Sends Dispute Over Nazi-Looted Pissarro Back to California Court Reopening Door for Restitution Claim*, The Art Newspaper (Apr. 22, 2022), https://www.theartnewspaper.com/2022/04/22/us-supreme-court-decision-cassirer-camille-pissarro-nazi-loot-museo-nacional-thyssen-bornemisza.

138 *Id*.

139 *Id*.

140 Zuckerman v. Metro. Museum of Art, 928 F.3d 186, 189 (2d Cir. 2019).

141 *Id.* at 189-90.

142 *Id*. at 192.

143 *Id*. at 190.

144 *Id.* at 197.

145 Zuckerman v. Metro. Museum of Art, 140 S.Ct. 1269, 1269 (2020).

146 Brief for Current and Former Members of Congress as Amici Curiae, supporting Petitioner, Zuckerman v. Metro. Museum of Art, 928 F.3d 186 (2d Cir. 2019) (No. 19-942).

147 *Id*. at 4.

148 *Id*.

decision is diametrically opposed to the purpose of the Act. If unreasonable delay is recognized by the courts as a bar to bringing a claim under the Act, the Act cannot function. Had the Second Circuit applied the underlying goal of the Act, to ensure courts do not dismiss claims by Holocaust survivors and their heirs as untimely and that Holocaust-era claims are decided on the merits, this case would likely have favored Zuckerman. This case highlights that while well-intentioned, the HEAR Act can fall flat in the face of court decisions. An amendment to the Act barring defendants from invoking laches defenses would help to achieve the legislative intent of ensuring the claims are decided on the merits.

C. Hypothesized International Application of the HEAR Act

As illustrated, the application of the HEAR Act is far from flawless, but it does contain some components which may be beneficial on the international stage. First, the Act recognizes individuals and groups who make claims for restoration.[149] Ownership of cultural heritage is not always cleanly owned by a single nation or person.[150] Many groups who are currently attempting to recover cultural property are part of groups that predate national borders.[151] Accordingly, adopting phrasing that mirrors the language of the Act in international law will enable people, groups, and nations to bring claims.

Finally, the demand and refusal rule embodied in the HEAR Act could be immensely helpful regarding repatriation claims. Clarifying this rule as the standard for accrual in international framework would ensure that the statute of limitations to bring claims does not begin to run until a demand is made for the return of cultural property.[152] This would provide time to gather funding and legal representation, as well as enable some to bring a case at all. In addition, the demand and refusal principle encourages those who have had their cultural property stolen to demand its return and puts pressure on institutions to facilitate its return. Notably, the HEAR Act does provide a statute of limitations, which in an ideal world would not exist if the real goal of the Act is to ensure courts do not dismiss claims by Holocaust survivors and their heirs as untimely and that Holocaust-era claims are decided on the merits.[153] However, the statute of limitations is in place as a mechanism of fairness for defendants,[154] such that keeping the limitations in place may induce larger countries that house stolen cultural property to sign on to this hypothetical framework.

This comment suggests that the HEAR Act's language which enables individuals, groups, or nations to make claims for repatriation and the demand

149 S. Res. 2763, 114th Cong. §§ 5(a)-5(c) (2016).

150 Klesmith, *supra* note 4, at 50.

151 Scher, *supra* note 18.

152 Bibas, *supra* note 129, at 2445-46.

153 *Id.*

154 Sue Choi, *The Legal Landscape of the International Art Market After the Republic of Austria v. Altmann*, 26 Nw. J. Int'l L. & Bus. 167, 197 (2005).

and refusal rule principle could be exceptionally helpful in an international context.

D. The Rosetta Stone in the Hypothesized Framework

Let us apply these HEAR Act concepts in the context of Egypt's demand for the Rosetta Stone. Currently, Egypt's largest challenge is the lack of international protection surrounding African cultural heritage. As the current law stands, Egypt only has the 1970 UNESCO convention backing their demand from the British Museum.[155] Notably this convention does not require or even ask Britain to return the Rosetta Stone upon Egypt's request.[156] While the Rosetta Stone's provenance is known, the timeframe surrounding the stone makes it "a hard legal battle to win."[157] In addition, the Egyptian government has never formally requested the return of the stone.[158] Britain uses this lack of a formal request by Egypt's government as well as an 1801 surrender treaty to justify keeping the Stone, among other reasons riddled with colonialist undertones.[159]

In applying the concept from the HEAR Act that any individual, group, or nation may demand the request of cultural heritage wrongfully taken from them, Hawass' claim can survive as an individual claim, and even as a group claim given the amount of signatures amassed by Egyptian citizens. Accordingly, Britain's stance that these claims are illegitimate because they do not come from the Egyptian government are null. Next, if we apply the demand and refusal rule to Hawass' petition, the statute of limitations for the claim begins when the petition is sent to Britain, not when the Rosetta Stone was taken in 1801. Given the vague international laws Egypt must rely on currently, these concepts from the HEAR Act provide some direction, and even some hope, that Egypt could prevail in its quest to regain its cultural heritage.

VI. Conclusion

The cultural looting through the colonization of African deserves its place of recognition on the global art and heritage stage. The HEAR Act offers a useful model to begin repatriating African Art. The Act is not a perfect model for a new international law regarding the return of African cultural heritage. However, some of the Act's requirements could serve as a guide to further inform and accelerate the process of returning cultural heritage. Not only has this cultural property been unjustly taken, but it also continues to be illicitly traded throughout the world.[160] Heritage communities feel the loss of cultural property from the

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155 UNESCO Convention, *supra* note 16.

156 *Id.* at art. 7.

157 PBS NEWS HOUR, *supra* note 14.

158 *Id*.

159 *Id*.

160 Klesmith, *supra* note 4, at 75.

absence of artifacts in daily rituals to the voids of statues in grand museums.[161] As Hawass continues to fight for ownership of one of their countries most important pieces of archeological history, the international community must assist in return of this "icon of Egyptian identity."[162]

[161] Marshall, *supra* note 116.

[162] Aton, *supra* note 13.

Should the United States Adopt Federal Artificial Intelligence Regulation Similar to the European Union

Jean Joseph*

Abstract

Artificial Intelligence (AI) promises to revolutionize our everyday lives and how we approach all sectors of the economy and society. For the laundry list of benefits this form of technology provides, there is a concern as to the ways AI can produce troubling outcomes – including racial discrimination and social inequality. The United States House of Representatives introduced the National AI Initiative Act of 2020 (NAIIA) to ensure continued US leadership in AI research and development. However, the NAIIA leaves issues concerning the risk of biases and discrimination associated with using AI systems to federal agencies and state governments. While promoting similar objectives, the European Union's (EU) AI Act ensures that AI systems used in the market are safe and respect existing laws on fundamental rights. This Comment argues that American lawmakers should look to the EU's AI Act as a model for enacting federal legislation that ensures AI systems used in the public and private sectors are safe and do not infringe on an individual's fundamental rights.

First, the Comment reviews the history of AI, AI legislation in the United States at the federal and state level, and the EU's AI Act. Next, the Comment analyzes the strengths and weaknesses of the European Union's AI Act, the National AI Initiative Act, and potential biases, discrimination, and racial inequality concerns under the present framework of AI regulation in the United States. Finally, the Comment argues that the United States should borrow the favorable provisions from the EU's AI Act, improve upon its weaknesses, and pass comprehensive federal AI legislation that emphasizes the fundamental rights of individuals while simultaneously promoting investment in AI research and development necessary to maintain US leadership in this form of technology.

Table of Contents

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I. Introduction

On April 21, 2021, the European Commission (Commission) proposed the Artificial Intelligence Act (EU AI Act), which, if adopted, would provide a framework for the governance of artificial intelligence (AI) in the European Union (EU).[1] The proposed AI Act aims to diminish the differences between national rules and create one common regulatory framework for the entire EU.[2] Through the EU AI Act, the Commission aims to ensure that AI systems placed on the Union market and used are safe and respect existing law on fundamental rights and Union values, ensure legal certainty to facilitate investment and innovation in AI, enhance governance and effective enforcement of existing law on fundamental rights and safety requirements applicable to AI systems, and facilitate the development of a single market for lawful, safe and trustworthy AI applications and prevent market fragmentation.[3] One of the EU AI Act's objectives is to foster legal certainty and provide safeguards for human-centric technologies that internalize European values, as enshrined in the European Charter of Fundamental Rights, the European Convention of Human Rights, and the European AI Ethics Guidelines.[4]

In October 2016, the White House Office of Science and Technology Policy (OSTP) released a series of reports defining the federal government's role in the development of AI as a facilitator of innovation and a minimalist regulator.[5] Also, it outlined how federal research and development investments would guide the "long term transformational impact of AI."[6] The National AI Initiative

[1] *Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts*, COM (2021) 206 final, (Apr. 21, 2021) (hereafter, EU AI Act).

[2] Natali Helberger & Nicholas Diakopoulos, *The European AI Act and How It Matters for Research into AI in Media and Journalism*, Digital Journalism 1, 2 (2022).

[3] EU AI Act, s*upra* note 1.

[4] *Ethics Guidelines for Trustworthy AI*, Eur. Comm'n (Nov. 17, 2022), https://digital-strategy.ec.europa.eu/en/library/ethics-guidelines-trustworthy-ai.

[5] Corinne Cath et al., *Artificial Intelligence and the 'Good Society': the US, EU, and UK approach*., 24 Sci. Eng. Ethics 506, 510 (2018).

[6] *Id.*

Act of 2020 (NAIIA) became law on January 1, 2021.[7] The NAIIA's focuses on improving AI innovation, advancing trustworthy AI, creating new education and training opportunities through AI, improving existing infrastructure through new technologies, facilitating federal and private sector utilization of AI to improve existing systems, and promoting an international environment that supports further advances in AI.[8] A critical difference between the EU AI Act and the NAIIA is that the NAIIA leaves issues concerning the risk of biases and discrimination associated with using AI systems to federal agencies and state governments. Instead of including language within the NAIIA which ensures AI systems placed and used in the US market are safe and respect existing laws on fundamental rights, the NAIIA mandates the establishment of a subcommittee for AI and law enforcement that advises on biases and other fundamental rights concerns. American lawmakers should look to the EU AI Act as a model for enacting federal legislation that ensures AI systems used in the public and private sectors are safe and do not infringe on an individual's fundamental rights.

Part I of this Comment reviews the history of AI and how AI perpetuates social prejudices and injustices. Part II discusses the EU's AI Act, high-risk AI systems, and fundamental rights concerns. Part III analyzes the strengths and weaknesses of the EU AI Act, the NAIIA, and potential biases, discrimination, and racial inequality concerns under the present framework of AI regulation in the US Part IV argues that the US should borrow the favorable provisions from the EU AI Act, improve upon its weaknesses, and pass comprehensive federal AI legislation that emphasizes the fundamental rights of individuals while simultaneously promoting investment in AI research and development necessary to maintain US leadership in this form of technology.

II. Background

A. The History of Artificial Intelligence

Modern AI traces back to the 1950s when Alan Turing published "Computing Machinery and Intelligence," where he described how to create intelligent machines and how to test their intelligence.[9] The article led to what later became known as "The Turing Test," which measured a machine's ability to think as a human would.[10] The Turing Test asks, "if a human is interacting with another human and a machine and unable to distinguish the machine from the human, then the machine is said to be intelligent."[11] In 1956, John McCarthy created

[7] H.R. Rep. No. 116-617 (2021) (Conf. Rep.).

[8] *Id.*

[9] *See generally* Michael Haenlein & Andreas Kaplan, *A Brief History of Artificial Intelligence: On the Past, Present, and Future of Artificial Intelligence,* 61 Cal. Mgmt. Rev. 5 (2019).

[10] Rebecca Reynoso, *A Complete History of Artificial Intelligence*, G2 (May 25, 2021), https://www.g2.com/articles/history-of-artificial-intelligence.

[11] Haenlein, *supra* note 9.

the word "Artificial Intelligence at the Dartmouth Summer Research Project on Artificial Intelligence (DSRPAI) workshop at Dartmouth College.[12] Following the workshop, Allen Newell and Herbert Simon created Logic Theorist, the first AI computer program capable of reasoning by proving theorems starting from mathematical principles.[13] Success continued into the 1960s due to the creation of new programming languages, robots, and research findings.[14] In 1961, Unimate became the first robot to work on a General Motors assembly line.[15] In 1965, Joseph Weizenbaum developed ELIZA, an interactive computer program that could communicate in English with a human being.[16]

Unfortunately, the 1970s were not as promising. Commonly known as the "AI Winter," this period saw a sharp decline in government funding on AI research.[17] For the next two decades, innovation in the field of artificial intelligence remained relatively stagnant in comparison to the prior years. However, the 1990s and 2000s gave way to machine learning AI applications.[18] For example, in 1997, Sepp Hochreiter and Jürgen Schmidhuber developed the Long Short-Term Memory (LSTM), which is a type of recurrent neural network (RNN) architecture used for handwriting and speech recognition.[19] In the same year, IBM's Deep Blue chess-playing program became the first system to beat a reigning world champion.[20] In 2000, Professor Cynthia Breazeal developed Kismet, a robot that could recognize and simulate emotions with its face. [21] In 2002, i-Robot released Roomba[22], which is now a staple in many households. In 2004, NASA's Spirit and Opportunity rovers navigated Mars' surface without human intervention.[23]

From smartphones to home electronics, AI has become a part of our everyday lives. In 2010, Microsoft launched Kinect for Xbox 360, which is the first gaming device that tracked human body movement using a 3D camera and infrared detection.[24] In 2011, IBM's Watson, a natural language question-answering computer, defeated two former "Jeopardy!" champions.[25] In 2011, Apple released Siri.[26] A few years later, Microsoft released Cortana, Amazon created Amazon

12 Reynoso, *supra* note 10.

13 Lucrezia Fanti et al., *From Heron of Alexandria to Amazon's Alexa: A Stylized History of AI and its Impact on Business Models, Organization and Work*, 49 J. Ind. Bus. Econ. 409, 415 (2022).

14 Reynoso, *supra* note 10.

15 *Id.*

16 *Id.*

17 Haenlein, *supra* note 9.

18 Reynoso, *supra* note 10.

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.*

23 *Id.*

24 Reynoso, *supra* note 10.

25 *Id.*

26 *Id.*

Alexa, and Google released Google Home.[27] In 2016, "Sophia" became the first "robot citizen" capable of performing image recognition, make facial expressions, and communicate through AI.[28] A major accomplishment in AI innovation occurred in 2015 when AlphaGo, a program developed by Google, was able to beat the reigning world champion in the board game Go.[29] AlphaGo achieved this success utilizing deep learning, a form of AI applied in image recognition algorithms used by Facebook and speech recognition algorithms that fuel smart speakers and self-driving cars.[30]

B. Racial Biases in Artificial Intelligence

Our preferences and biases shape the way we perceive the world around us. Our biases may lead to the exclusion, marginalization, or targeting of racial/ethnic groups. Although AI can improve efficiency and reduce human error, it can also perpetuate social prejudices and injustices.[31] The causes for bias are both technical and social: the code can be embedded through the biases of the designers and data, and the use of AI can exacerbate bias already existing in a social system.[32] Federal agencies are increasingly adopting and delegating decision-making responsibilities to AI technology.[33] AI systems are models used to form predictions based on patterns learned in historical data.[34] Designers choose which dataset the model will learn from, determine the accuracy of the model's prediction for different groups, and the testing procedure to evaluate the model.[35] Next, users determine whether the AI model is appropriate for their task, how to use the AI predictions, and who will manage the AI[36] Finally, users act on the predictions, choose how to manage the AI system, and use the results to make decisions with the immediate impact.[37] It is through this process that without sufficient safeguards, our decisions can incorporate racial bias into AI systems, causing significant impact.[38]

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27 *Id.*

28 *Id.*

29 Haenlein, *supra* note 9.

30 *Id.*

31 Morgan Livingston, *Policy Memo: Preventing Racial Bias in Federal AI*, J. Sci. Pol'y & Governance (May 27, 2020).

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.*

III. Discussion

A. Overview of the EU AI Act

The Act defines an "AI system" as software that is developed using specific techniques and approaches listed in Annex I and can, for a given set of human-defined objectives, generate outputs such as content, predictions, recommendations, or decisions influencing the environments they interact with.[39] As stated in Annex I, the techniques and approaches referred to are "Machine learning approaches, including supervised, unsupervised and reinforcement learning, using a wide variety of methods including deep learning," "Logic- and knowledge-based approaches, including knowledge representation, inductive (logic) programming, knowledge bases, inference and deductive engines, (symbolic) reasoning and expert systems;" and "Statistical approaches, Bayesian estimation, search and optimization methods."[40]

The Act provides horizontal regulation of AI systems consistent with existing EU human rights legislation and laws regulating data protection, data governance, consumer protection, non-discrimination, and gender equality.[41] Utilizing a risk-based approach, the Act sets out the minimum necessary requirements to address risks to values, fundamental rights, and principles associated with AI development and deployment without unnecessarily constraining technological development or trade.[42] Furthermore, the Act would have an extraterritorial effect, meaning that it would apply to users of AI systems in the EU and providers placing on the market or putting into service AI systems in the EU, irrespective of whether those providers are established within the EU or in a third country.[43] Its impact would be felt across the economy, creating new regulatory obligations for AI tools used in financial services, education, employment and human resources, law enforcement, industrial AI, medical devices, the car industry, machinery, and toys.[44]

The Act prohibits systems that pose an unacceptable risk, sets standards for systems that pose a high risk to fundamental rights, requires enhanced transparency for systems that pose a limited risk, and limits systems that pose a minimal risk to a voluntary code of conduct.[45] The Act prohibits AI systems that use subliminal techniques that are beyond a person's consciousness to materially

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39 EU AI Act, s*upra* note 1, art. 3(1).

40 *Annexes to the Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonized Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, COM(2021) 206 final*, (Apr. 21, 2021), Annexes 1 to 9 (hereafter EU AI Act Annexes), annex 1.

41 Bev Townsend, *Decoding the Proposed EU AI Act*, Am. Soc'y Int'l L. Insights, Sept. 20, 2021, at 3.

42 EU AI Act, s*upra* note 1, Explanatory Memorandum ¶ 3.5.

43 EU AI Act, s*upra* note 1, art. 2(1)(a).

44 Benjamin Mueller, *The Artificial Intelligence Act: A Quick Explainer*, Center For Data Innovation (May 4, 2021), https://datainnovation.org/2021/05/the-artificial-intelligence-act-a-quick-explainer/.

45 Natalie Smuha et al., *How the EU Can Achieve Legally Trustworthy AI: A Response to the European Commission's Proposal for an Artificial Intelligence Act*, LEADS Lab Univ. Birmingham, Aug. 5, 2021, at 2.

distort behavior in a way likely to cause that person physical or psychological harm.[46] The Act bans AI systems that exploit vulnerable groups to materially distort a person's behavior in a way likely to cause them harm.[47] The Act prohibits social score systems that evaluate or classify the trustworthiness of natural persons based on their social behavior, resulting in scores with a detrimental impact on those whose data were collected.[48] Moreover, the Act bans "real-time" remote biometric identification systems in publicly accessible spaces used for law enforcement, except where "strictly necessary."[49] The Act provides exceptions systems that pose an unacceptable risk depending on the potential harm caused.[50] Most AI will fall within unacceptable and minimal risk systems, however, for high-risk systems, the Act provides strict obligations before they may be put on the market.[51]

B. Overview of High-Risk AI Systems

High-risk systems are those "intended to be used as a safety component of a product or is itself a product" covered by specific EU product safety and conformity legislation.[52] The Act does not clearly define a high-risk system, but it includes systems that pose a significant risk to health, safety, and fundamental rights. The Act allows for the expansion of high-risk systems without promulgating new legislation if the Commission determines that the products pose a high risk to health, safety, and fundamental rights and has the potential to affect a "plurality of persons" and the inability of end-users to opt-out of an adverse outcome.[53] High-risk systems are subject to a risk management system, data training and data governance, technical documentation, recordkeeping, transparency, human oversight, accuracy, robustness, and cybersecurity.[54]

The risk management system must identify known and foreseeable risks, evaluate risks that occur when the AI system is in use, evaluate potential risks after implementation, and adopt appropriate risk management measures.[55] High-risk AI systems that use training of models with data would need to satisfy appropriate data governance and management practices, such as relevant design choices and data preparation processing operations, relevant assumptions with respect to the information that the data intends to measure, examine possible biases, and address potential data gaps.[56] Technical documentation of features such as the

46 EU AI Act, s*upra* note 1, art. 5(1)(a).

47 *Id.* art. 5(1)(b).

48 *Id.* art. 5(1)(c).

49 *Id.* art. 5(1)(d).

50 Smuha et al, *supra* note 45.

51 *Id.*

52 EU AI Act, s*upra* note 1, art. 6(1)(a).

53 Mueller, *supra* note 44.

54 EU AI Act, s*upra* note 1, art. 16(a).

55 *Id.* art. 9.

56 *Id.* art. 10.

system architecture, algorithmic design, and model specifications must be drawn up before the system is placed on the market or put into service, and it must be continuously updated.[57] The high-risk AI system must include automatic logging of events while the system is running, allowing for traceability of the system's functioning throughout its lifecycle.[58] The system must also be designed in a way that ensures that operation is sufficiently transparent to allow users to interpret its output and use the system appropriately.[59] High-risk AI systems must be designed to always maintain human oversight and prevent or minimize risks to health, safety, or fundamental rights.[60] The system must also be designed in a way that achieves a consistent level of accuracy, robustness, and cybersecurity throughout its lifecycle.[61]

Additionally, providers of high-risk AI systems must undergo a conformity assessment before placing the system on the market or putting it into service.[62] If the assessment shows that the requirements of the EU AI Act were satisfied, then the providers submit an EU declaration of conformity and affix the CE marking of conformity.[63] CE marking indicates that the manufacturer assessed the product and determined it met EU safety, health, and environmental protection requirements.[64] It is required for products manufactured anywhere in the world that are then marketed in the EU.[65] If an importer places a high-risk AI system on the market, they must verify that the provider has done the conformity assessment, drawn up the technical documentation, ensure the system bears the required conformity marking, and included the required documentation and instructions for use.[66] The Act requires systems governed by existing product safety legislation to maintain their current conformity assessment structures and regulatory frameworks.[67]

The Act allows these systems to integrate existing safety legislation to avoid duplicating administrative burdens and to maintain responsibilities while ensuring consistency among the different strands of EU legislation.[68] Compliance with the EU AI Act is subject to conformity assessment procedures already established in each sector, which may not confirm whether the product satisfies the EU AI Act.[69] High-risk AI systems that are not subject to existing legislation are

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[57] *Id.* art. 11.

[58] *Id.* art. 12.

[59] *Id.* art. 13.

[60] *Id.* art. 14.

[61] *Id.* art. 15.

[62] *Id.* art. 19.

[63] EU AI Act, s*upra* note 1, art. 19.

[64] *CE Marking*, Eur. Comm'n (Nov. 11, 2022), https://europa.eu/youreurope/business/product-requirements/labels-markings/ce-marking/index_en.htm.

[65] *Id.*

[66] EU AI Act, s*upra* note 1, art. 26(1).

[67] *Id.* Explanatory Memorandum ¶ 1.2.

[68] *Id.*

[69] Jakob Mökander, et al., *Conformity Assessments and Post-market Monitoring: A Guide to the Role of Auditing in the Proposed European AI Regulation*, 32 Minds & Machines 241, 248-53.

referred to as "stand-alone" systems and must comply with the requirements set out in the EU AI Act.[70] AI providers not subject to existing legislation must conduct their own conformity assessment and file their system in a database for high-risk AI systems.[71]

AI providers must also establish post-market monitoring systems designed to document and analyze performance of high-risk AI systems throughout their lifecycle.[72] The post-market monitoring system links to quality management, which establishes procedures for how providers design, test, and verify high-risk AI systems.[73] The quality management system also includes procedures for how to implement and maintain post-market monitoring of the respective high-risk system.[74] Distributors, importers, and users are subject to provider obligations if they place a high-risk AI system on the market under their name or make a substantial modification to it.[75] Distributors and importers must verify that the high-risk AI system bears the required CE conformity marking, contains the required documentation and instruction of use, and that the provider and the importer of the system comply with their obligations under the Act.[76] Users must deploy the system correctly, ensure the input data is of high quality, and monitor the system's performance on an ongoing basis with specific logging and audit requirements.[77] Users also need to implement a risk management system that documents and mitigates all risks associated with the AI system.[78]

C. EU AI Act Fundamental Rights Concerns

The Commission's decision to not overregulate AI systems leave too much discretion to providers to decide on fundamental rights violations. The Act limits fundamental rights to a set of safety standards without considering its uniqueness, it takes a more technical approach to preserve fundamental rights, and the Act's risk categories are insufficient to protect fundamental rights adequately.[79] The Act limits the scope of fundamental rights protections to promote economic activity and innovation.[80] This balancing act leaves AI systems more susceptible to interferences, intrusions, and violations of fundamental rights.[81]

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70 EU AI Act, s*upra* note 1, Explanatory Memorandum ¶ 5.2.

71 *Id.*

72 *Id.* art 61.

73 Mökander, *supra* note 69, at 252.

74 *Id.*

75 EU AI Act, s*upra* note 1, art. 28.

76 *Id.* art. 26-27.

77 *Id.* art. 29.

78 *Id.*

79 Smuha et al., *supra* note 45.

80 *Id.*

81 *Id.*

Regulations placed on providers of high-risk systems fail to promote the Commission's goal of offering a high level of protection for fundamental rights.[82] The discretion given to providers, the existing enforcement standards, and the remedies available lacks the level of scrutiny and oversight necessary to ensure sufficient protection against the dangers AI systems pose to the fundamental rights of those living in the EU.[83] For instance, the EU AI Act states that high risk system must be sufficiently transparent to ensure the user's ability to interpret and use the system's output.[84] However, the user is not obligated to communicate that information to persons subject to the AI supported decision.[85] AI users are also not obligated to explain or justify the decisions they reach towards those affected by them.[86] The users' only transparency obligation to persons subject to the AI is to inform them about the fact that an AI system is used.[87]

By setting fundamental rights protections based on market conditions, the Act currently fails to provide a "balanced and proportionate regulatory approach that is limited to the minimum necessary requirements to address the risks and problems linked to AI."[88] The tiers of acceptable AI risk before a system enters the market is insufficient to ensure that AI providers respect fundamental rights. The Act treats AI systems similarly to products such as cars, machinery, and toys.[89] This ignores the seriousness of these applications and the societal consequences if used improperly.

Rather than prohibiting AI systems that violate fundamental rights, the Act prohibits systems that engage in practices that create an "unacceptable risk."[90] The remaining risk categorizations allow for a degree of interference with fundamental rights if AI providers adhere to a voluntary code of conduct, enhanced transparency, set standards for systems that pose a high risk, and a system of self-assessment by AI providers.[91] Only AI systems identified as high-risk by the Commission must adhere to mandatory requirements. No risk or limited risk systems require increased transparency measures, and AI providers are only obligated to inform people that they are subjected to an AI system.[92]As a result, fundamental rights protection depends on if the Commission determines that the products pose a high risk to health, safety, and fundamental rights and has the potential to affect a "plurality of persons" and the inability of end-users to opt out of an adverse outcome.[93] Given how quickly AI technology is evolving,

82 EU AI Act, s*upra* note 1, Explanatory Memorandum ¶ 1.1.

83 Smuha et al., *supra* note 45.

84 EU AI Act, s*upra* note 1, art. 13.

85 Melanie Fink, *The EU Artificial Intelligence Act and Access to Justice*, EU Law Live (May 10, 2021), https://eulawlive.com/op-ed-the-eu-artificial-intelligence-act-and-access-to-justice-by-melanie-fink/#.

86 *Id.*

87 *Id.*

88 EU AI Act, s*upra* note 1, at ¶ 1.1.

89 Mueller, *supra* note 53.

90 Smuha et al., *supra* note 45.

91 *Id.*

92 *Id.*

93 EU AI Act, s*upra* note 1, art. 16(a).

providing a comprehensive list of high-risk systems may be challenging. Moreover, the effectiveness of the mandatory requirements imposed on high-risk AI systems hinges on the quality of the risk management system.[94] Over time, the mandatory requirements may become less effective if AI providers who do not wish to subscribe to them can circumvent them by arguing that their system is not within the list of high-risk systems.[95]

IV. Analysis

A. National Artificial Intelligence Initiative Act

The National Artificial Intelligence Act ("NAIIA") centers on American leadership in AI research and development, the development of trustworthy AI systems, preparing for potential workforce disruptions, and coordinating military and civilian sectors.[96] The NAIIA takes a hands-off approach to the domestic governance of AI technologies focusing on limiting regulatory overreach to empower individuals and corporations to benefit from AI.[97] The NAIIA is more involved in promoting an international environment that opens markets for American AI industries, protects America's technological advantage, and ensures that international cooperation is consistent with American values.[98]

The United States' focus on military defense and national security is the most developed aspect of its AI strategy. Prior to the NAIIA, the 2019 National Defense Authorization Act established the National Security Commission on AI, which was an independent bipartisan commission "to consider the methods and means necessary to advance the development of artificial intelligence, machine learning, and associated technologies to comprehensively address the national security and defense needs of the United States."[99] In its Final Report the Commission presented a strategy to reorganize the government to defend and compete in the coming era of AI-accelerated competition and conflict.[100] The first part of the report entitled "Defending America in the AI Era," explains what the United States must do to defend against AI-related threats and recommends how the U.S. government can responsibly use AI technologies to protect American people and interests.[101] The second part, "Winning the Technology Competition," addresses the critical elements of the AI competition and recommends

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94 Smuha et al., *supra* note 45.

95 *Id.*

96 National Artificial Intelligence Initiative Act of 2020, 15 U.S.C. §§ 9401-9461.

97 Huw Roberts et al., *Achieving a 'Good AI Society': Comparing the Aims and Progress of the EU and the US*, Sci. Eng. Ethics, Nov. 12, 2021, at [pincite].

98 *Id.*

99 National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115-232, §1051, 132 Stat. 1964 (2018).

100 Nat'l Sec. Comm'n A.I., Final Report [pincite] (2021).

101 *Id.*

actions the government must take to promote AI innovation to improve national competitiveness and protect critical U.S. advantages.[102]

The NAIIA established the National AI Initiative Office ("NAIIO"), which is responsible for implementing a national AI strategy and coordinating artificial intelligence research and policymaking across government, industry, and academia.[103] The NAIIO established the AI Researchers Portal, which connects researchers to federal resources and relevant grant funding programs.[104] The Portal includes information about the federal grants and funding processes for researchers, a directory of active AI federal research programs that connects researchers with potential funding opportunities and collaborations, a list of federal datasets and repositories, and links to computing infrastructure programs for AI research.[105]

The NAIIA established the National AI Research Resource Task Force (the "Task Force").[106] The Task Force consists of technical experts who provide recommendations on the feasibility of establishing a National AI Research Resource ("NAIRR").[107] The NAIRR is a shared data infrastructure that providers researchers access to resources necessary for continued AI research and development.[108] The Task Force provides recommendations for establishing the NAIRR's technical capabilities, governance, administration, assessment and requirements for security, privacy, civil rights, and civil liberties.[109] The NAIIA also established the National Artificial Intelligence Advisory Committee ("NAIAC"), which advises the President and the NAIIO on matters relating to the NAIIA.[110]

B. Bias, Discrimination, and Social Inequality Concerns Under Current U.S. AI Regulation

The NAIIA focuses on improving AI innovation and trustworthiness. However, it lacks language highlighting the need to improve AI in areas that would result in differential treatment or disparate impact for vulnerable populations.[111] Excluding these considerations from the NAIIA would perpetuate existing

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[102] *Id.*

[103] *National AI Initiative Office Launches AI Researchers Portal*, HPCwire (Jan. 6, 2022), https://www.hpcwire.com/off-the-wire/national-ai-initiative-office-launches-ai-researchers-portal/.

[104] *Id.*

[105] *Id.*

[106] *The Biden Administration Launches the National Artificial Intelligence Research Resource Task Force*, White House (June 10, 2021), https://www.whitehouse.gov/ostp/news-updates/2021/06/10/the-biden-administration-launches-the-national-artificial-intelligence-research-resource-task-force/.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *National Artificial Intelligence Advisory Committee (NAIAC)*, Nat'l. Inst. Standards & Tech. (July 13, 2023), https://www.nist.gov/artificial-intelligence/national-artificial-intelligence-advisory-committee-naiac.

[111] Nicol Turner Lee & Samantha Lai, *The U.S. Can Improve its AI Governance Strategy by Addressing Online Biases*, Brookings (May 17, 2022), https://www.brookings.edu/blog/techtank/2022/05/17/the-u-s-can-improve-its-ai-governance-strategy-by-addressing-online-biases/.

historic and systemic inequalities. Housing, hiring, criminal justice, healthcare, finance, politics, and facial recognition technologies are implementing AI into their services.[112] These places have a history of providing poor or inadequate decisions to people of color. Having AI systems that did not consider their needs and lived experiences would further burden these communities. Suppose the federal government gets bias identification and mitigation wrong. In that case, it will erode the public's trust in the efficacy of AI systems.

People of color have always been disadvantaged in obtaining affordable housing in the United States. Rather than prevent biases, AI-based lending services have reproduced the discrimination people of color face in getting a home loan. AI has exacerbated biases in home appraisals and loan approvals for Black homeowners.[113] AI-based mortgage lending systems have charged Black and Hispanic borrowers higher prices for mortgage loans.[114] Neither study found that from 2008 to 2015, online lenders have rejected a total of 1.3 million creditworthy Black and Hispanic applicants.[115] Even existing homeowners in majority Black neighborhoods have seen their property appraised for 23% less than those in predominantly White neighborhoods.[116]

Hiring processes have changed over the years due to the introduction of algorithms that favor White applicants over people of color.[117] Targeted ads on social media apps for job postings skew heavily toward specific gender and racial groups depending on the job.[118] Many employers are using emotion recognition technology ("ERT") to evaluate candidates.[119] ERT relies on software that observes a person's facial expressions and bodily cues.[120] However, more Black and Hispanic men have been passed over for employment when prescreened using ERT compared to their White counterparts.[121]

AI has reinforced the history of biased and discriminatory laws in the criminal justice system. For instance, on December 21, 2018, President Trump signed into law the First Step Act, which among other things, intended to reduce recidivism

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112 *Id.*

113 *Id.*

114 Charlton McIlwain, *AI Has Exacerbated Racial Bias in Housing. Could it Help Eliminate it Instead?*, MIT Tech. Rev. (Oct. 20, 2020), https://www.technologyreview.com/2020/10/20/1009452/ai-has-exacerbated-racial-bias-in-housing-could-it-help-eliminate-it-instead/.

115 Khristopher J. Brooks, *Disparity in Home Lending Costs Minorities Millions, Researchers Find*, CBS News (Nov. 15, 2019, 10:59 AM), https://www.cbsnews.com/news/mortgage-discrimination-black-and-latino-paying-millions-more-in-interest-study-shows/.

116 Andre M. Perry, Jonathan Rothwell & David Harshbarger, *The Devaluation of Assets in Black Neighborhoods*, Brookings (Nov. 27, 2018), https://www.brookings.edu/research/devaluation-of-assets-in-black-neighborhoods/.

117 Lee & Lai, *supra* note 111.

118 *Id.*

119 Jenn Fulmer, *The Value of Emotion Recognition Technology*, IT Business Edge, (Sept. 21, 2021), https://www.itbusinessedge.com/business-intelligence/value-emotion-recognition-technology/#what-is.

120 *Id.*

121 *Id.*

and provide inmates incentives for good behavior.[122] To complete this objective, the Department of Justice created the Pattern algorithm to predict recidivism and shorten criminal sentences based on good behavior.[123] The algorithm used factors such as their criminal history, education level, and disciplinary incidents while incarcerated to determine inmates who pose a low risk of returning to crime.[124] It divided inmates into groups of people who can get credit for completing the program and get out early, and those who cannot.[125] Unfortunately, the algorithm exhibited biases against people of color, overpredicting recidivism among minority inmates at higher rates compared to White inmates.[126] Other commercial risk assessment algorithms used by state and local governments have incorrectly judged Black inmates as more likely than white inmates to be at a higher risk of recidivism, while White inmates were more likely than Black inmates to be incorrectly flagged as low risk.[127]

AI has also contributed to the inequities in the healthcare system, allowing biased technology to resolve issues concerning an individual's health. Black people are more susceptible to organ failure and require immediate medical attention, but many hospitals are using algorithms that place Black patients lower on the transplant list than White patients.[128] Another algorithm used by hospitals to predict patients needing follow-up care disproportionately favored White patients where there should have been an even split.[129]

Obtaining financial security, economic freedom, and generational wealth is a challenge for African Americans because of racist banking practices. Designed to reduce biases inherent in face-to-face communication with banks, the user data generated to create these algorithms and the lack of diversity in the financial sector have only magnified the biases Black and Hispanic people encounter in receiving objective credit decisions. Algorithms incorporate biases that can reduce an individual's ability to access new credit cards, raise their credit lines, get approved for loans, or qualify for lower interest rates.[130] Systems are often not in sync with the ebbs and flows of market conditions, especially in dealing

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122 *An Overview of the First Step Act*, Fed. Bureau Prisons, https://www.bop.gov/inmates/fsa/overview.jsp (last visited Dec. 30, 2022).

123 Carrie Johnson, *Flaws Plague a Tool Meant to Help Low-Risk Federal Prisoners Win Early Release*, Nat'l Public Radio (Jan. 26, 2022, 5:00 AM), https://www.npr.org/2022/01/26/1075509175/justice-department-algorithm-first-step-act.

124 *Id.*

125 *Id.*

126 Duncan Purves & Jeremy Davis, *Criminal Justice Algorithms: Being Race-Neutral Doesn't Mean Race-Blind*, The Conversation (Mar. 31, 2022, 8:44 AM), https://theconversation.com/criminal-justice-algorithms-being-race-neutral-doesnt-mean-race-blind-177120.

127 *Id.*

128 Rae Ellen Bichell & Cara Anthony, *For Black Kidney Patients, An Algorithm May Help Perpetuate Harmful Racial Disparities*, Wash. Post (June 6, 2021, 8:00 AM), https://www.washingtonpost.com/health/black-kidney-patients-racial-health-disparities/2021/06/04/7752b492-c3a7-11eb-9a8d-f95d7724967c_story.html.

129 Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 Science 447, 448 (2019).

130 *Banking on the Bots: Unintended Bias in AI*, Deloitte, https://www2.deloitte.com/uk/en/pages/financial-services/articles/banking-on-the-bots-unintended-bias-in-ai.html (last visited Dec. 30, 2022).

with high inflation that force people with low-income jobs to depend on credit more to provide for themselves and their families.

AI has been used to spread political disinformation and stimy student protests at many colleges.[131] With campaign funds increasingly going towards digital ad spending, false information is spread online about police presence at polling places or incorrect information about time, place, and manner of voting intending to prevent racial minorities from exercising their constitutional right.[132] Some of these practices include telling people to vote via text, informing voters a birth certificate or naturalization document is required to register, and telling voters to boycott the election.[133] Many college police departments use Social Sentinel, an AI tool intended to detect threatening tweets about campus, to mitigate protest by monitoring what students say on social media.[134] Considering the protest that occurred in 2020 following the death of George Floyd and the resulting political awakening among Gen-Z students, allowing campus police to use this tool could result in students of color being disproportionately detained for exercising their freedom of speech and right to privacy.

We use facial recognition technology to unlock smartphones and access our banking information or health records. State and local law enforcement agencies also use facial recognition technology to identify suspects. The technology has falsely identified African American and Asian faces more than Caucasian faces, it had more difficulty identifying women than men, and it falsely identified older adults up to 10 times more than middle-aged adults.[135] These are only a few examples of how AI-based decision-making has magnified pre-existing biases and possibly created new biases. Since AI relies on user-generated content or data collection systems, they incorporate biases and reproduce inequalities we commonly see in face-to-face interactions. In doing so, these tools are following existing societal norms by favoring aspects of human behavior that are easily quantifiable over those which are hard to measure.[136]

131 Molly Cohen, *Several Colleges have Used an Artificial Intelligence Tool to Track Student Protests*, Daily Pennsylvanian (Sept. 26, 2022, 11:44 PM), https://www.thedp.com/article/2022/09/ai-monitoring-student-protests-social-sentinel; Young Mie Kim, *Voter Suppression Has Gone Digital*, Brennan Ctr. for Jus. (Nov. 20, 2018), https://www.brennancenter.org/our-work/analysis-opinion/voter-suppression-has-gone-digital.

132 Kim, *supra* note 131.

133 *Id.*

134 Arijit Douglas Sen & Derêka Bennett, *Tracked: How Colleges Use AI To Monitor Student Protests*, Pulitzer Ctr. (Sept. 20, 2022), https://pulitzercenter.org/stories/tracked-how-colleges-use-ai-monitor-student-protests.

135 Natasha Singer & Cade Metz, *Many Facial-Recognition Systems Are Biased, Says U.S. Study*, N.Y.Times (Dec. 19, 2019), https://www.nytimes.com/2019/12/19/technology/facial-recognition-bias.html.

136 Ntoutsi Et Al., *Bias in Data-Driven Artificial Intelligence Systems–An Introductory Survey*, Wiley Periodicals, Feb. 2020.

V. Proposal

A. Amendments to the National Artificial Intelligence Initiative Act

Similar to the way the EU AI Act integrates preexisting EU fundamental rights legislation, the NAIIA should include an AI Bill of Rights. The founding fathers authored the Bill of Rights to control the actions of the State and Federal governments. Some of the rights define the rights of the people, and others serve as restraints on governmental power. As AI and facial recognition technology become part of daily life, Americans are aware of the privacy harms that occur in how these systems collect our data and use it in a manner that unlawfully encroaches upon our fundamental rights. An AI Bill of Rights is a reasonable starting point to preserve individual rights and government restraint.

In reaching this goal, the White House Office of Science and Technology Policy ("OSTP") released its blueprint for protecting civil rights when using artificial intelligence (the "Blueprint").[137] The Blueprint identified five principles that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence.[138] The five principles include protection from unsafe or ineffective systems, algorithms and systems should be used and designed to prevent discrimination, protection from abusive data practices via built-in protections allowing the user to have agency over their data, notice that an automated system is being used and understanding how it contributes to outcomes that impact the user, and the ability to able to opt-out of the automated system and have access to a person who can remedy problems the user encounters.[139]

The first principle emphasizes the need for diverse communities to be involved in the development of automated systems to identify concerns, risks, and potential impacts.[140] Since automated systems often rely on historical data that include potentially biased information, they should be designed to protect individuals from inappropriate data use.[141] The second principle calls for proactive measures to protect individuals and communities from algorithmic discrimination.[142] These protections include proactive equity assessments as part of the design phase, use of data to ensure accessibility for people with disabilities, disparity assessments and mitigation.[143]The third principle supports limiting data collection to the user's reasonable expectations and that only data strictly necessary for the specific context is collected.[144] The user should be protected via built-in privacy

137 *See* Off. of Science & Tech. Pol'y, Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People 2 (2022).

138 *Id.* at 3.

139 *Id.* at 5-7.

140 Off. of Science & Tech. Pol'y, *supra* note 137, at 15.

141 *Id.*

142 Off. of Science & Tech. Pol'y, *supra* note 137, at 23

143 *Id.*

144 Off. of Science & Tech. Pol'y, *supra* note 137, at 30.

protections, data minimization, use and collection limitations, and transparency.[145] Users should control access to and use of their data, and consent to data collection should only be given when necessary.[146] The fourth principle focuses on how automated systems should provide notice of use and explanations as to how and why a decision was made or an action was taken by the system.[147] These systems should include clear descriptions of the overall system functioning, the individual or organization responsible for the system, and explanations of outcomes that are clear, timely, and accessible.[148] The fifth principle stresses the importance of human intervention to determine whether it is appropriate for a user to opt out from automated systems in favor of a human alternative.[149] Users should have access to timely human consideration and remedy by a fallback process if an automated system fails or it produces an error.[150]

The Blueprint serves as a stepping stone for protecting the rights, liberties, and privacy of the American public in the age of artificial intelligence. However, it does not address the role of government agencies in designing, using, and deploying AI systems.[151] As mentioned earlier, some of the most consequential outcomes of using AI systems come from law enforcement and government agencies. A second task force should be committed to government oversight and accountability.[152] An AI Bill of Rights should restrain the government's role as both a deployer of AI and a recipient of AI-generated data.[153] A federal task force combined with legislation passed by cities banning government and private sector use of facial recognition technology would aid in mitigating potential ethical harms of AI in our federalist society.[154]

B. Expanded Role for the National Artificial Intelligence Advisory Committee

In addition to the NAIAC's duties to the President, the committee should take measures to ensure fair and responsible use of AI while acknowledging the biases in these technologies. There are currently no federal laws that address issues concerning biased algorithms that allow renters to prey on minorities, voter intimidation laws do not address online disinformation, and individuals cannot sue tech companies for predatory practices.[155] Providing activists with

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145 *Id.*

146 *Id.*

147 Off. of Science & Tech. Pol'y, *supra* note 137, at 40.

148 *Id.*

149 Off. of Science & Tech. Pol'y, *supra* note 137, at 46.

150 *Id.*

151 Donna Etemadi, *AI Bill of Rights Must Protect Against Government Overreach*, Law360 (Oct. 27, 2022, 2:16 PM), https://www.law360.com/articles/1542989/ai-bill-of-rights-must-protect-against-government-overreach.

152 *Id.*

153 *Id.*

154 Tom Simonite, *Portland's Face-Recognition Ban Is a New Twist on 'Smart Cities'*, Wired (Sept. 21, 2020, 9:00 AM), https://www.wired.com/story/portlands-face-recognition-ban-twist-smart-cities/.

155 *Id.*

a place to speak could help in passing legislation that limits harmful uses of AI. Similar to the EU AI Act, the NAIAC could employ degrees of high, minimal, and no risk AI systems to determine appropriate levels of regulation.[156] This would allow the NAIAC to recommend more stringent regulatory actions on the use of AI in financial services, healthcare, employment, and criminal justice.[157]

The NAIAC could recommend that the NAIIO place additional systems that monitor for potential bias issues once an AI system is in public use.[158] Provide feedback channels that allow users to report errors to a human instead of an AI system.[159] Ensure some policies and procedures address critical functions throughout the AI lifecycle so that results are repeatable and potential risks are recorded.[160] Require AI providers to submit documentation on how their bias management processes are implemented and recorded at each stage.[161] Establish a subcommittee that is responsible for monitoring accountability mechanisms involved in the training and deployment of AI systems.[162] Require that providers of high risk systems have effective risk mitigation procedures in place that allow them to quickly detect potential biases and allocate more resources to respond to risks that are most likely to cause real-world harm.[163]

The NAIAC could establish conformity assessments and post-market monitoring systems providers must undergo before placing the system on the market. Unlike the EU AI Act, the NAIAC should establish separate conformity assessment structures for systems governed by existing product safety legislation so that these products satisfy the NAIIA.[164] The conformity assessment should be like the EU AI Act's requirements for "stand-alone" systems, which requires providers to conduct their own conformity assessment and submit it for review.[165] The post-market monitoring systems should establish procedures for how high-risk AI systems are designed and deployed and how to implement and maintain post-market monitoring of the respective high-risk system.[166]

V. Conclusion

Artificial intelligence is changing the world for the better by creating new jobs, transforming health care, preventing financial fraud, and making more resources available to significant numbers of peoples. As a result, governments such as

156 *Id.*

157 *Id.*

158 Reva Schwartz et al., *Towards A Standard for Identifying and Managing Bias in Artificial Intelligence*, Nat'l Inst. of Standards & Tech., at 42 (Mar. 2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf.

159 *Id.* at 43.

160 *Id.*

161 *Id.* at 44.

162 *Id.* at 45.

163 *Id.* at 46.

164 EU AI Act, s*upra* note 1, at ¶ 1.2.

165 *Id.* at ¶ 5.2.

166 Mökander, *supra* note 69, at 252.

the United States and the European Union have passed legislation to maximize these benefits. Where American AI legislation has focused more on establishing U.S. leadership in AI research and development, the European Union has taken a more ethical approach by prioritizing efforts that mitigate risks. The European Union strives to protect fundamental rights by using trustworthy AI that preserves privacy. The E.U. AI Act is imperfect and could do more to provide a robust enforcement mechanism for high-risk uses of AI. The first step, which the European Union has done, is to acknowledge the risks associated with AI and data-driven technologies and establish risk prevention or mitigation measures that address these issues.

In contrast, the United States has placed the ethical governance of AI in the hands of local governments and the private sector. Only some people are in unison on how to regulate AI. Only a small percentage of cities and companies have been proactive about imposing restrictions. Under this laissez-faire approach to AI regulation, people of color are at a greater risk of exploitation and benefit less from using the current AI systems. As grim as it may seem, there is an opportunity for the United States to preserve the free market and protect fundamental rights. Some systems allow government oversight and accountability for how AI systems are used and designed, how data is collected, and what data is collected. It is critical that the United States also strives to protect fundamental rights by putting into public use trustworthy AI that preserves privacy and truly benefits every American.

The Record High of Forcibly Displaced Persons, International Law, and the Comparative Case of Ukraine and Afghanistan: The Response to a War We Started Versus a War We Opposed

Erin Vance*

Abstract

This Comment addresses the rules and customs of international law that govern forcibly displaced persons, and how such laws have created wide gaps that have allowed the issues and challenges surrounding forced migration to not only persist, but also become increasingly worse. Specifically, Article 14 of the Universal Declaration of Human Rights provides, "everyone has the right to seek and to enjoy in other countries asylum from persecution," but places no accompanying obligation upon States to grant asylum and refugee status to these forcibly displace persons. Rather, States are given significant discretion when interpreting and defining responsibilities under Article 14. The gap between the right to seek asylum, guaranteed by Article 14, and the discretionary obligation of States leaves forcibly displaced persons asserting the right upon a State that has no obligation to them. In this view, the right of asylum belongs to the State rather than the forcibly displaced person. Additionally, the 1951 Convention Relating to the Status of Refugees requires three elements to be met for a forcibly displaced person to be considered a refugee, which leaves many forcibly displaced persons outside the scope of the definition despite finding themselves in refugee-like circumstances. The limited scope of the 1951 Convention Relating to the Status of Refugees is illustrated by the fact that it does not provide for forced displacement caused by armed conflict, severe economic insecurity, environmental degradation, and other failures of governance. Lastly, there is no single body of a comprehensive international legal framework that governs forced displacement, but rather it is scattered across various instruments of international law. The lack of a single governing framework makes regulating and enforcing forcibly displaced persons' rights difficult.

The current international legal regime that governs forcibly displaced persons lacks sufficient safeguards for the fundamental right to seek asylum and fails to encompass many individuals in refugee-like situations under its limited scope. To achieve a more equitable and remedial legal regime, the definition of a refugee needs to be re-defined to cancel out the failure of the current definition's limited scope. Further, the obligation upon States needs to be clearly defined rather than merely discretionary, with consequences when those obligations are not fulfilled.

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Table of Contents

I. Introduction

Human populations have been forcibly displaced throughout history, but now more than ever, forced human displacement is a staggering concern internationally. In May 2023, the United Nations Refugee Agency announced the number of forcibly displaced persons worldwide had surpassed 110 million individuals.[1] This statistic represented the highest annual increase of forced displacement, where 108.4 million individuals were reported to be forcibly displaced at the end of 2022.[2]

Statistics indicate that most forced movements occur within the Third World itself. The term "Third World" encompasses countries that are predominantly located in the Global South and considered to be developing countries that have

[1] U.N High Commissioner for Refugees, *Refugee Statistics,* https://www.unrefugees.org/refugee-facts/statistics/#:~:text=By%20the%20end%20of%202022,62.5%20million%20internally%20displaced%20people (last visited Nov. 17, 2023).

[2] *Id.*

fragile economic systems.[3] The term also expresses opposition to the current system of international law, which developed around European culture that continues to benefit the Global North at the expense of the Global South.[4] For example, in 2017, 68% of refugees worldwide came from Afghanistan, Myanmar, Somalia, South Sudan, and Syria, which are all countries located in the Global South.[5] Not only does most of the movement of forcibly displaced persons come from the Third World, but other Third World countries also host many of these forcibly displaced persons due to the fact they are geographically situated as countries neighboring the forcibly displaced persons' countries of origin.[6]

Article 14 of the Universal Declaration of Human Rights provides, "everyone has the right to seek and to enjoy in other countries asylum from persecution."[7] However, this right places no accompanying obligation upon States to grant asylum and refugee status to these forcibly displaced persons. Further, many forcibly displaced persons are fleeing their home in their native countries due to refugee-like circumstances, but their subjective circumstances do not fall under the scope of the 1951 Convention Relating to the Status of Refugees. The international law that governs forcibly displaced persons has gaps that create global issues and challenges, which has allowed the issue of forcibly displaced persons to worsen at an increasingly concerning rate.

This Comment addresses the rules and customs of international law that govern forcibly displaced persons, and how such laws have created wide gaps that have allowed the issues and challenges to not only persist, but also become increasingly worse. Following an explanation of what a forcibly displaced person is and the causes of forced migration, the cases of Ukraine and Afghanistan will be introduced, accompanied with a discussion on how the armed conflicts within those States are affecting their populations. Then, a historical overview of the international law and its rules and customs on forcibly displaced persons will be discussed, with a subsequent analysis of the policies, principles and laws that have created the frustrating gaps in the international rules and customs governing forcibly displaced persons. Within this analysis, the discussion will return to the cases of Ukraine and Afghanistan, focusing on the United States' response to the emergencies occurring in the two countries, and the implications that may be influencing the different response. Such implications could involve racial bias, the perceptions of the Global North compared to the Global South, and relationships to terrorism. Finally, this comment will propose how the international law should be reformed to create a broader definition of a refugee under the Convention, how an obligation upon states should be enforced to make the rights

[3] Samuel Berhanu Woldemariam et al., *Forced Human Displacement, The Third World and International Law: A Twail Perspective*, 20 Melbourne J. Int'l L. 251, 256.

[4] *Id.*

[5] *Id.,* at 253.

[6] U.N. High Commissioner for Refugees, *Global Trends: Forced Displacement In 2021*, https://www.unhcr.org/sites/default/files/legacy-pdf/62a9d1494.pdf (last visited Nov. 17 2023).

[7] G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

to forcibly displaced persons more effective and dependable, and how to make a more cohesive and burden sharing Convention.

II. Background

This section provides an overview of what a forcibly displaced person means, and what that phrase encompasses. Next, it describes the definition of a refugee and the different meanings that lay behind that term. This section will provide the causes of forced migration, or in other words, how and why people find themselves in the position of being forcibly displaced from where they call home. Finally, this section will discuss the countries of Ukraine and Afghanistan, which are the comparative countries of topic in this comment, and the conflict within those countries which have resulted in their natives being forcibly displaced.

A. What Is A Forcibly Displaced Person?

The phrase 'forcibly displaced person' is not all encompassing phrase. Rather, the phrase can be divided into separate groups, where the first group is referred to as internally forcibly displaced persons and the second group is referred to as externally forcibly displace persons.[8]

The Guiding Principles on Internal Displacement, a document that was introduced to the United Nations in 1998, provides the humanitarian and human rights standards applicable to internally forcibly displaced persons and the definition for such term.[9] The document provides that,

"Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their home or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."[10]

Thus, these persons have been forced from the place they call home but, unlike refugees, they continue to remain within the borders of their native countries.

The externally forcibly displaced persons are those who, unlike internally forcibly displaced persons, leave their native country and seek refuge in another State where they may have a claim to refugee status under international law.[11] These forcibly displaced persons are also referred to as cross-border migrants.[12] In this comment, the focus will primarily be on externally forcibly displaced persons in the context of Ukraine and Afghanistan.

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[8] Cristiano d'Orsi & Gino J. Naldi, *Climate-Induced Displacement In The Sahel: A Question of Classification*, 103 Int'l Rev. Red Cross, 1029, 1029 (2021).

[9] Francis M. Deng (Representative of the Secretary-General), *Guiding Principles on Internal Displacement*, E/CN.4/1998/53/Add.2 (1998).

[10] *Id.* at 5; Jessica Wyndam, *A Developing Trend: Laws and Policies on Internal Displacement*, 14 Hum. Rts. Brief 7, 9 (2006).

[11] d'Orsi & Naldi, *supra* note 8, at 1030.

[12] *Id.*

B. Causes of Forced Migration

There are several causes to forced migration, which is a general term that refers to the movements of refugees, asylum seekers, and internally displaced persons. Some of the common causes are conflict-induced displacement, development-induced displacement, and disaster-displacement.[13] Conflict-induced displacement occurs when people are forced to flee their homes as a result of armed conflict, including civil war, generalized violence, and persecution on the grounds of nationality, race, religion, political opinion or social group.[14] Development-induced displacement occurs when people are compelled to move as a result of policies and projects implemented to advance development efforts.[15] Disaster induced displacement occurs when people are displaced as a result of natural disasters, environmental change, and human-made disasters.[16]

Research identifies that the most prominent causes of forced migrations are armed conflicts, political instability, persecution, and economic underdevelopment.[17] This comment will be focusing on forced displacement caused by armed conflict within Ukraine and Afghanistan.

C. The Conflict in Ukraine

Following the order of their country's leader, Vladimir V. Putin, Russian troops invaded the country of Ukraine on February 24, 2022.[18] Since the initial invasion, the conflict has since become the largest ground mobilization Europe has seen since World War II in 1945.[19] The invasion was spurred by several factors, such as the threat Russia felt from Ukraine potentially becoming a member of NATO, the threat of a democratic State so close to Russian borders, and the Russian belief that Ukraine is culturally and historically part of Russia.[20]

During the siege, Russian commanders have intensely attacked civilians and infrastructure, leaving several cities in Ukraine in ruins.[21] The critical industrial infrastructure that Russia has damaged or destroyed across Ukraine has caused total outages of electricity, heating and water in some areas, while other services,

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[13] Development and Peace – Caritas Canada, *Addressing the Root Causes of Forced Migration: Recommendations for Canada,* Oct. 2018, at 1.

[14] Sherill Hayes et al., *Conflict Induced Migration and The Refugee Crisis: Global and Local Perspectives from Peacebuilding and Development*, 11 J. OF PEACEBUILDING & DEV. 2, 7 (2016).

[15] Hong Zhu & Yihan Wang, *Agency and Mobility In The Context Of Development Induced Migration: The Case of Three Gorges Out Migrants*, 47 J. ETHNIC MIGRATION STUD. 2745, 2746 (2020).

[16] U.N. High Commissioner for Refugees, *Climate Change and Disaster Displacement,* https://www.unhcr.org/climate-change-and-disasters.html (last visited Dec. 18, 2022).

[17] ALEXANDER BETTS, FORCED MIGRATION AND GLOBAL POLITICS 1 (Wiley-Blackwell, 1st ed. 2009).

[18] Dan Bilefsky et al., *Can The West Stop an Invasion by Russia Into Ukraine?*, N.Y. TIMES, Jan. 10, 2022, at A8; Dan Bifesky et al., *A Year of War in Ukraine: The Roots of the Crisis,* N.Y. TIMES, https://www.nytimes.com/article/russia-ukraine-nato-europe.html (last visited Nov. 17, 2023).

[19] *Id.*

[20] *Id*.

[21] *Id.*

such as medical care, internet access, and public transportation are disrupted.[22] For example, a theatre in Mariupol provided shelter to hundreds of people, including children, when a Russian strike destroyed the shelter on March 16, 2022.[23] Further, a geolocated image confirmed that "children" was written out in large lettering on either side of the theatre before bombing.[24] At that time, hundreds of thousands of people had been entrapped in the coastal city as Russian forces had encircled the area for weeks. Further, the people entrapped in the city were surviving without electricity, heat, or water.[25] Mariupol local officials instructed citizens to leave their deceased family members in the streets because it was too dangerous to hold funerals while city was under siege.[26]

The Russian invasion into Ukraine has had a devastating humanitarian toll and claimed thousands of Ukrainian citizens' lives. In the months following the Russian invasion, Ukraine initiated a proceeding in the International Court of Justice, where the Court noted that "the civilian population affected by the present conflict is extremely vulnerable" and that Russia's conduct has resulted in numerous "civilian deaths and injuries."[27] The invasion has forced more than seven million of these vulnerable people to flee Ukraine, resulting in the fastest growing refugee crisis since World War II according to the United Nations.[28]

D. The Conflict in Afghanistan

Following the terrorist attacks on the United States on September 11, 2001, President Bush signed into law a joint resolution that "authorized the use of force against those responsible for attacking the United States;" the United States later used the resolution as the "legal rationale" for the its military action in Afghanistan.[29] On October 7, 2001, the United States military began a bombing campaign against Taliban and al-Qa'ida forces in Afghanistan, based on the belief that was where the terrorist groups were hiding Osama bin Laden, the mastermind behind the 9/11 attacks.[30] This campaign officially launched Operation Enduring Freedom, and marked the beginning of a two decade long war.[31]

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[22] U.N. High Commissioner for Refugees, *Ukraine Situation*, https://reporting.unhcr.org/ukraine-situation (last visited Nov. 2, 2022).

[23] Tara John et al., *Russia Bombs Theater Where Hundreds Sought Shelter and 'Children' Was Written on the Grounds,* CNN, https://www.cnn.com/2022/03/16/europe/ukraine-mariupol-bombing-theater-intl/index.html (last visited Nov. 16, 2023).

[24] *Id.*

[25] *Id.*

[26] *Russian Strike Hits Theater in Mariupol Sheltering "Hundreds" of Residents, Ukraine Foreign Minister Says,* CBS News, https://www.cbsnews.com/news/russia-strike-theater-mariupol-residents-ukraine-foreign-minister-says/ (last visited Nov. 16, 2023).

[27] Allegations of Genocide Under the Convention on the Prevention of Punishment of the Crime of Genocide, (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J, ¶ 30, 75 (Mar. 16).

[28] *Ukraine Situation*, *supra* note 22.

[29] Council on Foreign Relations, *Timeline: The U.S. War In Afghanistan*, https://www.cfr.org/timeline/us-war-afghanistan (last visited Dec. 2, 2022).

[30] *Id.*

[31] *Id.*

In 2001, the largest outflow of forcibly displaced persons came from Afghanistan.[32] Approximately 200,000 Afghans fled their country due to armed conflict,[33] and 700,000 Afghans were internally displaced.[34]

E. The Definition Of A Refugee

The established definition of a 'refugee' in international law can be found in the 1951 Convention Relating to the Status of Refugees (Refugee Convention). The Refugee Convention defines a refugee as someone who leaves or is unable to return to his or her country of nationality as a result of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[35]

There are three essential elements to satisfying the test for obtaining refugee status. First, the individual must have a well-founded fear of persecution.[36] Second, the individual must be outside of one's country of origin or habitual residence.[37] Lastly, the individual must have the inability or unwillingness to rely on the protection of their country of origin or habitual residence, or the inability or unwillingness to return there due to a fear of persecution.[38]

From analyzing the definition of a refugee and its three elements, it is clear that the Refugee Convention does not encompass the scope of all forcibly displaced persons. The traditional categories of refugees provided by the Refugee Convention fail to cover the increasing number of persons who are in refugee-like situations. For example, the Refugee Convention does not provide for forced displacement causes such as armed conflict, severe economic insecurity, environmental degradation, and other failures of governance.[39] Thus, the current regime of international law on forcibly displaced persons fails to provide protection for and cover the needs of many forcibly displaced persons.

F. The Definition Of An Asylum Seeker

An asylum seeker is an individual who "flee[s] their country to seek protection in another country."[40] In order to receive such protection in another country,

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32 Fernando del Mundo, *2001 Global Refugee Statistics*, UNHCR (June 18, 2002), https://www.unhcr.org/en-us/news/latest/2002/6/3d0f6dcb5/2001-global-refugee-statistics.html (last visited Nov. 16, 2023).

33 *Id.*

34 Hiram A. Ruiz, *Afghanistan: Conflict And Displacement 1978 To 2001*, 13 Forced Migration Rev. 8, 8 (2002), https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/september-11th-has-anything-changed/ruiz.pdf (last visited Nov. 18, 2023).

35 Convention Relating to the Status of Refugees art. 1, July 28, 1951, 189 U.N.T.S 137.

36 Rafiqul Islam & Jahid Hossain Bhuiyan, An Introduction to International Refugee Law 19-20 (2013).

37 United Nations High Commissioner for Refugees, *What Is A Refugee?*, www.unhcr.org/what-is-a-refugee.html (last visited Nov. 2, 2022).

38 *Id.*

39 Arthur C. Helton & Eliana Jacobs, *What Is Forced Migration?*, 13 Geo. Immigr. L.J. 521, 521-22, 531 (1999).

40 *What Is A Refugee?*, *supra* note 37.

the asylum seeker must demonstrate that the "fear of persecution in [their] home country is well-founded."[41] Thus, an asylum seeker is an individual that has left their home country, but, unlike a refugee, has not yet been given citizenship rights of the country that they have landed in.

Article 14 of the Universal Declaration of Human Rights provides, "everyone has the right to seek and to enjoy in other countries asylum from persecution."[42] However, language actually guaranteeing the right to be granted asylum was rejected by many States.[43] While Article 14 provides the right of asylum to individuals, the application of that right is not concrete because States are given significant discretion when interpreting and defining responsibilities under Article 14.[44] For this reason, many individuals that cross international borders find themselves in a state of limbo for years, unable to return to the place they call home while simultaneously being prevented from fully integrating into the society of their hosting State due to their status as an asylum seeker.[45]

III. Discussion

A. The Current State Of International Law On Forcibly Displaced Persons

Human populations have been forcibly displaced throughout the history of our world. However, a multilateral effort to address this international issue was not made until the aftermath of the Second World War, when millions of persons in the Global West, specifically Europe, were forced to flee their homes during the wake of the war. [46] This multilateral effort was forged by the United Nations High Commissioner for Refugees (UNHCR), which was created in 1950.[47] After the creation of the UNHCR, multilateral initiatives were culminated, which remain the prominent legal and institutional frameworks dealing with the forcibly displaced today. Specifically, the Convention Relating to the Status of Refugees[48] (Refugee Convention) was adopted, and later, the 1967 Protocol Relating to the Status of Refugees[49] (Protocol). Since the adoption of the Protocol, the

41 *Id.*

42 G.A. Res. 217 (III) A, Universal Declaration of Human Rights, U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR].

43 Yvonne S. Brakel et al., *50 Years Was Too Long To Wait: The Syrian Refugee Crisis Has Highlighted The Need For A Second Optional Protocol To The 1951 Convention Relating To The Status of Refugees*, 40 U. Ark. Little Rock L. Rev. 51, 56 (2017).

44 *Id.*

45 Elisa Massimino & Alexandra Schmitt, *A Rights-Centered Paradigm for Protecting the Forcibly Displaced*, Am. Progress, Dec. 7, 2020, at 7.

46 U.N. High Commissioner for Refugees, *History of the UNHCR*, https://www.unhcr.org/en-us/history-of-unhcr.html; James C. Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33(2) Int'l & Comp L. Q. 348, 351 (1984).

47 *History of the UNHCR*, *supra* note 46.

48 U.N. Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons Convened, *Convention Relating to the Status of Refugees*, 189 U.N.T.S 137 (April 22, 1954) [hereinafter Refugee Convention].

49 G.A. Res. 2198 (XXI), Protocol Relating to the Status of Refugees (Jan. 31, 1967).

international legal framework governing forced displacement has changed very little, and this existing international legal regime is inadequate as mass displacement of a recurring nature continually takes place.

i. The Refugee Convention and Protocol

The Refugee Convention came to force on July 28, 1951, and was the first document to specify the rights afforded to refugees and the corresponding duties of High Contracting Parties.[50] It was created in response to the massive increase of European refugees following the World War II, and aimed to make "a comprehensive codification of rights afforded to refugees at an international level."[51] Specifically, the International Refugee Organization (IRO), a resettlement agency created by the United Nations in 1946, raised the need for the creation of this legal document.[52] The IRO believed that the surge of forced displacement following the Second World War showed that more legal guidance was necessary to inform future international refugee efforts, and so the IRO requested the creation of a comprehensive study of the history of refugee policy.[53] This study was called the 'Study of Statelessness,' and resulted in the IRO's recommendation of "the creation of a new independent agency dedicated to protecting stateless persons when national agencies could not."[54] This recommendation began the negotiations of the Refugee Convention, a "universal document" that would outline the "rights of refugees and the responsibilities of high contracting [states] to support [those] rights."[55]

The Refugee Convention established the still internationally recognized definition of a "refugee." Article 1(A)(2) of the Refugee Convention states that a refugee is a person "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to its."[56]

As previously stated, it is clear the Refugee Convention's definition of a refugee does not encompass the scope of all forcibly displaced persons and fails to cover the increasing number of persons who are in refugee-like situations. For example, the Refugee Convention does not provide for forced displacement

[50] Refugee Convention, *supra* note 48.

[51] U.N. Conference of Plenipotentiaries, *Convention Relating to the Status of Refugees*, 189 U.N.T.S 150 (July 7, 1951); Brakel, *supra* note 43, at 53.

[52] Brakel, *supra* note 43, at 56.

[53] *Id.*

[54] *Id.* at 56-57.

[55] *Id*. at 57.

[56] Refugee Convention, *supra* note 48, at art. 1A(2).

causes such as "armed conflict, persecution, severe economic insecurity, environmental degradation, or other grave failures of governance."[57]

Further, the Refugee Convention created a cornerstone protection by establishing the principle of "non-refoulement" within Article 33.[58] This principle protects asylum seekers or refugees from being returned to a country "where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[59] This right affords asylum seekers or refugees to have no fear of being returned to their home country once they are admitted to a State. The only exceptions to the non-refoulement principle are if a person is deemed to be a danger to the security of the country, or if the person has been convicted of a serious crime and is considered a danger to the community in which they reside.[60]

Additionally, Article 35 of the Refugee Convention calls upon States to undertake to cooperate with the UNHCR in the exercise of its functions.[61] However, what this cooperation should consist of is not addressed, described, or defined anywhere in the Refugee Convention. Thus, the drafters left it to the Contracting States to decide which refugees and the amount of refugees they would allow to resettle in their countries. This lack of any specific obligation or duty upon Contracting States has led to inconsistent national refugee laws and policies globally, and as a result, has created an unequal burden sharing system. Thus, while the world's displaced population has been provided recognized legal rights within the Refugee Convention, the actual application of these protections has been of poor quality.

The Refugee Convention was promulgated in the wake of World War II and had both "temporal and geographical restrictions."[62] Under the temporal restriction, individuals in refugee-like circumstances could only be granted refugee status if their situations were a "result of events occurring before 1 January 1951" and under the geographical restriction, only if such events occurred "in Europe or elsewhere."[63] However, as world and the events causing refugee-like situations changed after World War II, the Convention's definition of a refugee needed to evolve.[64] Thus, the Optional Protocol to the Refugee Convention was promulgated in 1967 and as a result, all individuals in refugee-like circumstances "were granted equal status" under the Convention's definition of a refugee, where no weight was given to temporal or geographic considerations.[65] In other words, the two restrictions that acted as gatekeepers were effectively removed by the addition of the Optional Protocol.

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[57] Helton, *supra* note 39, at 521.

[58] Refugee Convention, *supra* note 48, at art. 33.

[59] *Id.*

[60] *Id.*

[61] Refugee Convention, *supra* note 48, at art. 35.

[62] Brakel, *supra* note 43, at 57.

[63] *Id.*

[64] *Id.*

[65] *Id.*

The Refugee Convention and the Optional Protocol remain the sole international legal framework governing the protection and assistance of forcibly displaced persons. However, this 'comprehensive' document fails to address the concerns of many forcibly displaced persons. The Refugee Convention does not require Contracting States to grant asylum, nor does it specify how states are to share the burden of refugee resettlement. As Guy Goodwin-Gill, a renowned international legal scholar, noted,

"The 1951 Convention does not deal with the questions of admission, and neither does is oblige a State of refuge to accord asylum as such, or provide for the sharing of responsibilities…the Convention does not address questions of causes of flight, or make provisions for prevention; its scope does not include internally displaced persons, and it is not concerned with the better management of international migration."[66]

ii. Substantive International Human Rights Law and Criminal Law

Notwithstanding the Refugee Convention and its Protocol, international rules regulating the forcibly displaced can be found in international human rights law and criminal law, such as the Universal Declaration of Human Rights (UHDR)[67], the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)[68], the 1977 Additional Protocol II to the Geneva Conventions (Additional Protocol II)[69], and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture).[70]

The Universal Declaration of Human Rights (UDHR) was drafted by representatives of 8 nations and was adopted by the UN General Assembly in 1948.[71] The document highlights and represents the basic, fundamental human rights that should be afforded to individuals globally.[72] Specifically, Article 14 of the UDHR provides that, "everyone has the right to seek and enjoy in other countries asylum from persecution."[73] However, alternative language guaranteeing

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66 Guy S. Goodwin-Gill, '*The International Law of Refugee Protection*', *in* The Oxford Handbook of Refugee and Forced Migration Studies 36, 45 (Elena Fiddian-Oasmiyeh et al. eds., 2014).

67 UDHR, *supra* note 42.

68 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

69 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* June 8, 1977, 1125 U.N.T.S. 609 (entered into force Dec. 7, 1978).

70 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).

71 *Universal Declaration of Human Rights (1948), Drafting History,* United Nations Dag Hammarskjold Library, https://research.un.org/en/undhr/draftingcommittee#:~:text=In%20February%20 1947%2C%20in%20accordance,International%20Bill%20of%20Human%20Rights (last visited Nov. 17, 2023); UDHR, supra note 42.

72 *Universal Declaration of Hunan Rights,* United Nations, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Nov. 17, 2023).

73 *What is a refugee*?, *supra* note 37; UDHR, *supra* note 42, at art. 14(1).

this right to be granted asylum was rejected by many participating States because they viewed such a guarantee as an infringement upon sovereignty.[74] Thus, while the UDHR provides basic rights to individuals, States are given significant discretion when interpreting and defining their responsibility toward refugees and asylum seekers.

The Geneva Convention IV and the Additional Protocol II prohibit the act of forcibly displacing civilians during armed conflict.[75] Specifically, the Geneva Convention IV prohibits the "deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupation or not…regardless of their motive."[76] The Additional Protocol II prohibits parties to a conflict from ordering the displacement of civilians or compelling civilians to leave their territory.[77]

The Convention Against Torture provides a specific protection from refoulement, which complements the similar rule of "non-refoulment" that exists in the Refugee Convention.[78] Specifically, the Convention Against Torture provides that States shall not "expel, return (refoule) or extradite" a person to another state where the person may be subject to torture.[79] Refugee scholars have highlighted this rule as providing one of the strongest legal bases for complementary protection to forcibly displaced persons.[80]

B. Issues and Challenges In International Law On Forcibly Displaced Persons

i. Policy and Principles

One of the biggest challenges between forced displacement and international law is territorial sovereignty. As previously stated, when the UDHR first recognized the fundamental right to seek asylum, many participating States rejected additional language guaranteeing this right because they viewed this type of guarantee as an infringement upon sovereignty.[81] Territorial sovereignty is a cornerstone principle of international legal order.[82] It secures to States the sovereign power to govern affairs that take place within their territory and entitles them to seek cooperation with other States in respect of matters that transcend national

74 Woldemariam, *supra* note 71, at 259.

75 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 49, 147, Aug. 12, 1949; Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 17, Dec. 7, 1978.

76 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *supra* note 75.

77 Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *supra* note 75.

78 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46 (Dec. 10, 1984), 1465 U.N.T.S 85; *see also* Refugee Convention, art. 33, *supra* note 35, at 9.

79 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 78.

80 Woldemariam, *supra* note 71, at 257.

81 *Id.* at 258.

82 *Id.*

boundaries.[83] Forced human displacement involves the compelled movement of people to cross national boundaries due to circumstances that threaten their lives and safety.[84] This transboundary movement puts people in a position to pursue the right to seek asylum, with a State that, by virtue of its territorial sovereignty, has no obligation to grant asylum.[85] Thus, when considering traditional territorial sovereignty, the right of asylum does not belong to the forcibly displaced person, but rather the State.

ii. Law

Additionally, the fact that there is no single body of a comprehensive international legal framework that governs forced displacement makes regulating such movement, and enforcing displaced persons afforded rights, difficult. The current legal framework addressing the forcibly displaced is found scattered across various instruments of international law, which were previously discussed. Further, the current legal framework is reactive in nature, rather than preventative. It only comes into play after displacement has occurred, and its rules are only triggered after forcibly displaced persons have crossed national boundaries.

As previously stated, a refugee is defined as someone who leaves or is unable to return to his or her country of nationality as a result of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion."[86] However, this definition is limited and does not afford individuals in refugee-like situations the same opportunities and rights as individuals who fit within this dated and limited definition. For example, individuals who are forced to leave their homes due to environmental disasters, armed conflict, or severe economic insecurity do not fit the current definition of a refugee and therefore are not afforded that status while trying to seek a home elsewhere and subsequently face multiple challenges.[87] In other words, the traditional definition of 'refugee' that is provided in the Refugee Convention is too narrow and fails to cover the larger number of persons who find themselves in refugee-like situations, most notably those individuals that are referred to as forced migrants.

C. The Focus on Immediate Causes of Forced Displacement Rather than the Root Causes

There are several underlying factors that continue to cause forced migration, such as recurring conflicts, political and economic instability, persecution, and

[83] *Id.*

[84] *Id.* at 259.

[85] *Id.*

[86] Convention Relating to the Status of Refugees, *supra* note 35.

[87] Arthur C. Helton, *Forced International Migration: A Need for New Approaches by the International Community*, 18 Fordham Int'l L.J. 1623 (1995).

natural disasters.[88] International law and policy focuses predominantly on the immediate causes of and responses to forced migration, while there remains little, if any, international law or policy addressing the underlying factors that result in the causes of this international humanitarian issue.[89] That is, international law and policy addressing forced migration tends to be reactive rather than proactive.

The reactive international legal framework on forced migration often does not result in the forcibly displaced resettling in a foreign country, but rather results in being held for offshore processing and detention.[90] The focus on immediate causes has allowed increased securitization and border protection that attempts to stop refugees from ever reaching a place of asylum to resettle in.[91] This deterrence-focused program to forced migration has been enabled by the fragmented and unresponsive nature of the current international legal framework, which could be prevented by a comprehensive framework that does not put sovereignty on a pedestal.[92]

D. Overview Of The United States' Process Of Accepting Forcibly Displaced Persons

In 1968, the United States joined the international refugee regime by ratifying the Protocol to the Refugee Convention.[93] The Immigration and Nationality Act (INA) authorized and governed refugee admissions and resettlement, which was later amended by the Refugee Act of 1980 (Act).[94] The Act aimed to create a more uniform procedure for refugee admissions, and to promote refugee self-sufficiency through federal assistance for refugees.[95]

Under the INA, a "refugee" is described as a person who is outside his or her country and who is unable or unwilling to return because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[96] The INA's definition of a refugee is modeled after the definition provided in the Refugee Convention. All refugees that are resettled in the United States had first contact with the UNHCR.[97] The UNHCR processes and assesses each individual refugee claim,

88 Woldermariam, *supra* note 71, at 255.

89 *Id*. at 255.

90 *Id.*

91 *Id.*

92 *Id.* at 259.

93 Joan Fitzpatrick, *The International Dimension of U.S. Refugee Law*, 15 Berkeley J. of Int'l L. 1, 1 (1997).

94 Immigration and Nationality Act of 1952, 8 U.S.C §1101; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102.

95 Anastasia Brown & Todd Scribner, *Unfulfilled Promises, Future Possibilities: The Refugee Resettlement System in the United States*, 2 J. Migration Hum. Sec. 101, 102 (2014).

96 8 U.S.C. § 1101(42).

97 Brakel, *supra* note 43, at 72.

and based on such assessment, the UNHCR will refer the individual cases to the United States for resettlement.[98]

Under the INA, the President of the United States, has the power to determine the number of refugees to be admitted to the country each fiscal year.[99] This determination, which is made after consulting with Congress, is based on the consideration of humanitarian concerns as well as various national security concerns.[100] Further, the President also has the power to expand admission when an emergency refugee situation arises that was not foreseen at the time the determination for the number of admittees was made.[101] In contrast to the expansion power, the President has the power to suspend or place restrictions on entry of immigrants into the country, if failing to do so would be adverse to national interests.[102]

In the aftermath of September 11th, 2001, the United States' refugee framework was overhauled to ensure national security, even though none of the attackers had entered the country under the status of a refugee.[103] Specifically, refugee admissions were completely suspended until a review of refugee related security procedures had taken place, and until the implementation of enhanced security measures were completed.[104] As a result, refugee admissions into the United States fell from 70,000 in 2001 to 27,1331 in 2002.[105] The number of admissions didn't return to near 70,000 until 2013.[106]

In 2015, the Syrian Refugee crisis began, and "under significant pressure from the international community…President Barack Obama vowed to take in at least 10,000 Syrian refugees over the next year."[107] In Presidential Declarations, President Obama increased the refugee ceiling in 2016 to 85,000 and to 110,000 in 2017.[108] However, when President Trump took office in January 2017, he issued a Presidential Order calling for a 90-day travel ban for persons coming from Iraq, Syria, Iran, Somalia, Sudan, Yemen, and Libya.[109] In addition to the travel ban, a 120-day suspension was put on all acceptances of refugees, regardless of national origin.[110] Further, the ceiling number of refugee acceptances for 2017 was reduced from 110,000 to 50,000.[111] The travel ban was issued in the wake

98 *Id.*

99 *Id.*

100 *Id.*; 8 U.S.C. § 1157(a)(3).

101 *Id.*; 8 U.S.C. § 1157(b).

102 8 U.S.C. § 1182(f).

103 Michelle Mittelstadt et al., *Through the Prism of National Security: Major Immigration Policy and Program Change in the Decade Since 9/11*, Migration Pol'y Inst. Aug. 2011, at 1,17.

104 Andorra Bruno, *Refugee Admissions and Resettlement Policy* 2, Libr. Congress Cong. Rsch. Serv. December 18, 2018.

105 *Id.*

106 *Id.*

107 Brakel et al., *supra* note 43, at 73.

108 *Id.* at 73-74.

109 *Id.* at 74.

110 *Id.*

111 *Id.*

of violent attacks carried out by members of the Islamic State in Paris and Brussels.[112] Despite the travel ban focusing on Islamic countries, President Trump assured the public that the ban was not a Muslim ban, but, rather, was intended to keep terrorists out of the United States.[113]

The United States has reacted differently when it comes to emergencies occurring in the Global West. As previously stated, Putin's Russian troops invaded the country of Ukraine on February 24, 2022.[114] Following the invasion, Ukraine filed allegations of violations of the 1948 Convention on the Prevention of Punishment of the Crime of Genocide (Genocide Convention) against Russia in the International Court of Justice (ICJ).[115] The ICJ found that "it is doubtful that the Genocide Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State…"[116] The ICJ further noted that Ukraine's civilian population was "extremely vulnerable" and that many civilian deaths and injuries had taken place because of the conflict.[117] Following the ICJ's holding, the United States State Department called the ICJ's ruling "significant," and called on Russia "to comply with the order, immediately cease its military operations in Ukraine, and establish unhindered humanitarian access in Ukraine."[118]

Further, a prosecutor of the International Criminal Court (ICC) opened an investigation into events involving the conflict in Ukraine.[119] However, the ICC investigation poses challenges to United States policy, because the country has long objected to the ICC exercising jurisdiction over the nationals of states that are not party to the Rome Statute.[120] During the Trump administration, sanctions were imposed on the ICC to prevent an ICC investigation into the conduct of United States personnel in Afghanistan.[121] These sanctions were only lifted last year by the Biden administration.[122] Contrary to past policy practices, the United States Senate adopted a resolution with bipartisan support on March 15, 2022, which encouraged States to petition the ICC to investigate war crimes committed

112 *Id.* at 52.

113 *Id.* at 51.

114 Aleksander Vasovic & Natalia Zinets, *Missiles Rain Down Around Ukraine,* Reuters, https://www.reuters.com/world/europe/putin-orders-military-operations-ukraine-demands-kyiv-forces-surrender-2022-02-24/ (last visited Nov. 18, 2023).

115 *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 Am. J. Int'l L. 631, 632 (2022) [hereinafter International Mobilization].

116 Allegations of Genocide Under the Convention on the Prevention of Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. ¶ 59 (Mar.16).

117 *Id.* at ¶ 75.

118 Press Release, U.S. Dep't of State, Welcoming the International Court of Justice's Order Directing the Russian Federation to Immediately Suspend Military Operations in Ukraine (Mar.16, 2022), https://www.state.gov/welcoming-the-international-court-of-justices-order-directing-the-russian-federation-to-immediately-suspend-military-operations-in-ukraine/.

119 International Mobilization, *supra* note 115, at 631-32.

120 Kristen E. Eichensehr, *Contemporary Practice of the United States*, 115 Am. J. Int'l L. 138, 729 (2021).

121 International Mobilization, *supra* note 115, at 636.

122 *Id.*

by Russian troops.[123] Further, Antony Blinken, the United States Secretary of State, announced on March 23, 2022, that:

"Based on information currently available, the U.S. government assesses that members of Russia's forces have committed war crimes in Ukraine…a court of law with jurisdiction over the crime is ultimately responsible for determining criminal guilt…U.S. government will continue to track reports of war crimes and will share information…with allies…We are committed to pursuing accountability using every tool available, including criminal prosecutions."[124]

The history of United States' refugee policy since the aftermath of the September 11th terrorist attacks prioritizes national security, border protection, and principles of sovereignty, rather than prioritizing the safety of these forcibly displaced persons fleeing their homes. Indeed, the only reason that the Obama administration raised the ceiling number of refugee acceptances was because of the increased pressure that was placed on the United States by the international community, who was taking on an unequal share of their burden. Further, as evidenced by the Trump administration's travel ban and suspension of refugee acceptances in 2017, considerations of race and national origin come into play when making international policy decisions.

IV. Analysis

In analyzing the United States' response to refugee situations, it is clear there has been a different response when it comes to situations occurring in the Global North and the Global South. When it comes to refugees fleeing situations in the Global South, the United States response is underwhelming. Such a response is credited to high prioritization of national security concerns in the wake of 9/11, the fact that the United States is not a country of first asylum, and the principle of sovereignty. On the other hand, the United States has had different responses when it comes to persons facing refugee-like situations in areas of the Global North, such as the current case of Ukraine. The contrasting response to the Global North could be because of the fact the United States doesn't attach national security concerns with the Global North in the way it does with the Global South.

As previously mentioned, the Refugee Convention provides individual refugees with the right to seek asylum in another country but the principle of state sovereignty places limits on States' obligations to fulfill those rights because nowhere in the Refugee Convention are States' obligations clearly defined.[125] Thus, the respect for state sovereignty places limits on the amount of burden sharing States are required to provide. For example, Article 35 of the Refugee Convention calls upon States to cooperate with the United Nations High Commissioner for Refugees (UNHCR) in the exercise of its functions and implementation of the Refugee Conventions.[126] However, the protection and consideration

[123] S. Res. 546, 117th Cong. (2022).

[124] Press Release, U.S. Dep't of State Press Release, War Crimes by Russia's Forces in Ukraine (Mar. 23, 2022), https://www.state.gov/war-crimes-by-russias-forces-in-ukraine/.

[125] Woldemariam, *supra* note 71, at 259.

[126] Refugee Convention, *supra* note 48, at Art. 35.

given to state sovereignty when failing to define States' obligations in the Refugee Convention has created an inconsistent patchwork of national refugee laws and policies across the world that has led to inequitable burden sharing distribution among States and in turn has led to poor protections and rights guarantees to the forcibly displaced.[127] For example, the lack of specifically defined obligations and responsibilities within the Refugee Convention has led to the United States creating its own distinct immigration and refugee law that allows it to have different responses to the refugee crisis in the Global North and Global South.[128] Because it is not required to meet a specific burden sharing quota, the United States can enact travel bans and annual refugee ceiling limits which leave countries of first asylum with a vast surplus of their fair share of the burden.

The unequal burden sharing system results in countries of first asylum being overrun by a new population they cannot fully support, financially and humanitarianly.[129] Often in this situation, the countries of first asylum are forced to set up refugee camps between their border and the refugee's country, thus creating a middle ground where refugees can find themselves stuck for indefinite periods of time while they await resettlement plans.[130] These refugee camps have less than favorable conditions and are often overcrowded, lack running water, electricity and other living necessities.[131] Such conditions create drastic health concerns and safety concerns, leaving the refugees trapped in an environment that is arguably no better than their homeland they previously escaped.[132] As scholars have noted, the "protection of state sovereignty has created an inconsistent patchwork of national refugee laws and policies across the [world that] has led to an inequitable distribution of the burden" among states and in turn, poor protection and guarantees to the forcibly displaced.[133]

The existing international refugee regime firmly establishes the principle of non-refoulement, but it fails to place specific obligations upon states governing the grant of asylum or sharing the burden of refugee resettlement.[134] As a result, individual States are left free to pursue their own short term national interests rather than equitable international humanitarian goals.

V. Proposal

Currently, the traditional categories of a refugee are too narrow and fail to encompass a large number of persons in refugee-like situations. To achieve a more equitable and remedial refugee legal regime, there are several key factors that need to be scrutinized and amended. First, the definition of a refugee needs

127 Woldemariam, *supra* note 3, at 259.

128 Helton, *supra* note 90, at 143.

129 Brakel, *supra* note 43, at 76.

130 *Id.* at 66.

131 *Id.* at 77.

132 *Id.*

133 *Id.* at 59.

134 Refugee Convention, *supra* note 48, at Art. 33.

to be re-defined. Second, an additional Protocol needs to be made where the obligation and expectation of each country is clearly defined in order to create a more equitable burden sharing system. Lastly, there must be consequences or sanctions that countries must face when they fail to reasonably meet their obligations or refuse to meet their obligations through tools such as travel bans.

The Refugee Convention is limited in that its definition of a refugee only includes those individuals who are unable to remain in or return to their native country due to the fear of being persecuted based on their race, religion, nationality or political beliefs.[135] This definition clearly leaves out a large number of the population of persons who find themselves leaving their native country with little to no option. This population most notably includes the population of forcibly displaced persons who have been induced to leave their home due to armed conflict. While such individuals may not be in fear of danger due to their race, religious beliefs or nationality, they are in fact leaving their native homes not because they desire to, but because they believe they have no other choice if they want to survive. This specific population of individuals indeed deserves to be included in the definition of a refugee and shows that the scope of forced displacement calls for the need to formulate new international refugee policy. Generally, the definition of a refugee within the international legal regime needs to be expanded to any individual who feels they have no choice other than the one to flee their home and seek sanctuary in another country in order to survive, whether the threat in their home be based on reasons of armed conflict, fear of persecution, environmental reasons, or severe economic degradation.

Not only does the definition of a refugee need to be expanded, but the expectations and obligations of the countries that are party to the Refugee Convention need to be clearly and explicitly defined. This amendment would require States to let go of territorial sovereignty in order to equitably and holistically serve international order. If States are not required to meet certain numerical quotas annually, then countries of first asylum will continue to share more of the burden, and refugees will find themselves in countries that do not have the capacity to support them or, even worse, stuck in a refugee camp.

Thus, as a proposed solution, each country that is party to the Refugee Convention shall be required to fulfill a numerical quota annually based on the size of their country, the country's GDP, and the country's past burden sharing practices. In analyzing each country's past burden sharing practices, the number of refugees that have been welcomed into each country will be critical. For example, a country that has utilized immigration controls and travel bans, such as the United States, will have to share a larger portion of the burden and accept a larger number of refugees when the new policies are set in place, while a country of first asylum, such as Greece, will have a lower numerical quota in order to meet their obligation due to having a larger share of the burden in the past. The effort of this policy is to equalize the past inequitable burden sharing system in order for each country to feel that their past efforts have been recognized and to feel legitimized in the procedures going forward.

[135] Refugee Convention, *supra* note 48, at Art 1.

Additionally, in order to ensure that individuals who are being forced to flee their home are re-settled accordingly based on resources available internationally, there must be a system in place at the beginning of each fiscal year that assesses the burden that each country can carry economically, which will ensure the humanitarian assistance and aid that should be afforded to refugees, and the situation each refugee is in and the urgency of their situation. In assessing each refugee's situation, the country that the individual is fleeing from should not be a critical factor, but rather the critical factor assessed should be based on the degree of danger that is posed to their survival. In keeping the refugees' home country anonymous throughout the resettlement process, the chances of racial bias affecting their resettlement would be decreased and make the resettlement process more equitable for each refugee. For example, anonymity would protect refugees coming from the Global South while national security is a top priority in many countries across the world and would prevent countries that foster sovereignty and national security for utilizing immigration tools, racial travel bans, and refugee acceptance ceilings based on a specific country.

Furthermore, in order to deter country's from failing to meet their obligations through the utilization of immigration controls, travel bans, and their own refugee acceptance ceilings, a system of consequences should be set in place. Without such a system of consequences, countries will have no incentive to fulfill their obligations to the international refugee burden sharing system, which would lead the international order back to an inequitable burden sharing system. In the case that a country refused to meet its obligation, the country would be required to pay a fine that would go towards a country that would then be forced to take on the unmet obligation of the neglecting country. Such a consequential system not only creates an incentive to meet burden obligations, but also creates a sense of credibility between the countries involved.

VI. Conclusion

While the definition of refugee should be greatly expanded to encompass individuals that are forced to flee their homes in refugee-like situations, the burden sharing system and the resettlement process also needs to be reformed. The current burden sharing system is inequitable and leaves countries of first asylum being overwhelmed with the influx of new populations, a clearly and specifically defined obligation of each country party to the Refugee Convention along with a consequential system could greatly improve the burden sharing system and create a better outcome for resettled refugees in that they would find themselves resettled in a country that could actually support them economically and humanitarianly. Additionally, the resettlement process should be amended to afford anonymity for background information and provide more credence to the actual situation the refugee is in. Such a process would decrease the threat of racial bias during the resettlement process and the period of time spent resettling the individual. The following amendments would improve the obstacles that are currently faced in the dated international refugee legal regime.