Global Law Scholars | Class of 2024
2L Research Project

Colonial Residues on International Law

Credit: Frank Bowling

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INTRODUCTION

Colonial Residues Essay Collection

This project considers colonial residues and imperialism's long-lasting effects on nations and people. Throughout the nineteenth and twentieth centuries, empires "exited" their colonies. However, we may ask: have colonial powers' imperial reigns ended? Several colonial regimes maintain extractive connections to their former colonies—through trade practices, workforce systems, and political dealings. For instance, China's Belt and Road Initiative has potentially instituted a neo-colonial practice, using infrastructure development as a new tool for imperialism.

Further, colonial powers' exit blatantly resonates in the political and security issues that arise following independence. In the Philippines, after sequential periods of Spanish, Japanese, and American imperialism, political instability ensued; dictators such as Ferdinand Marcos engaged in widespread human rights abuses and authoritarian practices. These security concerns resonate in political actions and escalations to war along with global migration, refugee crises, and geographic displacement.

In cases of such displacement, individuals impacted by colonial exit may migrate to neighboring or distant countries. Following Pakistan's and India's independence from Britain, the nations entered into war, and thousands sought refuge globally. Exile and forced migration may escalate to broader humanitarian concerns and refugee crises. In some instances, diasporic communities develop as people maintain ties to their homeland while living abroad. Simultaneously, other individuals may be made stateless—without a homeland and place of return. These resonances—experienced through trade, security, legal processes, and migration—demonstrate colonial residues in a globalized world.

Colonial Residues Presentation

On April 19, 2023, the Global Law Scholars hosted a panel discussion with Ali Zafar, Professor Katrin A. Kuhlmann, and Professor James Campbell. Ali Zafar is a macroeconomist and private-sector specialist who advises governments in sub-Saharan Africa, South Asia, and the Middle East. At the time of the panel, Zafar worked as a consultant to the African Development Bank and USAID. Professor Kuhlmann, the Co-Director of the Center on Inclusive Trade and Development, focuses her research on trade and development, regional trade agreements (with a particular focus on Africa), trade and gender, inclusive agricultural trade, comparative economic law, and the interdisciplinary connections between law and development. Professor Campbell's research focuses on citizenship, federal courts, Indigenous recognition, and overseas imperialism in U.S. constitutional thought.

During the panel, the discussion centered around Neo-Colonialism and colonial residues, along with development, security, and social dynamics. Regarding development dynamics, the panelists responded to questions about the most enduring residues of colonialism in international trade, investment, and financial markets. Further, panelists considered the role of economic dependence following colonial exit. In addition, panelists discussed the social dynamics of living under colonial rule and constitutions. Audience members also asked questions about specific regional dynamics and proposed policies for mitigating colonial tensions.

Each member of the Global Law Scholars Class of 2024 contributed a Paper for this research project. However, please note that the Papers do not represent the views of all members of the Global Law Scholars program, the panelists, individual members of the Class of 2024, or Georgetown University Law Center.

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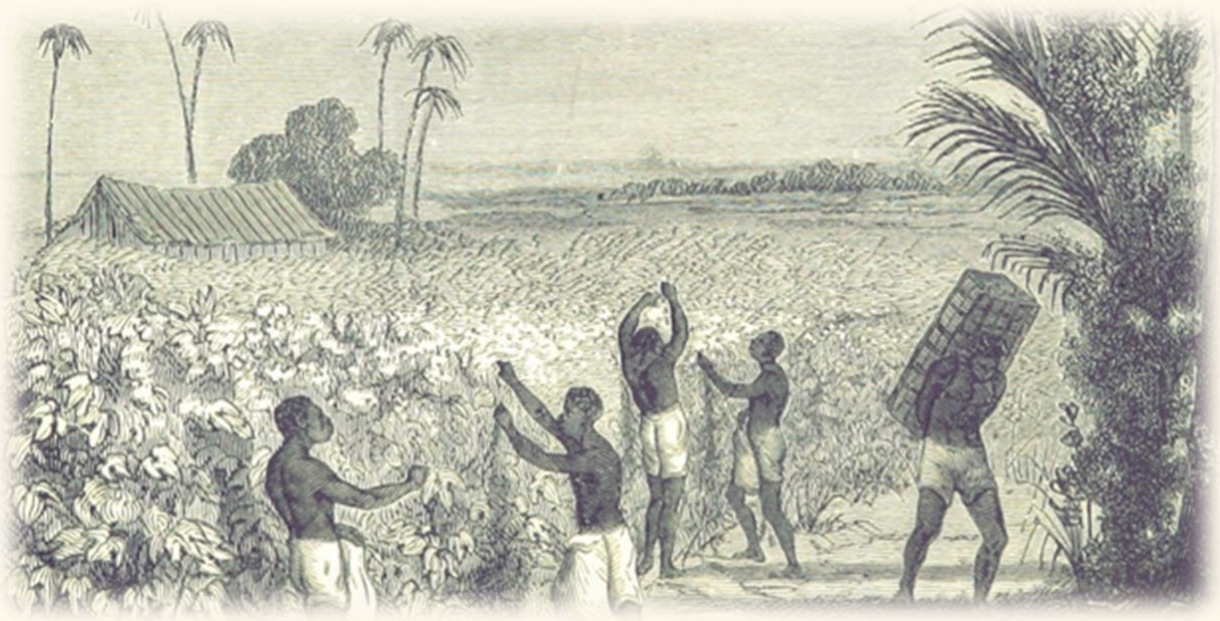
Chapter 1:

Colonial Residues on Trade, Finance, & Development



A drawing illustrating agricultural labor and economic exploitation on a nineteenth-century African plantation. Credit: African Economic History Network

Essay 1

Chasing Cotton: Colonial Legacies in Modern Trade

I. INTRODUCTION

Residue is "something that remains after a part is taken, separated, or designated or after the completion of a process." This implies that residues are relics of the past. Colonial residues are rarely so benign. Instead, they have formed fertile grounds for continuing similar patterns of manipulation and extraction through neo-colonial and domestic apparatus. Colonial residues coat postcolonial institutions and processes, injuring our ability to imagine alternatives.

Path dependence is an institutional developmental theory that focuses on the cumulative effects of historical institutions and practices on the evolutionary trajectory of a nation.[1] In *Development in Historical Perspective*, Cypher and Dietz note that "if the institutional basis of a society has been formed through a long process whereby inhibiting institutions and social practices have become deeply entrenched, then it is more likely that the future evolutionary path will be one of *vicious circles* of cumulative causation leading to low levels of income and achievement."[2] Colonialism was rooted in mercantilism, which focused on speculative gains; under this system, the colonial powers prioritized economic extraction at the lowest possible costs within their colonies.[3] Under this premise, colonial

[1] JAMES M. CYPHER & JAMES L. DIETZ, THE PROCESS OF ECONOMIC DEVELOPMENT 310 (Routledge, 3rd ed. 2009).
[2] *Id.*
[3] *Id.* at 81.

powers avoided investing in the development of their colonies, undermined their existing institutions, and pursued policies that reverberate within the trade system today.

The following Paper traces how British colonialism altered long-standing trade patterns through the use of legal interventions that created market distortion, undermining the historical and material comparative advantage of the Indian Subcontinent so they remain embedded within the post-colonial trade infrastructure. This was enabled by a two-pronged economic strategy. First, Britain erected a tariff barrier limiting the import of finished cotton goods to protect the local industry in Britain. Second, Britain restructured the economy of its colonies to emphasize exporting raw materials from colonies and importing finished goods from Britain in those colonies.

II. HISTORY OF COTTON IN THE PRE-COLONIAL ERA

The production and trade of cotton textiles from the Indian subcontinent are ancient in origin.[4] The oldest surviving Indian textiles have been found in Egypt, dating back to 4000 BCE.[5] Before the 1500s, the Indian Subcontinent was the leading producer of cotton textiles and engaged in trade with East Asia, Africa, and the Middle East via sea and land routes.[6] Indian, Arab, and North African merchants and traffickers composed networks covering vast territory and engaging in cross-oceanic trade in cotton, ivory, and enslaved people from the East African interior.[7] This trade relied on extensive credit networks, which in turn relied on regional concepts of property entitlements based on familial and tribal bonds that allowed for the creation of collateral.[8] Indian cotton textiles were coveted for their quality. Different regions had specialized techniques and designs that were the result

[4] SVEN BECKERT, EMPIRE OF COTTON 7 (Penguin Books, 2015).
[5] *The Story of Cotton: Part 3: The Art of Indian Chintz*, The Whitworth: A Place Between the Trees (Apr. 13, 2022), https://aplacebetweenthetrees.com/2022/04/13/the-story-of-cotton-part-3-the-art-of-indian-chintz/.
[6] *Id.*
[7] Sheetal Chhabria, *Capitalism in Muddy Waters: The Indian Ocean Economy in the 19th century*, 30 J. OF WORLD HIST., 306, 306–15 (2019) (reviewing PEDRO MACHADO, OCEAN OF TRADE: SOUTH ASIAN MERCHANTS, AFRICA AND THE INDIAN OCEAN, C. 1750–1850 (Cambridge University Press 2014); JOHAN MATHEW, MARGINS OF THE MARKET: TRAFFICKING AND CAPITALISM ACROSS THE ARABIAN SEA (University of California Press 2016); FAHAD BISHARA, SEA OF DEBT: LAW AND ECONOMIC LIFE IN THE WESTERN INDIAN OCEAN, 1780–1950 (Cambridge University Press 2017)).
[8] *Id.*

of generations of knowledge-making and transfer. Indian cotton textiles served as currency in the East African economy, and Indian cotton merchants gained influence in the region even as the Portuguese and British began their imperialistic expansions.[9] Over time, as cotton weaves became more prized, workshops and factory towns permitting production at scale became more common across Asia, the Middle East, and Africa. In the late 1500s, Portuguese and then British traders arrived in India. They purchased cotton which was shipped to Britain for resale and often sold at over 100% markup.[10]

III. IMPACT OF BRITISH COLONIALISM

The British East India Company (the Company) was established by the British government to compete with the Dutch and other colonial powers.[11] In 1600, it received a royal charter to pursue trade that permitted the venture to establish its own army.[12] In 1613, it received a permit from the Mughal Emperor to establish factories across Surat, Gujarat, and South India. In the late 1600s, it began to concentrate on cotton trade, carrying both cotton textiles and raw cotton from India to Britain. Meanwhile, demand for cotton products continued to grow in Britain and a cotton weaving industry began to develop in Manchester, United Kingdom.[13] Weavers in Britain relied on merchants for raw materials, allowing cotton merchants to focus on the import of raw materials into Britain to amass political and economic power.[14]

The Company won a decisive victory over the ruler of Bengal, backed by the French, in the Battle of Plassey in 1757.[15] The Company first established direct control over the politico-economic system in Bengal by interfacing with the existing *zamindari* system and quickly expanded its control

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[9] *Id.*
[10] CYPHER & DIETZ, *supra* note 1, at 87.
[11] *East India Company*, BRITANNICA, https://www.britannica.com/topic/East-India-Company (last visited Jan. 5, 2023).
[12] *Battle of Plassey*, BRITANNICA, https://www.britannica.com/event/Battle-of-Plassey (last visited Jan. 5, 2023).
[13] Barbara Pickersgill, *The British East India Company, John Bradby Blake and Their Interests in Spices, Cotton and Tea*, CURTIS'S BOTANICAL MAGAZINE, 379-01 (2017); *The Story of Cotton: Part 1: The Weaver*, The Whitworth: A Place Between the Trees (Jan. 20, 2021), https://aplacebetweenthetrees.com/2021/01/20/3329/.
[14] BECKERT, *supra* note 4, at 39.
[15] *Battle of Plassey*, BRITANNICA.COM, (last visited Jan. 5, 2023), https://www.britannica.com/event/Battle-of-Plassey (last visited Jan. 5, 2023); CYPHER & DIETZ, *supra* note 1, at 81.

over the subcontinent.[16] The *zamindari* system utilized hereditary landowners or intermediaries to collect taxes on behalf of the ruler. The Company imposed high taxes and "implemented a pressurized institutional system where the burden of paying the revenue dues was laid upon the natives without any support of insurance in times of calamities."[17]

In its colonies, the British consolidated power by creating new classes of elites with interests tied to merchant capitalists. This led to the entrenchment of features of merchant capitalism including "[speculative] behavior, monopoly practices, favoritism, and patronage in employment, corruption within government, intermittent changes in technology, the absence of labor rights and labor norms, authoritarian governments, and profits based upon cunning trading of commodities and usurious banking practices."[18] Thus, the "new collaborative elite in the colonies became consummate masters of artifices of merchant capital at the same time that their colonial masters were abandoning such systems at home."[19]

Over time, the British, with the East India Company at the helm, focused on inserting themselves further upstream in the supply chain for the production of raw cotton and cotton textiles. This allowed them to outcompete Indian merchants and assert greater control over weavers through an agency system that provided weavers credit advances, generally in the form of tied credit that required the loan to primarily be used for the purchase of equipment and goods imported by the creditor. This enabled British merchants to set the terms of production and trade. The East India Company also began introducing new regulations that limited the ability of weavers to sell their cloth in the open market or to produce goods for other merchants, resorting to violence to enforce the

[16] CYPHER & DIETZ, *supra* note 1, at 9.
[17] Soujanya Niroula, Implication of British Economic Policies on Indian Famine (May 2, 2021) (Honors Thesis, University of Mississippi Sally McDonnell Barksdale Honors College) (on file with eGrove at University of Mississippi); *id.* at 35.
[18] CYPHER & DIETZ, *supra* note 1, at 86.
[19] *Id.*

terms.[20] As a result of these policies, the margins Indian weavers made on produced cloth declined from 30% to a mere 6% by the late 1700s.[21]

In 1858, the British crown took control of India and established an imperial legislative council and local legislative councils composed exclusively of British officials to manage governance in the Indian provinces.[22] Over the 1800s, the British began to eliminate the indigenous customary system of property that allowed multiple claims over land. Instead, the British introduced a system of "one owner rule" over resources that had been used collectively.[23] Additionally, the British imposed heavy taxes on agriculture that forced farmers to focus on cash crops like indigo, cotton, and wheat.[24] Such specialization eliminated traditional farming that resulted in crop rotation, leading to land degradation and falling yields.[25] Over time, the British also began to privatize common lands to expand their tax base, and in the 1870s, the British began to take over and deplete common forests to obtain lumber.[26]

The period of British rule in India saw recurring famines as British tax policy and an unregulated export economy encouraged the production of cash crops including cotton, jute, indigo, oilseeds, and opium.[27] During these famines, India continued to export rice and wheat in significant quantities.[28] Throughout this period, the British failed to offer tax relief or governmental intervention;

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[20] BECKERT, *supra* note 4, at 44.
[21] *Id.*
[22] U.K. PARLIAMENT, GOVERNMENT OF THE RAJ 1858-1914, https://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-empire/parliament-and-the-american-colonies-before-1765/government-of-the-raj-1858-1914/ (last visited Jan. 5, 2023); *Indian Councils Act of 1909*, BRITANNICA, https://www.britannica.com/topic/Indian-Councils-Act-of-1909 (last visited Jan. 5, 2023).
[23] CYPHER & DIETZ, *supra* note 1, at 81.
[24] *Id.* ("Famously, the British restructured agriculture, forcing specialization in indigo, cotton – which could be used as inputs into the British textile industry – and wheat to keep workers' wages down in England."); *Id.* at 83 (quoting MIKE DAVIS, LATE VICTORIAN HOLOCAUSTS 289–90 (Verso 2001), "Recent scholarship confirms that it was *subsistence adversity* [high taxes, chronic indebtedness, inadequate acreage, loss of subsidiary employment opportunities, enclosure of common resources, dissolution of patrimonial obligations, and so on] not entrepreneurial opportunity, that typically promoted the turn to cash crop cultivation.").
[25] *Id.* at 83.
[26] CYPHER & DIETZ, *supra* note 1, at 82.
[27] Niroula, *supra* note 17, at 14; *id.* at 82.
[28] Niroula, *supra* note 17, at 14 (barring a short period between 1900 and1902 where wheat exports declined and imports remained strong as relief programs were organized domestically).

they adopted laissez-faire policies in their colony that shifted the burden of global trade volatility on the native population.[29] As the British strengthened their hold across the subcontinent, they remodeled India's economic and political structures to maximize their economic gains.[30] Between 1800 and 1913, the number of textiles workers, including spinners and weavers, dropped by over 61%.[31] As wages fell and textiles workers were left impoverished, the internal market in India was further decimated, the country began to deindustrialize, and India was soon reduced to a supplier of raw cotton.[32]

IV. BRITISH POLICY IN THE "MOTHER COUNTRY"

As demand for cotton textiles increased in England, it began to threaten the local wool industry. The British government instituted protectionist laws banning calico prints and textiles from India that had gained widespread popularity.[33] A later law opened the channel for raw cotton at no tariff, allowing local manufacturers to fill the vacuum in supply left by the ban on Indian textiles by producing imitation textiles. European manufacturers turned to acquiring Asian knowledge in what can be described as "one of history's most dramatic instances of industrial espionage."[34]

The use of intellectual property rights, extracted from an emerging design pedagogy, was critical for facilitating this "industrial espionage." In the *Bureaucracy of Beauty*, Arindam Dutta traces how British officials created intuitions such as the Department of Sciences and Art in Britain and schools of art and design within the Indian subcontinent to enable access to traditional knowledge and designs under the guise of uplifting the "backward" native artisan who lacked formal art training.[35]

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[29] *Id.* at 20.
[30] *Id.* at 21.
[31] CYPHER & DIETZ, *supra* note 1, at 87.
[32] *Id.*
[33] BECKERT, *supra* note 4, at 47–48 ("In 1685, England imposed a 10 percent duty on 'all calicoes and other Indian linen and all wrought silks which are manufactures of India.' In 1690, the tariff was doubled. In 1701, Parliament outlawed the import of printed cottons . . . . In 1774, Parliament decreed that cotton cloth for sale in England had to be made exclusively of cotton spun and woven in England.").
[34] *Id.* at 48–49 ("In order to match the fabulous qualities of their India competitors, European manufacturers, supported by their various national governments, collected and shared knowledge about Indian production techniques.").
[35] ARINDAM DUTTA, THE BUREAUCRACY OF BEAUTY 146 (Routledge 2007).

In this, they failed to acknowledge "the irony of artisans without a formal training turning out specimens that were already objects of admiration for European consumers."[36] This effort translated traditional "knowledge into a universal cognitive datum" capable of being decoded and replicated at scale by European industrialists.[37]

As production began to surpass demand for cotton goods within Britain, manufacturers and traders set their sights on international markets, one of the largest of which had been the South Asian subcontinent. The British not only managed to appropriate intellectual property created by regional weavers and artisans, but they also sold cheaper imitations to the population of origin. Tariffs on Indian textiles imported to Britain increased to 70-80 % by 1814.[38] Between 1814 and 1844, textile exports from Britain to India increased from 1 million yards to 53 million yards.[39]

Britain also focused on the African Continent, tapping into a demand created by longstanding trade between South Asia and Africa. Britain used Indian fabric to fund the purchase of enslaved people to be transported to the West Indies and Northern America.[40] By the end of the eighteenth century, Africa and the Americas became the most important export markets for Britain, and 94% of Britain's textile exports were designed for these markets. [41] By the early nineteenth century, Manchester's cotton industry had turned the town into the world's first industrial city.[42] By the late nineteenth century, Britain succeeded in introducing laws to protect intellectual property (IP) originating in Europe, but such protections were not expanded to the colonies.

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[36] *Id.*
[37] *Id.* at 148.
[38] CYPHER & DIETZ, *supra* note 1, at 87.
[39] *Id.*
[40] BECKERT, *supra* note 4, at 50.
[41] *Id.* at 51.
[42] *Evolution of the Modern City*, BRITANNICA, https://www.britannica.com/place/Manchester-England/Evolution-of-the-modern-city (last visited Jan. 5, 2023).

Reflecting on the Great Exhibition, organized by the British to "display the wonders of industry from around the world,"[43] Dutta notes that although the Indian section was the second largest section due to India's status as Britain's premier colony, "none of the extensive deliberations and concerns on the matter of IP leading up to the great exhibition were deemed relevant to the myriad Indian products, collected at extremely cheap prices by the East India Company."[44] In fact, "English designers routinely copied or adapted oriental designs, copyrighting them under their own name," obtaining legal protection that stripped native artisans of any benefit of an international framework of intellectual property rights.[45]

V. BRITISH POLICY IN THE AMERICAS

To meet the need for raw materials for its largest export industry, Britain also established cotton plantations in its colonies in the Americas and exported enslaved Africans to be exploited for free labor in order to produce cotton at the lowest prices possible. In North America, the British adopted a policy of settler colonialism as championed by John Stuart Mill, which imposed fewer burdens than the institutions used in India and Jamaica.[46]

The production of cotton at a commercial scale only began to take root in the Americas in the late 1700s, after the supply of cotton from the West Indies was disrupted by revolutions and local slave revolts.[47] Americans relied on the system of plantation slavery first refined on sugar plantations in the West Indies.[48] Although slavery was brought to the Americas in the 1400s, approximately 46

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[43] Liza Picard, *The Great Exhibition,* British Library: Victorian Britain (Oct. 14, 2009), https://www.bl.uk/victorian-britain/articles/the-great-exhibition (last visited Jan. 5, 2023) ("The Great Exhibition, housed within the 'Crystal Palace,' embodied Prince Albert's vision to display the wonders of industry from around the world." The exhibition displayed over 100,000 objects from over 15,000 contributors.).
[44] DUTTA, *supra* note 35, at 162.
[45] DUTTA, *supra* note 35, at 148.
[46] CYPHER & DIETZ, *supra* note 1, at 84.
[47] BECKERT, *supra* note 4, at 95.
[48] *Id.* at 109–10; CYPHER & DIETZ, *supra* note 1, at 80 (The Dutch established the first plantations in Latin America which combined "capitalist-type behavior, such as expanded production, as represented by the maintenance of a fixed investment in plantation lands, and the profit motive, with quasi-feudal attitudes towards labor.").

percent of slaves sold to the Americas arrived there after 1780.[49] Cotton cultivation, predominately by enslaved peoples on large plantations, grew rapidly through the 1800s, and exports to Great Britain burgeoned. While the United States gained independence from the British and set its sights further west, the infrastructure and networks established in the settler colonies sustained the new supply chain for cotton.[50]

By 1820, cotton exports increased to 32% of U.S. exports from 2.2% in 1796.[51] Cotton supply from the United States led to a drop in the price of cotton across the world. This permitted England to reduce its dependence on India and obtain raw materials even more cheaply, allowing it to compete more effectively in the domestic markets of its colonies. Historian Sven Beckert, in his book *Empire of Cotton*, explains that "not secure property rights but a wave of expropriation of labor and land characterized this moment."[52]

VI. RECKONING WITH THE WAR YEARS

By the American Civil War, cotton composed 61% of U.S. exports by value, and raw cotton imported from the United States composed 77% of the cotton consumed in Britain. Recognizing the "treacherous foundation" provided by slavery, by the Civil War, British industrialists became concerned about their growing dependence on America for cotton.[53] As the "outbreak of the Civil War severed in one stroke the global relationships that had underpinned the worldwide web of cotton production and global capitalism since the 1780s," Britain once again turned its focus to encouraging the production of raw cotton in India.[54]

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[49] BECKERT, *supra* note 4, at 93.
[50] *Id.* at 118.
[51] *Id.* at 104.
[52] *Id.* at 37.
[53] Sven Beckert, *Empire of Cotton*, THE ATLANTIC (Dec. 12, 2014), https://www.theatlantic.com/business/archive/2014/12/empire-of-cotton/383660/.
[54] BECKERT, *supra* note 4, at 125.

The British believed the Indian population incapable of electing its own representative body and continued to govern the subcontinent by Parliament. The electoral influence of cotton merchants was evident in the customs policies enacted. Prior to 1879, duties on cotton textiles were a significant part of government revenue in India. In 1877, even as India levied customs duties on foreign products, the House of Commons in Britain passed a resolution declaring that "duties now levied upon cotton manufactures imported into India, being protective in their nature and contrary to sound commercial policy, ought to be repealed."[55] In 1879, the Viceroy of India abolished import duties on cotton.[56] In 1909, the British Parliament began to introduce a series of reforms through the Indian Councils Act which expanded the elective principle in India and began to involve natives, albeit in a limited capacity, in governance.[57]

During the years of the First World War, a fiscal deficit forced India to raise tariffs from 5% to 7%, but duties were not extended to cotton textiles until 1917. As Indian resistance to colonial rule continued to gain momentum, the British government passed the Government of India Act, also known as the Montagu-Chelmsford Reforms, in 1919 in an attempt to appease moderates within the subcontinent.[58] These reforms increased the size and scope of the Legislative Council,[59] giving the Indian people "a constitutional forum through which they could voice their views on budgetary matters," and introduced a fiscal autonomy convention that permitted the Secretary of State for India to veto joint decisions of the Viceroy and Legislative Council if it "were in the interest of good

[55] HL Deb, 142 *Import Duties in India* 1131–64 (Mar. 13, 1905), https://api.parliament.uk/historic-hansard/lords/1905/mar/13/import-duties-in-india.
[56] *Id.*
[57] *Indian Councils Act of 1909*, BRITANNICA, https://www.britannica.com/topic/Indian-Councils-Act-of-1909 (last visited Jan. 5, 2023).
[58] *Montagu-Chelmsford Report*, BRITANNICA, https://www.britannica.com/event/Montagu-Chelmsford-Report (last visited Jan. 5, 2023).
[59] *Indian Councils Act of 1909*, BRITANNICA, https://www.britannica.com/topic/Indian-Councils-Act-of-1909 (last visited Jan. 5, 2023).

government," allowing "the government in India the power to respond" to British views on budgetary matters.[60]

Acquiescing to the demands of the Indians now involved in the governance of the colony, the British government also commissioned studies to evaluate the "advisability of protective tariffs" in key industries and set up a Tariff Board. While the Tariff Board recommended tariffs on cotton, the government did not concede until compelled by its need to borrow money from India to address fiscal challenges that emerged in the wake of the First World War.[61] In the 1930s, Britain saw a rapid decline in the production and export of cotton owing to high costs caused by post-war inflation, tariffs imposed by India—previously Britain's "pre-eminent Third-World Market"—and a boycott of British textiles by the Indian independence movement.[62] With reclaimed politico-economic autonomy in India, India's cotton sector began to recover.

Still, the Indian industry continued to struggle, and by India's independence, manufacturing only accounted for seven percent of the national product.[63] Cypher and Dietz contrast the "conscious [S]tate involvement such as subsidies, tariffs, selective construction of infrastructure, labor training, and prohibitive trade restrictions" that enabled the development of leading trade sectors in places like Britain, France, Germany, the United States, (and later, South Korea, Taiwan, and Japan) with the approach adopted by colonial powers in less developed regions. "Colonialism imposed a pattern of production and trade on the pre-capitalist, less developed regions, a pattern that did not reflect the actual, potential, or conceivable dynamic comparative advantages of those nations."[64] They elaborate, "[l]ater, as these patterns became ingrained, altering adverse path dependence was made more difficult

[60] Susan Wolcott, *British Myopia and the Collapse of Indian Textile Demand*, 51 J. OF ECON. HIST., 367, 381 (1991).
[61] *Id.* at 383.
[62] *Id.* at 368.
[63] CYPHER & DIETZ, *supra* note 1, at 88.
[64] *Id.* at 93.

even after political independence."[65] The trajectories of the United States and India within the cotton trade demonstrate the lasting impact of different colonial policies and objectives on modern institutions and networks.

VII. THE UNITED STATES SUSTAINED COLONIAL LEGACIES

In the period after the Second World War, inspired by India's struggle for independence, more and more colonies began to pursue national self-determination with the backing of the United States. The United States was keen to free colonial nations from European control in order to open the market for American products and investment in resources. The U.S. Department of State noted in 1949 that "many underdeveloped mineral resources in the areas which will participate in the cooperative effort are of considerable importance to the more highly developed nations of the world including the United States."[66] As a result of this policy, international organizations such as the International Monetary Fund and the World Bank also began to restructure themselves with a focus on development. The new forms of credit introduced by these institutions once again permitted wealthy nations to exert influence and control over developing economies.[67]

Colonialism led to the development of "social dualism" within developing economies. Within social dualism, the "modern [capitalist] sector exists as a virtual enclave within the larger pre-capitalist and semi-capitalist sector."[68] Due to this, "the capitalist sector in less developed nations continues to manifest distinct structural characteristics which [reveal] the continued influence of merchant capital and pre-capitalist ideas," limiting the ability for social investments, including in infrastructure and other public goods, to create a virtuous cycle of growth.[69] In this environment, merchant capital continues to dominate systems of banking and finance within former colonies and serve as a "locus

[65] *Id.*
[66] *Id.* at 99–100.
[67] *Id.*
[68] *Id.* at 101.
[69] *Id.*

of widespread speculative activities which absorb a large portion of the potentially loanable fund which could be used to support socially useful public and private investments."[70]

Keen to maintain its competitiveness in the global cotton market, the United States has continued to subsidize cotton production. Between 1995 and 2010, the United States provided USD $32 billion in subsidies for cotton under programs such as countercyclical payments, production flexibility, and direct payments. Most of these payments are directed at big corporations and farmers. While the United States prohibits the import of products from China that are made using "prison labor," it continues to rely on the nearly free prison labor within the cotton industry at home.[71]

While the United States only produces 12% of the world's cotton supply, it continues to dominate 28% of the export market. These subsidies are harmful and sustain a colonial legacy: for developing economies, many of which rely on cotton as a cash crop, these subsidies have been a continued point of discontent. They lead to trade distortions in the global market, and the externalities are borne by the most vulnerable members of developing economies. These distortions disproportionately harm developing economies: unable to subsidize their cotton sectors, developing economies are unable to effectively compete in the global market.

For the Doha round of World Trade Organization (WTO) negotiations in 2001, reducing distorted domestic support, eliminating export subsidies, and increasing market access for agricultural products were key subjects. The resulting ministerial declaration pledged to reject the use of protectionism and reaffirmed the commitment of members to undertake "comprehensive negotiations aimed at: substantial improvements in market access; reductions of, with a view to

[70] *Id.* at 102.
[71] U.S. CUSTOMS AND BORDER PROTECTION, CBP Issues Detention Order on Cotton Products Made by Xinjiang Production and Construction Corps Using Prison Labor (Dec. 2, 2020), https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-cotton-products-made-xinjiang-production.

phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support." [72]

In 2002, a dispute arose between the United States and Brazil regarding U.S. domestic support for cotton. A panel established by the WTO to consider the dispute found that U.S. subsidies led to price suppression internationally.[73] An appellate body upheld this finding.[74] After the ruling, the United States put an end to user marketing payments but failed to make changes to countercyclical subsidies or marketing loans, leading Brazil to initiate compliance proceedings.[75]

In 2009, the four key cotton-producing countries in Africa—Benin, Burkina Faso, Chad, and Mali (known as the "Cotton Four" or "C4")—hosted a dialogue and demanded a reduction in cotton subsidies. In response, the United States suggested that increased production in India and China was responsible for the increase in global prices.[76] In the past year, extreme weather has hurt cotton output across the United States and India. Cotton prices in the United States remain stable while cotton prices in most of the world have increased. While India is the largest producer of raw cotton today, the United States has remained a key exporter of cotton to India and India has recently lowered its import duties in response to high domestic fiber prices that limit its ability to compete with global prices.[77]

VIII. CONCLUSION

The British once used the protection of their own industry as a justification for expropriation, extraction, subjugation, and slavery. This process devastated native populations across the world. Today, the United States, which originated as a part of this project, continues this legacy by insisting

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[72] World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, 41 I.L.M. 746 (2002).
[73] Sachin Sharma & Kavita Bugalya, *Competitiveness of Indian Agriculture Sector: A Case Study of Cotton Crop*, 133 PROCEDIA – SOC. AND BEHAV. SCI. 320, 320–35 (2014).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] INT'L TRADE ADMINISTRATION, U.S. DEP'T OF COM., INDIA – COUNTRY COMMERCIAL GUIDE: FOOD AND AGRICULTURE VALUE CHAIN (2022), https://www.trade.gov/country-commercial-guides/india-food-and-agriculture-value-chain.

on protecting an industry that competes with some of the most vulnerable developing economies. In doing so, the country has turned to carceral labor. By subsidizing this industry, the United States continues the colonial legacy of extracting labor from black and brown bodies.

Essay 2

How Important Is Monetary Sovereignty? An Analysis of the Legal Framework Employed by France to Retain Monetary Control Over its Former Colonies

Though France's former African colonies (the "former colonies") gained independence in 1960, for many of the former colonies, their monetary independence has yet to come. Monetary policy regulation remains one of the most important tools in the economic toolkit for sovereign nations. Internationally, monetary policies facilitate international trade, foreign direct investment, and other financial transactions for countries trying to engage in the global economy.[1] Domestically, a State's ability to regulate its monetary policies increases its flexibility when dealing with inflation, protecting consumers, and defending itself during global, exogenous financial shocks.[2] Removing a State's ability to regulate its own monetary policies, especially for developing countries, removes its monetary sovereignty and its ability to adequately strengthen its economy and foster development.[3]

For many of the former French colonies, France maintained control over the regulation of monetary policies. Through central banks in West and Central Africa, monetary cooperation

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[1] *See* Gustavo Adler & Carolina Osorio-Buitron, *Tipping the Scale? The Workings of Monetary Policy Through Trade* 1 (IMF, Working Paper 17/142, 2017); *see also* Özcan Karahan & Musa Bayır, *The Effects of Monetary Policies on Foreign Direct Investment Inflows in Emerging Economies: Some Policy Implications for Post-COVID-19*, 8 FUTURE BUS. J. 1, 12 (2022).
[2] *See Monetary Policy: What Are Its Goals? How Does It Work?*, Board of Governors of the Federal Reserve System (July 29, 2021), https://www.federalreserve.gov/monetarypolicy/monetary-policy-what-are-its-goals-how-does-it-work.htm#:~:text=The%20Federal%20Reserve%20Act%20mandates,for%20monetary%20policy%20is%20commonly (last visited Dec. 18, 2022).
[3] *See* Chipote Precious & Makhetha-Kosi Palesa, *Impact of Monetary Policy on Economic Growth: A Case Study of South Africa*, 5 MEDITERRANEAN J. SOC. SCIS. 76, 76 (2014).

agreements, and operation account agreements, France has negotiated a legal system through which it may exercise its direct control over its former colonies' monetary policies. The legal system gains its authority through the CFA franc currency.[4] Currently pegged to the euro, the CFA franc operates as the sole currency in most of the former colonies.[5] Inherent in a fixed exchange rate system with no separate legal tender, States lose their monetary sovereignty.[6] Nonetheless, in 2019, the West African Economic and Monetary Union renegotiated the terms of their monetary cooperation agreement attempting to limit France's ability to exercise its control over their policies. Without removing the peg to the euro, this dependency, even without a formal legal regime, remains as deep-seated colonial residues continue to guide the relationship and foster reliance on France by its former colonies.

This Paper will provide a brief background of the CFA franc currency, how its existence comes as a direct result of colonization, and how its structure intrinsically removes monetary sovereignty from the former colonies. Then, it will analyze the founding agreements of the monetary unions, central banks, and the monetary cooperation relationships between France and its former colonies that create the legal regime of the currency. Through this analysis, this Paper will highlight the express and implicit methods of control exerted by France. It will also analyze the 2019 West African Union Agreement to present the relinquishment of France's legal power while also demonstrating former colonies' continued monetary dependency. Lastly, this Paper will analyze the side effects of the monetary relationship, including (1) the residual dependency on France (post-formal legal regime) to

[4] Defined in the Background section *infra* because it has gone through a series of name changes. Furthermore, the currencies, which use the same "CFA franc" abbreviation, represent separate legal currencies in West and Central Africa. I will explain the breakdown in the Background section.

[5] *See Background Information from the Study Guide to the Fabric of Reform*, IMF, https://www.imf.org/external/pubs/ft/fabric/backgrnd.htm (last visited Dec. 18, 2022).

[6] *See Classification of Exchange Rate Arrangements and Monetary Policy Frameworks*, IMF (June 30, 2004), https://www.imf.org/external/np/mfd/er/2004/eng/0604.htm ("Exchange Arrangements with No Separate Legal Tender (the IMF classifies the CFA franc zone under this arrangement). The currency of another country circulates as the sole legal tender (formal dollarization), or the member belongs to a monetary or currency union in which the same legal tender is shared by the members of the union. Adopting such regimes implies the complete surrender of the monetary authorities' independent control over domestic monetary policy.").

abide by its monetary policies and utilize its neo-colonial currency[7] and (2) the costs of losing monetary sovereignty.

I. BACKGROUND

To understand the colonial residues inherent in the CFA franc, we must start at the founding of the currency. After World War II, the international community agreed to establish a globalized system in which nations would cooperate with each other in the areas of monetary, investment, and trade policies.[8] With the hopes of liberalizing trade and investments in the global market, the nations opined that cooperation would champion world peace because a country would not go to war against another country on which it relies for its essential goods.[9] The Bretton Woods Agreement in 1945 codified this new relationship with three essential elements: (1) the creation of the International Monetary Fund (the "IMF"); (2) the creation of the World Bank Group (the "World Bank"); and (3) the parties to the treaty agreed to peg[10] their currencies to the US Dollar on the condition that the US Dollar remain an asset-backed currency (i.e., backed by gold).[11] The United States' economy became

[7] Put in other words, France has created a legal structure in its former colonies that makes it difficult to withdraw from the CFA franc fixed exchange rate system.
[8] *See* W. M. Scammell, *The Bretton Woods Model: The Principles of the System*, IMF 108, 109 (1975).
[9] Economist Thomas Friedman coined the Golden Arches Theory of Conflict Prevention explaining that "no two countries that both have McDonald's had fought a war against each other since each got its McDonald's." THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE 248 (Farrar, Straus and Giroux, 1999). Though this theory was created in 1996 and may not be true today, the idea remains relevant. As countries become integrated, the cost of war increases significantly. The cost of war will include more than just the cost of arms and defense; it will include the disintegration of a long-standing economic interdependence that will cost the consumers and economies of both countries the most.
[10] Currency pegs reduce foreign exchange risks. Defined as "a policy in which a national government or central bank sets a fixed exchange rate for its currency with a foreign currency or a basket of currencies and stabilizes the exchange rate between countries," currency pegs require nations to control their currency to rise and fall with the currency to which it is pegged. Caroline Banton, *Currency Peg: What It Is, How It Works, and Fixed Exchange Rates*, INVESTOPEDIA (July 11, 2022), https://www.investopedia.com/terms/c/currency-peg.asp#:~:text=A%20currency%20peg%20is%20a,a%20currency%20compared%20to%20another (last visited Dec. 18, 2022). A currency peg stabilizes the value and allows for a consistent exchange rate with the pegged currency. The pegged currency is usually a strong currency in which any trading partner would be willing to receive payment. When trading, most countries do not want payments in the importing country's currency. Instead, they prefer payments in a currency that is pegged to a preferred foreign currency or, if not pegged, is easily traded and valued at a stable rate.
[11] *See* Scammell, *supra* note 8, at 108-09.

the strongest in the world after World War II, and as a result, many nations that pegged their currency to the strong US Dollar would experience a currency devaluation.[12]

France ratified the Bretton Woods Agreement in 1945, pegged the French franc to the US dollar, and experienced a devaluation of the empire's currency.[13] Because France wanted to "generously" isolate its colonies from the devaluation of the French franc, France created the official currency of its African colonies, in the CFA franc zone, called les Colonies Françaises de l'Afrique franc (in English, the franc for the French Colonies of Africa, but hereinafter, the "Colonial CFA Franc").[14] The creation of the Colonial CFA franc stabilized the currency by pegging it to the French franc, but the stabilization primarily benefited France.[15] The pegging of the currency allowed France to export and import goods to and from its colonies using its own currency forming a shield against the French franc devaluation when extracting the natural resources and raw materials from the colonies.[16] Most importantly, imports into the CFA Zone were cheaper relative to domestic goods, but exports became non-competitive in the global market.[17] Therefore, although France's actions appeared to protect its colonies from financial instability in the global market, they created a deeply rooted dependency by its colonies on French imports and exports primarily to France. By assigning

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[12] *See* David Frum, *The Real Story of How America Became an Economic Superpower*, THE ATLANTIC (Dec. 24, 2014), https://www.theatlantic.com/international/archive/2014/12/the-real-story-of-how-america-became-an-economic-superpower/384034/.

[13] *See* Chiarella Esposito, *French International Monetary Policies in the 1940s*, 17 FRENCH HIST. STUD. 117, 134 (1991).

[14] *See A Brief History of the CFA Franc*, AFR. BUS. (Feb. 19, 2012), https://african.business/2012/02/finance-services/a-brief-history-of-the-cfa-franc/ (quoting René Pleven, the French Finance Minister, explaining the circumstances of its creation in these terms, "In a show of her generosity and selflessness, metropolitan France, wishing not to impose on her faraway daughters the consequences of her own poverty, is setting different exchange rates for their currency.").

[15] *See* Anis Chowdhury & Jomo Kwame Sundaram, *Neo-colonial Currency Enables French Exploitation*, MR ONLINE (Aug. 3, 2022), https://mronline.org/2022/08/03/neo-colonial-currency-enables-french-exploitation/.

[16] *See id.*

[17] *See id.* When a country's currency is arbitrarily high, as it is here because France maintained the higher value of the Colonial CFA franc instead of devaluing it along with the French franc, the country's goods and services become more expensive. Therefore, imported goods are relatively cheaper than domestic goods, making imports increase. Conversely, more expensive goods in the country cause exportation to stagnate because other countries can find the goods cheaper elsewhere. A country with a higher-valued currency will become a net importer.

the CFA franc zone an artificially high currency value, exports to countries other than France became nonexistent.

In 1958, the Colonial CFA franc was rebranded to the franc of the Communauté française d'Afrique[18] (the "Colonial Community CFA franc").[19] The Colonial Community CFA franc signified the notion of "community" by French leadership. The notion of "community" continued up through independence in 1960.[20] At the time of decolonization, France's President, Charles du Gaulle, encouraged all former colonies to maintain membership in the Colonial Community CFA franc to represent a continued cooperative relationship and stabilization of the former colonies' currency.[21] Eight West African former colonies continued their monetary cooperation with France by adopting the Communauté Financière Africaine franc[22] (the "West African CFA franc"). Likewise, six Central African former colonies continued their monetary cooperation with France by adopting the Coopération Financière en Afrique Centrale franc[23] (the "Central African CFA franc").[24] The exchange rates, policies, and regulations from the colonial period remained for the Central and West African CFA francs until 1972 and 1973 (respectively) when the member countries entered into a monetary cooperation agreement with France and renegotiated the terms of the currency (which remains in effect for the Central African CFA franc).[25] However, in 2019 the West African countries renegotiated the terms in hopes of a split from France in furtherance of their independence and monetary sovereignty. Unfortunately, the results proved more symbolic than concrete.[26]

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[18] The English version is not available, but the translated name is: the franc of the French Community of Africa.
[19] *See* Chowdhury & Sundaram, *supra* note 15.
[20] *See id.*
[21] *See id.*
[22] The English version is not available, but the translated name is: the franc of the African Financial Community.
[23] The English version is not available, but the translated name is: the franc of the Financial Cooperation in Central Africa.
[24] Together, the two currencies are generally known as the CFA franc because their exchange rates are the same as pegged to the euro today. Therefore, they are interchangeable. However, for the purposes of this Paper, and the distinction between the two monetary unions, it is essential to distinguish the two currencies.
[25] *See* Chowdhury & Sundaram, *supra* note 15.
[26] Peter Fabricius, *Is West Africa's Eco Currency Just an Echo of the Colonial Past?*, INST. FOR SEC. STUD. (Jan. 24, 2020), https://issafrica.org/iss-today/is-west-africas-eco-currency-just-an-echo-of-the-colonial-past.

II. LEGAL AUTHORITY

A. The Central African CFA Franc, its Institutions, and the Monetary Cooperation Agreement

The institutions of the Central African CFA franc zone have created a power dynamic in France's favor. The institutions work in concert to give France a prominent seat at the table when creating financial policies for the six Central African member States and control over the use of each member State's foreign assets. The six Central African countries established the Central African Monetary Union[27] (the "CAMU") which became the legal entity authorized to enter binding agreements with France.[28] The authority for the CAMU derives from the Convention Regissant l'Union Monétaire de l'Afrique Centrale[29] (the "CAMU Treaty").[30] The primary mission of the CAMU was to create monetary and fiscal regulatory harmonization across the six member countries.[31] The CAMU Treaty has four key provisions (summarized below) that remove the independent power of monetary regulation from the former colonies in Central Africa and allow France to assert its influence.

> Article VI of the CAMU Treaty establishes the Central African CFA franc as the sole, legal monetary unit of the Central African member States.[32]
>
> Article XX of the CAMU Treaty creates the Bank of the States of Central Africa (the "BEAC") which has the exclusive right to issue currency among the member States.[33]
>
> Article XXVII of the CAMU Treaty mandates the BEAC to centralize the foreign assets of the member States in a fund pursuant to the Operations Account agreement in the French Treasury.[34]

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[27] The Central African former countries later created the Central African Economic and Monetary Community, CEMAC, which supplemented and incorporated the CAMU. Scholars typically cite the CEMAC as the union of the Central African CFA franc, but because the cooperation agreement with France was between the CAMU, not the CEMAC, I will refer to the CAMU in this Paper.
[28] Convention Regissant l'Union Monétaire de l'Afrique Centrale U.M.A.C., Nov. 22, 1972, Banque de France.
[29] The English version is not available, but the translated title is: the Convention Governing the Central African Monetary Union.
[30] *See id.*
[31] *See* Convention Regissant l'Union Monétaire de l'Afrique Centrale U.M.A.C., *supra* note 28, art. 1.
[32] *See id.* art. 6.
[33] *See id.* art. 20.
[34] *See id.* art. 27.

> Article XXXII of the CAMU Treaty requires the harmonization of financial regulations whereby the "member states will act in conjunction with the CAMU to strengthen existing financial and banking regulations."[35]

On the surface, the provisions of the CAMU appear to structure an arrangement beneficial to all member States as they work to strengthen the region's monetary and economic policies. Having a single currency between the members, in theory, opens regional trade markets and liberalizes capital flow.[36] However, further examination of the institutions, in concert, demonstrates the French influence. Therefore, it is essential to also assess the key provisions of the Statuts de la Banque des Etats de l'Afrique Centrale[37] (the "BEAC Statutes") in parallel with the CAMU Treaty.[38] The key provisions of the BEAC Statutes are summarized as follows:

> Article XI of the BEAC Statutes outlines the requirements of reserve deposits in the French Treasury. (1) to ensure the convertibility of currency to the French franc, the BEAC must deposit reserves in the French Treasury; (2) fifty percent of foreign assets must be deposited in the French Treasury in the Operations Account; and (3) foreign exchange to cover twenty percent must be maintained in the Operations Account for daily convertibility.[39]
>
> Article XXXVIII of the BEAC Statutes authorizes the Monetary Policy Committee to decide all monetary policies and define the financial standards to meet the objectives of the BEAC and CAMU.[40] [41]
>
> Article XXXIX of the BEAC Statutes structures the Monetary Policy Committee to consist of fifteen (15) members – the National Director of the BEAC, two (2) appointed members by each member State, and two (2) appointed members by France.[42]

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[35] *See id.* art. 32.
[36] *See* Qing He et al., *Does Currency Matter for Regional Trade Integration?*, 76 INT'L REV. ECON. & FIN. 1219, 1220 (2021).
[37] The English version is not available, but the translated title is: the Statutes of the Bank of the States of Central Africa.
[38] Statuts de la Banque des Etats de l'Afrique Centrale, Nov. 22, 1972, Banque de France.
[39] *See id.* art. 11.
[40] *See id.* art. 38.
[41] Monetary policies are the means by which countries, or their central banks, can achieve growth objectives and address inflation. Some countries, like the United States, maintain their own Federal Reserve which is responsible for regulating monetary policies. Other countries, like the countries in the EU or the members of the CAMU, decide to centralize their monetary policy regulation in a regional central bank. Therefore, the monetary policies of the BEAC apply to the flow of money in the six Central African member States. *See Monetary Policy: Stabilizing Prices and Output*, IMF, https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Monetary-Policy (last visited Dec 18, 2022).
[42] *See* Statuts de la Banque des Etats de l'Afrique Centrale*, supra* note 38*,* art. 39.

> Article LV of the BEAC Statutes constructs the BEAC's Board of Directors which will consist of two (2) directors from each member State and two (2) directors from France.[43]

According to the BEAC Statutes, French representation is required on the two most important decision-making bodies. First, France appoints two members to the Monetary Policy Committee which works to further Article XXXII of the CAMU Treaty whereby member States must harmonize their domestic legislation with the monetary policies of the CAMU and BEAC.[44] Second, France appoints two directors to the Board of Directors which makes all major decisions for the BEAC. Although the French representation does not appear to represent a majority opinion, France's power in the bank resembles a "de facto veto … while CFA franc officials attend only in an advisory capacity."[45] Thus, the CAMU Treaty and BEAC Statutes solidify the power dynamic where France controls the monetary policies in its Central African former colonies.

The monetary power held by France stems directly from the Central African CFA franc. France used its leverage through the monetary cooperation agreement discussed below to negotiate seats on the governing body of the BEAC and the policy-making committee. The 1972 Convention de coopération monétaire entre les Etats membres de la banque des Etats de l'Afrique centrale (BEAC) et la République Française[46] (the "Central African Cooperation Agreement") establishes the foundation of this power dynamic.[47] The Central African Cooperation Agreement pegs the Central African CFA franc to the French franc – now the euro.[48] It guarantees unlimited convertibility by France of the currency issued by the BEAC. The French guarantee opens the Central African CFA

[43] *See id.* art. 55.
[44] Convention Regissant l'Union Monétaire de l'Afrique Centrale U.M.A.C., *supra* note 28, art. 32.
[45] Jeremy Asiedu, Monetary Sovereignty in the CFA Franc Financial Union (2019) (B.A. thesis, Malmö University) (on file with the Digitala Vetenskapliga Arkivet).
[46] The English version is not available, but the translated title is: the Convention on Monetary Cooperation between the member States of the BEAC and the French Republic.
[47] Convention de Coopération Monétaire entre les Etats Membres de la Banque des Etats de l'Afrique Centrale (BEAC) et la République Française, Nov. 23, 1972, Banque de France [hereinafter *Central African Cooperation Agreement]*.
[48] *See id.* art. 11.

franc countries to the global economy through trade, investments, and capital flows. France acknowledged the benefit to the former colonies and used these advantages to leverage representation in the Central African institutions.[49] Not only was the leverage implicit, but France also expressly stated its intentions in the Central African Cooperation Agreement.Article VII of the Central African Cooperation Agreement says:

> La Banque des États de l'Afrique Centrale prévue à l'article 3 est un établissement multinational africain, à la gestion et au contrôle duquel participe la France en contrepartie de la garantie qu'elle apporte à sa monnaie.[50]

The structure of France's representation in the BEAC implicitly demonstrates the goal of maintaining monetary control in its former colonies. However, the provision in the Central African Cooperation Agreement requiring some form of representation in the BEAC in exchange for the guarantee of convertibility demonstrates an explicit quest for power.

The structure of the CAMU and BEAC, in concert with the power of the currency peg, removes monetary sovereignty from the member States, centralizes the regulatory power in the BEAC, and provides France exclusive and legally binding power on the key decision-making bodies. These agreements have remained unchanged since 1972 and define the relationship between France and its former Central African colonies today.[51] France's guaranteed convertibility of the Central African CFA franc embodies colonial residues because it preserves the ingrained colonizer power dynamic.

B. The West African CFA Franc, its Institutions, and the Monetary Cooperation Agreement

[49] *See* Chowdhury & Sundaram, *supra* note 15.
[50] Central African Cooperation Agreement, *supra* note 47, art. 7. Translated: "The [BEAC] provided in Article 3 is a multinational African establishment. France participates in the control and management of the BEAC in return for the guarantee it provides for its currency."
[51] *See Les Textes Fondateurs des Coopérations Monétaires*, Banque de France, https://www.banque-france.fr/economie/relations-internationales/partenariats-afrique-france/cooperations-monetaires-afrique-france/les-textes-fondateurs-des-cooperations-monetaires (last visited Dec. 18, 2022).

The institutional structures in the West African CFA franc zone mirror those of the Central African CFA franc zone prior to the 2019 renegotiation of the cooperation agreement.[52] Like the Central African member States, the eight West African member States established the West African Monetary Union (the "WAMU"), and later, the West African Economic and Monetary Union (the "WAEMU") which incorporated and supplemented the WAMU.[53] The WAMU Treaty, and subsequent WAEMU treaty, has similar provisions to the CAMU Treaty (1) it made the West African CFA franc the exclusive monetary unit of the member States;[54] (2) it established the Central Bank of the States of West Africa (the "BCEAO");[55] and (3) its fundamental purpose is to harmonize the monetary and fiscal regulations of the member States by obligating them to adopt uniform regulations regarding the execution and control of financial dealings.[56] The BCEAO Board of Directors[57] and Monetary Policy Committee[58] also mirror the BEAC, including the mandatory French representation on both bodies.

France also gained its leverage and monetary power over the West African member States through the West African CFA franc. Like the 1972 Central African Cooperation Agreement, France and the West African member States entered the Accord de coopération entre les gouvernements des États membres de l'Union monétaire ouest-africaine et le gouvernement de la République Française[59]

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[52] The period 1973–2019 looks the same as the Central African CFA franc. The terms of the respective cooperation agreements are the same, the values (exchange rates) are the same, and France's membership on the governing bodies is the same. The story only diverges when we reach 2019.

[53] The WAMU founding treaty is the Traite De L'union Monetaire Ouest Africaine (in English, the Treaty of the West African Monetary Union), and the WAEMU founding treaty is the Traite De L'union Economique Et Monetaire Ouest Africaine (in English, the Treaty of the West African Economic and Monetary Union).

[54] *See* Traite de l'Union Monetaire Ouest Africaine art. 4, Jan. 20, 2007, Banque Centrale des Etats de l'Afrique de l'Ouest [hereinafter *WAMU Treaty*].

[55] *See id.* art. 26; *See also* Traite de l'Union Economique et Monetaire Ouest Africaine art. 41, Jan. 10, 1994, Banque de France (incorporating the WAMU Treaty's BCEAO provision into the WAEMU Treaty) [hereinafter *WAEMU Treaty*].

[56] *See* WAMU Treaty, *supra* note 54, art. 34.

[57] *See* Statuts de la Banque Centrale des Etats de l'Afrique de l'Ouest art. 79, Jan. 20, 2007, Banque Centrale des Etats de l'Afrique de l'Ouest [hereinafter *BCEAO Statutes*].

[58] *See id.* art. 67.

[59] The English version is not available, but the translated title is: the Cooperation Agreement between the Governments of the member States of the [WAMU] and the Government of the French Republic.

(the "West African Cooperation Agreement").[60] The West African Cooperation agreement established the terms of the West African CFA franc, including its peg to the French franc—now the euro. France, again, expressed its desire for monetary control through power-seeking provisions in the West African Cooperation Agreement provided below. Article VI of the West African Cooperation Agreement states:

> La réglementation uniforme des relations financières extérieures des États de l'Union, établie conformément aux dispositions de l'article 22 du Traité du 14 novembre 1973 constituant l'Union Monétaire Ouest Africaine, sera maintenue en harmonie avec celle de la République française.[61]

Article X of the West African Cooperation Agreement states:

> Deux Administrateurs désignés par le Gouvernement français participent au Conseil d'Administration de la Banque Centrale des États de l'Afrique de l'Ouest, dans les mêmes conditions et avec les mêmes attributions que les Administrateurs désignés par les États membres de l'Union.[62]

The structure of the institutions in the West African CFA franc zone closely resembles the Central African CFA franc zone, and France's quest for monetary power over its former colonies dominates in both regions.

However, unlike the Central African CFA franc zone, which is still legally bound by French control, the West African CFA franc zone reapproached the negotiations table in 2019 to sever the residual ties to its former colonial power. The results brought a new cooperation agreement called the Accord de coopération entre les gouvernements des États membres de l'Union monétaire ouest-africaine et le gouvernement de la République Française[63] (the "2019 West African Cooperation

[60] Accord de Coopération entre la République Française et les Républiques Membres de l'Union Monétaire Ouest-Africaine, Dec. 4, 1973, Banque de France [hereinafter *West African Cooperation Agreement*].
[61] *Id.* art. 6. Paraphrased translation: "The harmonization of financial regulations required by the [UMOA Treaty] [and UEMOA Treaty] must also harmonize with the regulations of the French Republic."
[62] *Id.* art. 10. Paraphrased translation: "Two Directors from France will participate on the [BCEAO]'s Board of Directors in the same capacity as attributed to the member states."
[63] The English version is not available, but the translated title is: the Cooperation Agreement between the Governments of the member States of the WAMU and the Government of the French Republic.

Agreement").[64] The sentiment of member States demonstrated a desire to move away from the West African CFA franc and adopt a new single currency pegged to the Euro, called the Eco.[65] The differences between the West African Cooperation Agreement and the 2019 version are summarized below:

> Article IV of the 2019 West African Cooperation Agreement removes the representation of France on the Monetary Policy Committee in favor of independent persons nominated by the WAEMU, in concert with France.[66]
>
> What is not in the 2019 West African Cooperation Agreement? (1) There is no longer a requirement to deposit foreign reserves in an Operations Account with the French Treasury; (2) there is no longer a requirement for France to appoint directors to the Board of Directors of the BCEAO; and (3) there is no longer a requirement to harmonize financial and monetary regulations with the French Republic.[67]

France no longer has contracted legal control over the monetary policies of its former West African colonies. However, the announcement of the end of the West African CFA franc has become more symbolic than substantive. France may have removed formal requirements to deposit foreign assets into the French Treasury, but Article II of the 2019 West African Cooperation Agreement maintains France's guarantee of unlimited convertibility into the euro at a fixed rate.[68] The conditions create a soft obligation to maintain foreign reserves accessible to the French Treasury and further France's influence.[69] Furthermore, the anglophone West African countries, who sought to join the countries in the West African CFA franc zone in creating a new single currency, objected to France's

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[64] Accord de Coopération entre les Gouvernements des États Membres de l'Union Monétaire Ouest-Africaine et le Gouvernement de la République Française, Dec. 21, 2019, Banque de France [hereinafter *2019 West African Cooperation Agreement*].

[65] *See New Currency 'Eco' to Replace CFA Franc but Will Remain Pegged to Euro*, FR. 24 (Dec. 22, 2019), https://www.france24.com/en/20191222-cfa-franc-to-be-replaced-by-the-eco-but-will-stay-pegged-to-euro.

[66] *See* 2019 West African Cooperation Agreement, *supra* note 64, art. 4.

[67] *See id.*

[68] This provision provides both a guarantee by the French government and pegs the new currency created by the West African former colonies to the Euro.

[69] Because the West African CFA franc is now pegged to the euro, not the French franc, the WAEMU can theoretically pull all reserves from the French Treasury and deposit them in the BCEAO account, but this has yet to be done, with a low probability of happening soon. *See* Elliot Smith, *West Africa's New 'Eco' Currency Sparks Division Over Timetable and Euro Peg*, CNBC (Jan. 17, 2020), https://www.cnbc.com/2020/01/17/west-african-eco-currency-sparks-division-over-timetable-and-euro-peg.html.

conditions.[70] They argued that France's conditions made the symbolic removal of monetary oversight simply that—symbolic; by pegging the currency to the euro and remaining the guarantor, France dug its heels into the colonial influence that it had guarded since independence in 1960.[71] Therefore, the 2019 announcement of the Eco and the 2019 West African Cooperation Agreement, though on their faces represent an important start to breaking colonial ties, illustrate the deeply rooted colonial residues that exist beyond a mere legal instrument. The colonial residues lie in the monetary system itself that France created before its exit in 1960—-highlighting the distinction between national sovereignty and monetary sovereignty.

If anything, the 2019 West African Cooperation Agreement shows how difficult it will be for the former colonies to move out from under French monetary authority. The talks for the Eco continue to lag, and implementation dates get pushed farther down the line.[72] Three years since the announcement of the Eco, the West African CFA franc still exists as if nothing has changed and so do the colonial ties.[73] Therefore, the hope of less monetary dependence in the West African CFA franc zone remains bleak.

III. SIDE EFFECTS

Although economic stability is an undeniable benefit of the monetary arrangement, the costs of losing monetary sovereignty tip the scale unfavorably for the CFA franc countries. Undoubtedly, some benefits of the arrangement include: (1) the countries using the CFA franc currency have lower

[70] *See id.*
[71] *See id.*
[72] *See* Alessandra Prentice et al., *Ivory Coast President Says New West African Currency Launch May Take Five Years*, REUTERS (Sept. 26, 2020), https://www.reuters.com/article/us-westafrica-economy-eco/ivory-coast-president-says-new-west-african-currency-launch-may-take-five-years-idUSKBN26H0V1.
[73] *See* Kingsley Kobo, *Hopes for a West African Single Currency Fade as Ghana and Nigeria Launch Digital Money*, QUARTZ (Dec. 30, 2021), https://qz.com/africa/2108317/what-happens-to-the-eco-when-the-e-naira-and-e-cedi-launch.

debt[74] than other similarly situated countries on the continent;[75] (2) the countries also have lower inflation rates[76] because the exchange rates are fixed to a strong currency with a substantial number of reserves deposited in the French Treasury;[77] and (3) the countries, by having a fixed exchange rate, reduce risks that, in theory, should attract investors into the economies.[78] However, despite the benefits, CFA franc countries still lose monetary sovereignty—a much more expensive cost.

A. Monetary Sovereignty

The CFA franc countries lack most of the essential rights that confer monetary sovereignty. The IMF defines monetary sovereignty using the bundle of three essential rights: (1) the right to issue currency, (2) the right to determine and change the value of that currency, and (3) the right to regulate the use of that currency.[79] Of the three rights, the West and Central African former colonies only hold the first—the right to issue currency. The IMF asserts that States have the right to delegate the issuance of currency to a regional, central bank of their choosing.[80] A key element in the legal authority of the

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[74] Balance of payments issues spark sovereign debt. A balance of payment crisis, commonly called a currency crisis, occurs when a State is a net importer and cannot afford to pay its imports with a foreign currency. As explained in note 10 *supra*, countries prefer to be paid in a reliable foreign currency. Therefore, to have foreign currency, a State's export must at least equal their imports. If there is an imbalance of imports, without a peg to a stronger currency, the domestic currency devalues (because there is more demand for a foreign currency over domestic currency), and the buying power of the domestic currency also decreases—increasing the debt needed to pay for the imports.

[75] *See* Casimir Oyé Mba, *The Pros and Cons of the CFA Franc Zone*, THE AFR. REP. (Jan. 20, 2020), https://www.theafricareport.com/22378/the-pros-and-cons-of-the-cfa-franc-zone/.

[76] Inflation can occur through either: (1) a decrease in the supply of goods and services with increased demand – cost-push inflation; or (2) an influx of money supply with too few goods to buy – demand-pull inflation. Fixing the exchange rate of a currency responds to the second cause of inflation by preventing a depreciation of the local exchange rates. By keeping the exchange rate fixed, the price of imports remains cheaper for local consumers, so the consumers have the desire to maintain their local currency, because purchasing power is unchanged. Lastly, confidence remains high because local consumers, investors, and the government have guaranteed the ability to convert their currency into a foreign currency with the deposit of a significant number of reserves. *See* Mary Hall, *Cost-Push Inflation vs. Demand-Pull Inflation: What's the Difference?*, INVESTOPEDIA (Apr. 17, 2022), https://www.investopedia.com/articles/05/012005.asp.

[77] *See id.*

[78] This has proven to be ineffective because investment remains low in CFA franc countries compared to other countries on the continent. *See* Landry Signé, *How the France-backed African CFA Franc Works as an Enabler and Barrier to Development*, BROOKINGS (Dec. 7, 2019), https://www.brookings.edu/opinions/how-the-france-backed-african-cfa-franc-works-as-an-enabler-and-barrier-to-development/.

[79] *See* François Gianviti, *Current Legal Aspects of Monetary Sovereignty*, *in* 4 CURRENT DEVS. IN MONETARY AND FIN. L. 3, 4 (IMF, 2005).

[80] *See id.* at 5.

BEAC and the BCEAO is the exclusive right to issue the CFA franc in the member States, so the CFA franc countries possess the first right. However, the remaining essential rights belong to France.

A pegged currency inherently and completely removes the right to determine and change the value of the CFA franc from the former colonies.[81] A State cannot decide, as a matter of domestic monetary policy, to increase or decrease the value of its currency because it is fixed to a currency outside of its control (unlike floating currencies[82] where a government can intervene in the private market). A look at the CFA franc post-COVID presents a good example of the inability to change the currency's value. The euro, normally a strong and stable currency, hit parity[83] with the US Dollar in July of 2022.[84] For the first time in twenty years, the euro has lost significant value compared to the US Dollar. Although the cause of this imbalance comes from the United States' monetary policies, the effects extend to the euro and any currency pegged to the euro. The issue lies primarily in debt repayment for CFA franc countries. As the euro lost value relative to the US Dollar, the CFA franc proportionately lost value, making debt servicing for bonds in US Dollars more expensive. Furthermore, a secondary issue lies in more expensive imports. As imported goods coming from the United States become more expensive relative to the purchasing power of the CFA franc, the consumers bear the burden of the pegged currency. A country with a floating currency could change its interest rates to respond to the devaluation of its currency, or the country could buy its currency in the market to increase its value. Both intervention mechanisms are off the table for the former

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[81] *See* Maurice Obstfeld & Kenneth Rogoff, *The Mirage of Fixed Exchange Rates*, 9 J. ECON. PERSPS. 73, 74 (1995).
[82] Cory Mitchell, *Floating Exchange Rate: What It Is, How It Works, History*, INVESTOPEDIA (Nov. 28, 2020), https://www.investopedia.com/terms/f/floatingexchangerate.asp (defining a floating currency as a "regime where the currency price of a nation is set by the forex market based on supply and demand relative to other currencies [which] is in contrast to a fixed exchange rate, in which the government entirely or predominantly determines the rate.").
[83] *Explainer: What's the Impact of Euro Parity with the Dollar?*, AP NEWS (July 14, 2022), https://apnews.com/article/what-does-euro-dollar-parity-mean-7b8bfe3429feefd9465e985369998e77 (defining currency parity as the time when one currency reaches an equal value compared to another currency). Therefore, the currencies exchange at the same rate—one for one.
[84] *See* Greg Iacurci, *U.S. Travelers Are Getting Bigger Discounts in Much of Europe Amid Favorable Euro-dollar Exchange Rate*, CNBC (Sept. 6, 2022), https://www.cnbc.com/2022/09/06/euro-dollar-exchange-rate-yields-steep-discount-for-americans.html.

colonies, and they must rely on a response from the European Monetary Union (the "EMU") and the European Central Bank (the "ECB") which has not come quickly enough.[85]

The former colonies forfeited the right to regulate their currency. At the surface level, monetary unions and regional central banks have the benefit of harmonization of financial and monetary regulations across the region, but underneath the surface, the deciding power in the BEAC (directly) and BCEAO (indirectly)[86] belongs to France which hinders the member States' ability to respond to external financial shocks. Responses to global financial crises[87] (or mild recessions)[88] typically require each country to swiftly decide monetary policies that address their specific concerns[89] because of the heterogeneity across markets, industries, and political structures of respective member States. However, the reliance on central banks, with France's "de facto veto" power, forces member States to agree on a unified policy response to the financial shock.[90] Since "the conduct of fiscal and monetary policy within the Franc Zone is not optimal," swift adoption of a sufficient monetary policy in response to a shock becomes less likely—causing the countries to suffer.[91] In addition, harmonization of monetary policies must consider the circumstances of each member State, the French government, and the EMU[92] which all have different concerns and stakeholders. Not only do the competing interests delay the timeline for an effective policy, but the interests of the guarantor

[85] *See* Ali Zafar, *CFA Franc Zone: Economic Development and the Post-COVID Recovery*, BROOKINGS (Aug. 5, 2021), https://www.brookings.edu/blog/africa-in-focus/2021/08/05/cfa-franc-zone-economic-development-and-the-post-covid-recovery/.
[86] France's convertibility guarantee creates indirect power in the decision-making process.
[87] Like the Great Recession.
[88] Like the post-COVID recession due to global supply chain issues paired with governments stimulating their economies.
[89] "If shocks are not immediately offset by a monetary-policy response then their effect will vary substantially across member states, with no obvious common policy response appropriate to all." David Fielding & Kalvinder Shields, *Modelling Macroeconomic Shocks in the CFA Franc Zone*, 66 J. DEV. ECON. 199, 221 (2001).
[90] Asiedu, *supra* note 45, at 28.
[91] *See* Fielding & Shields, *supra* note 89, at 222.
[92] Because the European Monetary Union (the "EMU") decides monetary policies for the euro, their policies indirectly affect all countries that peg to their euro.

and legislative body of the euro also have significant bargaining power in the direction of the harmonization of the monetary policy in the former colonies.[93]

Although the CAMU and WAEMU have the option of withdrawing from their respective cooperation agreements, revoking France's guarantee of convertibility, and converting their currency to a floating currency, the two unions would need to make major strides in debt reductions and inflation intervention. Against the backdrop of the symbolic 2019 West African Cooperation Agreement, the foundation has not yet materialized for a break away from French influence. There remains a considerable journey to monetary sovereignty evidenced by the retention of the CFA franc's peg to the euro.

IV. CONCLUSION

France's tactic of imposing power remains the same. France exchanges its security for power in its former colonies.[94] In some colonies, security meant military security, but in the West and Central African CFA franc zones, monetary security is the name of the game. The CAMU and the BEAC have not indicated any desire to renegotiate the power dynamic of their monetary relationship with France. France keeps its representatives on the Board of Directors and Monetary Policy Committee in the Central African former colonies and continues its direct influence over the monetary sovereign of the CAMU member States. On the other hand, the countries in the West African CFA franc zone attempted to sever ties in 2019 with the renegotiation of the 2019 West African Cooperation Agreement. However, the results suggest a mere symbolic agreement instead of a substantive break away from the colonial power. The power still exists as France continues to guarantee monetary security in exchange for indirect influence. Though the provisions of the 2019 West African

[93] *See The CFA Franc: French Monetary Imperialism in Africa*, LONDON SCH. ECON. AND POL. SCI. (July 12, 2017), https://blogs.lse.ac.uk/africaatlse/2017/07/12/the-cfa-franc-french-monetary-imperialism-in-africa/.
[94] *See* Mohamed Keita & Alex Gladstein, *Macron Isn't So Post-Colonial After All*, FOREIGN POL'Y (Aug. 3, 2021), https://foreignpolicy.com/2021/08/03/macron-france-cfa-franc-eco-west-central-africa-colonialism-monetary-policy-bitcoin/.

Cooperation Agreement do not expressly assert authority over the monetary policies, like the original West African Cooperation Agreement, the effects, ingrained in the system, persist. Therefore, the legacy currency in both zones prevails despite clear attempts to cleanse former colonies of colonial residues.

Essay 3

The Dark Brew: The Coffee Industry and Neo-Colonialism in South America

I. WHO MADE US COFFEE—COFFEE'S COLONIAL ROOTS

Coffee is not only a popular beverage consumed by over three-quarters of U.S. consumers, but also a critical source of income for some 12.5 million farmers in "developing" countries.[1] However, our daily coffee consumption comes with an ugly truth: colonialism shaped the original landscape of the coffee industry in South America, continuing to impact the continent today.

Highly specialized and often operated on a large scale, plantations require a high level of capital investment and function by exploiting low-waged laborers.[2] The colonial character of plantations in Latin America is not just reflected through the ownership of European descendants and their capitals, but also through how the lands work today.

Enslaved peoples from Africa worked in large, European-owned estates in Brazil and the Caribbean, where they farmed immense amounts of coffee planted from stolen African seeds.[3] In Central America, Indigenous populations were expelled from their own lands, left with no other

[1] *Coffee Development Report 2019*, INT'L COFFEE ORG., http://www.ico.org/documents/cy2021-22/coffee-development-report-2019.pdf (last visited Dec. 20, 2022).
[2] Ivette Perfecto, M. Estelí Jiménez-Soto, & John Vandermeer, *Coffee Landscape Shaping the Anthropocene*, 60 CURRENT ANTHROPOLOGY 236, 236 (2019), , https://www.journals.uchicago.edu/doi/full/10.1086/703413 (last visited Jan. 25, 2022).
[3] Martin Mayorga, *Coffee… an Industry Built on Colonialism and Slavery*, MAYORGA COFFEE BLOG (Dec. 21, 2022), https://mayorgacoffee.com/blogs/news/coffee-an-industry-built-on-colonialism-and-slavery.

option but to work for their oppressors on big estates.[4] African slaves and Indigenous populations led a hard life, being underfed, poorly treated, and disempowered.[5] Many fell victim to violence or died simply due to the hardships inherent in their work.

Bigger estates are typically controlled by wealthy families or multinational traders. Particularly in Brazil, these estates have developed expertise in efficient farming.[6] The farms are mechanized, leading to a low cost of production. Owners often have their own mill and often buy coffee from other parts of the community. In short, the owners are financially strong with a business model that mirrors that of multinational traders. They maintain the financial means to control producers through money lending and stay close to the roasters and importers in the market.[7]

After having worked and amassed certain fortunes in foreign countries, including the United States, several expat farmers would come back to South America to purchase lands. They come back for certain advantages: market access, financing abilities, and investment strategies. Consequently, the expat farmers are able to build quality coffee farms and effectively compete against other local farmers in the business.[8]

Comparatively, however, small, local farmers who tend to be of the Indigenous population are marginalized, selling to the same multinational companies that they have partnered with for generations because they lack other viable choices.[9] These farmers experience seasonal hunger and struggle because of the complex web of abusive practices that exist in the supply chains.[10] The small

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*

farmers have suffered from an unequal power dynamic that dates back to the colonial days that still subject them to great disadvantages.[11]

II. WHAT ELSE IS IN THE INDUSTRY—INTERNATIONAL COFFEE AGREEMENT AND ITS COLLAPSE

A. International Coffee Agreement

The International Coffee Organization (ICO) is the main intergovernmental organization to tackle the challenges facing the world coffee sector through international cooperation. Its member governments represent 93% of world coffee production and 63% of world consumption.[12]

Coffee farming in Latin America was shaped by a series of regional and global trade agreements that aimed to lessen some of the worst impacts of the boom-and-bust cycles experienced in the twentieth century.[13] The International Coffee Agreement (ICA) is an international commodity agreement between coffee-producing countries and consuming countries. ICO, the controlling body of the agreement, represents all major coffee-producing (exporting) countries including Brazil, Colombia, and most consuming (importing) countries including the United States.[14] First signed in 1962, the agreement's initial goal was to maintain exporting countries' quotas and to keep coffee's market prices high and stable.[15] Through a mandatory export quotas regime, ICA managed to stabilize coffee prizes in the face of great global coffee production fluctuations.[16] Nonetheless, with the

[11] *Id.*
[12] *Members of the International Coffee Organization*, INT'L COFFEE ORG., https://www.ico.org/members_e.asp?section=About_Us (last visited Jan. 25, 2023).
[13] *Environmental History of Coffee in Latin America*, Oxford Research Encyclopedia, https://oxfordre.com/latinamericanhistory/oso/viewentry/10.1093$002facrefore$002f9780199366439.001.0001$002facrefore-9780199366439-e-440 (last visited Jan. 27, 2023).
[14] *International Coffee Agreement*, WIKIPEDIA, https://en.wikipedia.org/wiki/International_Coffee_Agreement (last visited Jan. 23, 2023).
[15] *Id.*
[16] John Baffes, *Set Up to Fail? How Commodities Agreements Collapse*, WORLD BANK (Jun. 29, 2020), https://blogs.worldbank.org/voices/set-fail-how-commodity-agreements-collapse (last visited Jan. 27, 2023).

emergence of new coffee supplies, ICA eventually collapsed in 1989, causing a series of catastrophic consequences in Latin America's industry.[17] As a consequence, coffee prices fell 40%.[18]

The disagreement was triggered by consumers' change in taste towards milder and higher quality coffee.[19] With the retained quotas from the 1983 agreement, the change increased the value of milder coffee at the expense of more traditional varieties such as robusta.[20] Brazil in particular—the world's most powerful coffee producer—refused to reduce its quotas, believing it would lower their market share.[21] The consumers, led by the United States, demanded higher quality coffee and the end of selling coffee to non-members at reduced rates.[22]

The 1983 ICA was set to expire on October 1, 1989, but realizing that it would be impossible to enter into a new agreement before the termination date, the Coffee Council (ICO's highest body) effectively decided to suspend the export quotas on July 4th, 1989.[23] Without an extended agreement, producing countries lost most of their influence on the international market.[24] ICO's average indicator price for the last five years prior to the end of the regime fell from USD $1.34 per pound to USD $0.77 per pound for the first five years after.[25]

The current 2007 ICA entered into force on February 2, 2011, when it was approved by two-thirds of the exporting and importing signatory governments.[26] As of 2013, it had 51 members, of

[17] *History of the International Coffee Organization*, INT'L COFFEE ORG., https://www.ico.org/icohistory_e.asp?section=About_Us (last visited Jan. 25, 2023) [hereinafter *ICO History*].
[18] Baffes, *supra* note 16.
[19] *International Coffee Agreement*, *supra* note 14.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *ICO History*, *supra* note 14.

which 44 are exporting members, and 7 importing (the EU represents all its 28 member States). According to ICO, its members represent 93% of all coffee production and 63% of the consumption.[27]

III. WHEN WE TASTE COFFEE WHAT ARE WE TASTING—POST-1989 COFFEE INDUSTRY AND AGENTS

A. How did the coffee industry in South America react and rebuild the landscape after the collapse of the treaty?

International coffee prices have been extremely volatile in recent years, severely straining the livelihoods of producers. For most of 2020, coffee prices sagged 30% below the average price level of the previous ten years, making it impossible for farmers to even meet their production costs.[28] And while prices have since improved, they are not stable enough for farmers to put in long-term investments in their businesses.

ICO is not the only functioning cell in the international coffee organism. In the wake of the 1989 ICA crisis, NGOs including Fair Trade and certified organic coffee have promoted new forms of coffee production.[29] Fair Trade serves as an alternative to traditional international aid since small-scale producers and communities benefit directly by selling goods that they produce at a "fair" price.[30] The goal of Fair Trade is to diminish the unfair power dynamic between developed, industrialized countries that are on the buyer side, and the developing, largely farming countries that provide raw coffee materials.[31]

The Union of Indigenous Communities in the Isthmus Region (UCIRI) is the world's first fair trade cooperative in the Oaxaca region of Mexico with a mission to revert the poverty among local

[27] *Members of the International Coffee Organization*, *supra* note 12.
[28] *Rainforest Alliance Certified Coffee*, RAINFOREST ALL., https://www.rainforest-alliance.org/insights/rainforest-alliance-certified-coffee/ (last updated Aug. 26, 2021).
[29] *Environmental History of Coffee in Latin America*, *supra* note 13.
[30] Larissa Zemke, *To What Extent Are Small-Scale Coffee Producers in Latin America the Primary Beneficiaries of Fair Trade*, MLINE LIBRARY, https://milnepublishing.geneseo.edu/good-corporation-bad-corporation/chapter/appendix-d-to-what-extent-are-small-scale-coffee-producers-in-latin-america-the-primary-beneficiaries-of-fair-trade-by-larissa-zemke/ (last visited Dec. 22, 2022).
[31] *Id.*

coffee farmers.[32] The umbrella organization Fairtrade International created a set of certification systems, setting out its global standard for fairly traded products, and certifying the producers that have met the standard in the trade supply chains.[33] Coffee being the first fair trade product, is audited by FLOCERT in over 30 countries, with the majority in Colombia, Peru, and Brazil.[34] 32% of the audits conducted by FLOCERT in 2020 were about coffee.[35]

However, the coffee auditing system does not eliminate all problems with fair trading in the coffee industry. While consumers grow familiarity with Fair Trade-certified coffee, the strict certification standard may have widened the economic gaps between coffee growers of different capitals levels and effectively lowered the quality of the coffee consumers can obtain through the certified labels.[36] For example, in a case study in Finland and Nicaragua, even within the fair trade coffee labeling system, wealth is sliding with the consuming countries to which a greater percentage of the final retail coffee price actually flows, and small farmers and workers in developing countries nonetheless suffer from the familiar exploitation and cannot effectively fight against poverty.[37] It appears that the sympathetic customers eventually still exploit the workers from the other end of the coffee trading business, even though they may sincerely believe the opposite while selecting the more pricey ethical products.

While fair trade standard to some extent enhances low-income workers' welfare, which seems to help alleviate some of the side effects (the exploitation of low-wage laborers) of colonialism, the reason why it appears frail in eliminating colonial consequences in the South America coffee industry

[32] *Id.*
[33] FLOCERT, https://www.flocert.net/about-flocert/vision-values/roots-role-fairtrade/ (last visited Jan. 25, 2022).
[34] *Certification in Numbers: International Coffee Day*, FLOCERT, https://www.flocert.net/certification-in-numbers-international-coffee-day/ (last visited Jan. 25, 2022).
[35] *Id.*
[36] *Id.*
[37] *Id.*

is because setting an ethical standard and affecting change through the demand side does not expand the lower-end of the supply chain, which is where the vast majority of colonialism victims reside. A more effective way should directly target the specific lower-income laborers, as opposed to indirectly nudging the industry through a change of preference on the demand side.

In this sense, many smaller organizations in South America that implement financial aid to and are directly involved with the targeted community, and organizations originating from the local community based on region, gender, and other factors, might be more successful in alleviating coffee's colonial roots. These include International Women's Coffee Alliance (IWCA), Federación Nacional de Cafeteros de Colombia (FNC), Feed the Future Partnership for Sustainable Supply Chains (PSSC), the International Labour Organization (ILO), and the United States Agency for International Development's (USAID) Farmer-to-Farmer (F2F) program.

Founded in 1927 by Colombian coffee growers, FNC represents local coffee producers nationally and internationally.[38] The organization offers bilingual information, in English and Spanish, about the different services, products, publications, and sustainability initiatives of the Colombian coffee industry to promote the products of local growers.[39] In addition to the information output, FNC Colombia also has the capacity to engage in financial development on behalf of the local growers. For example, in 2022 the Development Bank of Latin America and FNC Colombia signed a Memorandum of Understanding, which seeks to support 130,000 Colombian women and strengthen the region's industry over the next four years.[40]

PSSC, launched in December 2020, helps small agribusinesses in twelve countries in Latin America, Africa, and Asia, particularly those owned or led by women, navigate operational

[38] FEDERACIÓN NACIONAL DE CAFETEROS DE COLOMBIA, https://federaciondecafeteros.org/wp/?lang=en (last visited Jan. 25, 2023).
[39] *Id.*
[40] *Id.*

uncertainties and limited connectivity to markets through business advice and advisory services, debt relief, and a resilience grant fund.[41] With this financial support, businesses can continue to serve and buy from vulnerable smallholder farmers in their communities.

IWCA empowers women who work in the international coffee industry by supporting a global network with independent IWCA Chapters.[42] Each IWCA Chapter has idiosyncratic strategic priorities and membership models according to their chapter's characteristics, under the instruction of the IWCA Chapter Formation Protocol.[43] The mission of IWCA is to "empower women in the international coffee community to achieve meaningful and sustainable lives; and to encourage and recognize the participation of women in all aspects of the coffee industry."[44] In a 2021 survey, IWCA identified that the top three priorities for its chapters in producing countries were (1) access to markets, (2) access to finance, and (3) understanding Voluntary Sustainability Standards (VSS) Program.

So far, VSS-compliant coffee has constituted the majority of global coffee production.[45] Most certified coffee originates from Latin America and the Caribbean, and the demand for sustainable coffee is increasing, but the global market remains oversupplied, with a significant amount of VSS-compliant coffee not being sold. As such, while IWCA and similar organizations may be able to help break the information wall for marginalized coffee producers, an international trade regulator similar to ICO has to step in and make sure there is no gross overproduction in the global market.

An alternative way to overall production control is to focus on individual worker's rights. For example, the ILO seeks to reduce work-related illnesses and accidents in global value chains to promote decent work. In this initiative, through the Vision Zero Fund, and with financial

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[41] *Usaid Partners with Keurig Dr Pepper to Protect Supply Chains Amid Covid-19*, COMUNICAFFE, https://www.comunicaffe.com/usaid-partners-with-keurig-dr-pepper-to-protect-supply-chains-and-amid-covid-19/.
[42] WOMEN IN COFFEE ORGANIZATION, https://www.womenincoffee.org/what-we-do (last visited Dec. 22, 2022).
[43] *Id.*
[44] *Id.*
[45] *Coffee Coverage*, IISD, https://www.iisd.org/ssi/commodities/coffee-coverage/ (last visited Dec. 22, 2022).

contributions from the European Commission, it is intended to achieve this objective in the coffee value chains in Mexico, Colombia, Honduras, and other Latin American countries.[46] Protecting worker's rights through international organizations' involvement is particularly important, as a recent study conducted by the Department of Labour revealed. The study showed that child labor in the coffee industry was particularly notorious. Coffee has the third most child labor of all industries, after cotton and sugarcane.[47] In Brazil, in 2015, 4,993 child laborers participated in coffee cultivation without contracts or other protective equipment.[48] In Costa Rica, in 2021, 1,422 children aged from five to fourteen were being exploited as child laborers in the coffee industry, amounting to 8.8% child laborers in the country. [49]

USAID's F2F program provides technical assistance from U.S. volunteers to farmers, farm groups, agribusinesses, and other agriculture sector institutions in developing and transitional countries.[50] In particular, F2F provides technical assistance from highly skilled U.S. volunteers to farmers, cooperatives, and agribusinesses in less developed agricultural areas, including in South America.[51] Partners of the Americas, an implementing partner of F2F, works on coffee activities in Guatemala, where Partners of the Americas places volunteers to assist farmer groups in the Western and Central Highlands.[52] Recent F2F volunteer assignments have focused on assisting with strategic planning and organizational development, Good Manufacturing Practices, certification in coffee,

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[46] *Improving OSH in the Coffee Supply Chain in Latin America*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/americas/programas-y-proyectos/WCMS_754329/lang--en/index.htm (last visited Jan. 25, 2023).
[47] Oliver Nieburg, *Coffee Child Labour: Under-researched and Undetected*, BEVERAGE DAILY (Aug. 13, 2019), https://www.beveragedaily.com/Article/2019/08/13/Coffee-child-labour-podcast-How-widespread-is-the-issue (last visited Jan. 27, 2023).
[48] *Id.*
[49] *Id.*
[50] USAID, https://2012-2017.usaid.gov/what-we-do/agriculture-and-food-security/supporting-agricultural-capacity-development/john-ogonowski (last visited Jan. 27, 2023).
[51] FARMER TO FARMER, https://www.partners.net/wp-content/uploads/2015/03/F2F-Colombia-2018-2023_One-Pager-1.pdf (last visited Jan. 27, 2023).
[52] *Guatemala Farmer-to-Farmer Program Highlights*, PARTNERS OF THE AMERICAS, https://www.partners.net/our_stories/guatemala-farmer-to-farmer-program-highlights/ (last visited Jan. 27, 2023).

marketing, grant proposal development, and food safety compliance.[53] Another F2F implementing partner, NCBA CLUSA, is working on coffee systems in Peru, Ecuador and Honduras.[54]

Based on the analysis of the above international and governmental organizations aiming at resolving the consequences of neo-colonialism in the coffee industry in South America, a holistic approach, including personnel training, information offering, targeted community (women, children, specific local farmers) promotion, direct financial aids, financial literacy promotion, and workers' rights protection, is more important than relying on creating coffee certifications. International cooperation nonetheless has great importance and potential. Not only can international organizations obtain more accurate information about the coffee growers' needs and priorities through targeted surveys in the local communities, they can also decrease the bureaucratic costs in layered inter-governmental programs, and can address the issues more effectively. However, while international cooperation often exists in the form of resources from developed countries flowing into developing countries, it bears to recognize the colonial roots and similar pattern in the original dark brew business, and to fully acknowledge the creativity, strength, and diversity of local communities.

IV. CONCLUSION

The origination and the current layout of the coffee industry in South America is heavily influenced by its colonial past. Particularly, the change of taste of U.S. consumers in the 1980s led to the end of a major international treaty impacting South America's international coffee regulation. Smaller farmers and coffee growers particularly struggle in the international currents. While certain ecological certificates may prima facie aid smaller businesses in South America, the extent of this

[53] *John Ogonowski and Doug Bereuter Farmer-to-Farmer Program Fiscal Year 2021 Annual Report*, USAID, https://pdf.usaid.gov/pdf_docs/PA00Z6BR.pdf (last visited Jan. 27, 2023).
[54] *Locally-led Development Leads to Growth for Coffee and Cacao Industry Leaders in Peru and Honduras*, NCBA CLUSA, https://ncbaclusa.coop/blog/locally-led-development-leads-to-growth-for-coffee-and-cacao-industry-leaders-in-peru-and-honduras/ (last visited Jan. 27, 2023).

enhancement is doubtful. Ultimately, international organizations including several minority population alliances come into play in aiding the coffee industry and promoting equality for minority coffee growers.

Essay 4

The G20's Surveillance of the Global Financial Market as a Form of Neo-Colonialism

I. INTRODUCTION

Financial crises over the past century have shown how the ripple effects of national and regional economic policies continue to impact global financial stability. Normally, the initiatives taken to combat such crises are held in the national scope, but there is an increasing push towards internationally coordinated efforts.[1] This has led to the development of global governance as a means of harmonization and collaboration between the different financial markets. Global financial governance enables countries and international organizations to identify and address pertinent issues beyond the capacity of a single party through collective efforts of surveillance.[2] After the 2018 financial crisis, the Group of 20 (G20) was made the contemporary de facto forum for coordinating global financial regulatory efforts with the collaboration of major international financial actors.[3]

International financial regulation is defined by four core themes: (i) the nature of regulatory problems that require broad decision-making beyond traditional state affairs; (ii) the absence of hierarchical structures and acknowledgment that at the international level, solutions are complex; (iii)

[1] Rolf H. Weber, *Multilayered Governance in International Financial Regulation and Supervision,* 13 J. INT'L ECON. L. 683, 634 (2010).
[2] Rolf H. Weber, *The Legitimacy of the G20 as a Global Financial Regulator*, 28 BANKING & FIN. L. REV. 389, 389 (2013).
[3] Refers to the World Bank, International Monetary Fund, and regional development banks.

global governance is not a new way of understanding the operation of society and contemporary issues and demands multilayered governance; and (iv) globalization has led to an altered and reduced importance of national sovereignty in favor of various other actors.[4] This view of international financial regulation asserts that authority is required to regulate the global system and an organization task with such holds a great deal of power of which has been delegated to the G20.

Financial markets have always had an international aspect especially during the period of colonization. Just an earlier version of globalization, colonization by the western countries is a prop of an unequal global political economy based on cultural superiority and imperialism.[5] Globalization is neo-colonialism. Western countries formed international financial organizations to control the economic development of former colonies and established "spheres of influence" under the principles of cooperation and fragmentation that objectively protect western economic interests.[6] Neo-colonialism is a complex and invasive form of western domination that has been implemented through foreign financial policies.[7] This Paper contends that the G20's role as the surveyor of the global financial market is the contemporary form of neo-colonialism that asserts control over developing economies through the guise of regulation. The first section of this Paper provides a historical background and describes the institutional framework of the G20. The next section examines the regulatory scope of the institution by examining its engagement with international financial institutions. The concluding section asserts that the G20 lacks the legitimacy to survey the Global Financial Market and repackaged forms of colonization must be condemned.

II. BACKGROUND

[4] *See* Weber, *supra* note 1, at 692 (providing further explanation of the five core themes).
[5] Martha Donkor, *Marching to the Tune: Colonization, Globalization, Immigration, and the Ghanaian Diaspora*, 52 AFR. TODAY 27, 28-29 (2005).
[6] *Id.* at 30.
[7] *Id.* at 31-32.

The G20 is an international platform for the world's biggest and emerging economies. In the aftermath of the late 1990s global financial crisis of 1997-1999, the Group of Seven (G7) established the G20 to include emerging countries in global economic discussions.[8] The origins of the G-level groupings lead back to 1973 after an oil crisis and various national economic shocks. Senior financial leaders from the United States, United Kingdom, West Germany, and France met in the first informal meeting and later invited Japan during an IMF meeting to become the Group of Five. Their first summit in 1975 brought along Italy, and an extended invitation to top political leaders in 1976 led to Canada's membership. The G7 extended membership to Russia in 1998, but Russia's membership was suspended, and they permanently left in 2014. The G7 and G20 concurrently exist as an informal aspect of the Bretton Woods institutional framework.[9]

The G20's current membership was extended to nineteen countries and the EU and formed after a series of discussions.[10] Countries were selected by the G7 using five criteria, mainly their systematic importance and ability to contribute to global financial stability. Broad representation and regional balance were also factored with the overall goal of maintaining a small group to encourage open dialogue. There is an established practice of select invitations to five guests and international organizations to meetings as observers. Spain is a permanent guest, and two African countries stand in for the African Union and New Partnership for Africa's Development.[11] Membership within the group is represented by the political heads of States and financial leaders at summits and ministerial meetings.[12]

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[8] *About the G20*, G20, https://www.g20.org/about-the-g20/ (last visited Nov. 17, 2022).
[9] Peter Holcombe Henley & Niels M Blokke, *The Group Of 20: A Short Legal Anatomy from the Perspective of International Institutional Law*, 14 MELBOURNE J. INT'L L. 550, 557-60.
[10] The 19 countries are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, and the United States. *Id.* at 552.
[11] *Id.* at 563.
[12] G20 conferences also include summits of business leaders, youth, women labor unions, parliaments, civil societies, think tanks, audit institutions, science academies, startups and cities. *Engagement Groups*, G20, https://www.g20.org/en/workstreams/engagement-groups/ (last visited Dec. 15, 2022).

In 2008 amid a financial crisis affecting western countries, the group held its first summit of leaders and made it an annual occurrence. The meetings function as a space for discussions which produce declarations, communiqués, and objectives without a legal framework.[13] The active participation of State leaders has garnered attention to the documents that are now considered soft law. Policy decisions culminating in the documents have evolved with resolutions and plans approved by the leaders that are voluntarily adopted through reforms or specific working groups. The G20's regulatory topics have grown to cover a wide range of subjects beyond financial regulations now tackling war, climate change, terrorism, pandemics, immigration, and refugees.[14]

The organization's informal framework for cooperation is a central feature and holds no plans to change the lack of institutional practices.[15] From its inception, the G20 has done without formal structures like a charter, a permanent secretariat, or decision-making rules. The members control the purpose of the group through joint statements, declarations, and delegations of senior civil servants.[16] Leadership of the G20 follows the host country of the annual summit with communication from the preceding and succeeding hosts. The annual agenda is set by the host nation and its content is informed by working groups and reports from international financial organizations. The G20 as an informal international organization allows for flexibility that is restricted only by the member expectations and prior experience.[17] It is the member States that have elected to maintain the structure for all its benefits and challenges.

III. REFORMS FOR INTERNATIONAL FINANCIAL INSTITUTIONS

[13] Weber, *supra* note 2, at 394.
[14] Henley & Blokke, *supra* note 9, at 564.
[15] *Id.* at 553-56.
[16] Christian Downie, *How Do Informal International Organizations Govern? The G20 and Orchestration*, 98 INT'L AFFS. 953, 956 (2022).
[17] *Id.* at 957.

G20 policy decisions are often implemented through reform work within international organizations.[18] As intermediaries, international organizations are enlisted by the G20 to further their regulatory objectives, a form of indirect governance labeled as orchestration.[19] The G20 tasks international organizations with requests to undertake research, prepare reports and develop recommendations. In 2011, the WTO was tasked with developing a pilot program for regional humanitarian food reserves.[20] Cooperation by international organization is not governed by formal arrangements that are commonplace with organizations like the United Nations, but rather by a general willingness to collaborate and maintain their relevance. Proposals from the G20 are triangular in that they are informed by contributions from international organizations, then recommended to international organizations by G20 working groups with an expectation of a response through progress reports.[21] The rest of this section will now look at examples of finance and economic orchestrations by the G20 through the IMF, World Bank and Organization for Economic Cooperation and Development (OECD). Of the 496 times the G20 used orchestration, fifty-one percent was related to finance and economic policy[22] and forty-five percent towards the mentioned organizations.[23]

A. International Monetary Fund

In the context of finance and economics, the G20's primary choice of intermediary organization is the IMF.[24] The Bretton Woods institution has been an essential tool of the G20's reframing of financial regulation, and summit agendas are often focused on the restructuring and

[18] Henley & Blokke, *supra* note 9, at 553.
[19] Downie, *supra* note 16, at 954.
[20] Henley & Blokke, *supra* note 9, at 577.
[21] Downie, *supra* note 16, at 958-59.
[22] *See* Weber, *supra* note 2, at 394-96 (showing that finance and economic policy expands to transparency and accountability, oversight, risk management, tax and anti-corruption, capital adequacy, interest rate policies of central banks' fiscal sustainability and infrastructure spending).
[23] Downie, *supra* note 16, at 962-963.
[24] *Id.* at 965.

development of the organization.[25] The establishment of the G20 Eminent Persons Group on Global Financial Governance (G20 EPG) is one such way of developing reforms for the governance of international financial institutions.[26] The G20 EPG is a forum of institutional leaders with extensive knowledge and experience of global financial architecture and governance, tasked with providing guidance of the role of the IMF regulating capital accounts and corporate governance.[27]

The G20 EPG report recommended that the G20 reset its role in global financial architecture and devolved work to international financial institutions with an assertion that the IMF is integral to the international monetary and financial system.[28] A G20-led working group that would steer the reorientation of development finance was suggested as a reform that would minimize the overlap of board and management responsibilities.[29] Proposal 11 targets the IMF's framework of policy guidance towards capital flows and risks to financial stability stating direction and policy objectives.[30] Proposal 12 demands that the surveillance efforts of the IMF should be utilized to create a global risk map[31] building upon the IMF-FSB Early Warning Exercise.[32] The group also holds that the IMF needs to establish a liquidity facility and governance challenges should be resolved through consensus building.[33]

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[25] *See* Weber, *supra* note 2, at 394-96 (outlining when the IMF had been a relevant topic of the summits such as at the Pittsburgh Summit of September 2009).
[26] THE G20 EMINENT PERSONS GROUP, MAKING THE GLOBAL FINANCIAL SYSTEM WORK FOR ALL: REPORT OF THE G20 EMINENT PERSONS GROUP ON GLOBAL FINANCIAL GOVERNANCE 90-92 (2018), https://www.globalfinancialgovernance.org/assets/pdf/G20EPG-Full%20Report.pdf [hereinafter the G20 EPG report].
[27] *See* G20 EPG report, *supra* note 26 (highlighting that members are professors, chairpersons, managing directors, and ministers.
[28] *Id.* at 66.
[29] *Id.* at 9.
[30] *Id.* at 20.
[31] *Id.* at 21.
[32] *See IMF-FSB Early Warning Exercise*, IMF (Mar. 16, 2021), https://www.imf.org/en/About/Factsheets/Sheets/2016/08/01/16/29/IMF-FSB-Early-Warning-Exercise (describing the G20 task to the IMF and FSB to collaborate on regular Early Warning Exercises).
[33] G20 EPG report, *supra* note 26 at 22.

In response to the G20 EPG report, the IMF considered all the proposals such as the establishment of a multilateral swap facility which had been rejected by the board prior to the report.[34] There has been progress made in terms of the EPG proposal especially in regard to the 15th General Review of Quotas.[35] The IMF has over 200 documents and engagements with the G20 and high levels of collaboration between the two organizations has led to calls for a formal integration process. Mervyn King, as governor of the Bank of England, advocated for integrating the G20 into the IMF as a governing council and acquiring a procedure for voting on decisions.[36] The involvement of the G20 in the IMF, with a membership of 190 countries, surpasses collaboration and insinuates supervision. G20 members are already highly represented among IMF membership and the double representation of national interest through the G20 is concerning.

B. World Bank Group

The G20's relationship with the World Bank is similar to that of the IMF and recommendations from the G20 EPG were also extended to the bank. In 2008, when the World Bank considered a general capital increase in response to the financial crisis, it was greatly opposed by G7 States, the Part I countries then offered to consider the increase if the organization implemented internal reforms suggested by the G20.[37] The voice reforms are a declaration by the G20 that the World Bank should raise the share of Part II votes by three percent which was charged to the bank's development committees and executive directors. The World Bank elected to follow the G20's suggestion and let it lead negotiations in which the Part II countries were requesting an increase of six

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[34] Kevin P. Gallagher et al., *Safety First: Expanding the Global Financial Safety Net in Response to COVID-19*, 7 (B.U. Glob. Dev. Pol'y Ctr. GEGI, Working Paper No. 0037, 2020), https://www.bu.edu/gdp/files/2020/04/GEGI-GDP_WorkingPaper_0037_r01.pdf.
[35] Communiqué, G20, G20 Finance Ministers and Central Bank Governors Meeting in Fukuoka, Japan (June 9, 2019), http://www.g20.utoronto.ca/2019/2019-g20-finance-fukuoka.html.
[36] Mervyn King, Governor, Bank Eng., Speech at the University of Exeter (Jan. 19, 2010).
[37] Robert H. Wade, *Emerging World Order? From Multipolarity to Multilateralism in the G20, the World Bank, and the IMF*, 39 POL. & SOC'Y 347, 360-361 (2001).

percent to their share of voting rights.[38] Part II are developing nations and highly underrepresented in the G20.

The World Bank has also undertaken the role of implementing the G20's emerging development agenda as the secretariat. An increasing number of appointments at the World Bank are from G20 States, and it is criticized as "the G20-ization of the World Bank."[39] The Bank often provides the G20 updates on its progress in undertaking the group's suggested multipronged approach with the IMF to address emerging debt.[40] Through the Financial Stability Board (FSB), a G20 creation, the Bank cemented its relationship with the G20 and is often assigned tasks working alongside the board.[41] In 2011, FSB introduced the Key Attributes of Effective Resolution Regimes for Financial Institutions as the international standard for resolution regimes. In 2020, the World Bank recommended implementation of the key values to their non-G20 members.[42] The World Bank primarily exists to serve developing nations and is entirely controlled by western countries; no developing country holds membership in the G20.[43]

C. Organization for Economic Cooperation and Development

The OECD has been a keen intermediary organization for the G20 as the second most engaged by the group.[44] The organization brings together thirty-eight rich countries mostly from Europe to stimulate economic progress and global trade.[45] OECD is a member of the G20 Framework for Strong, Sustainable and Balanced Growth (FSSBG) and has contributed to the development of its

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[38] *Id.* at 361-362.
[39] *Id.* at 368-370.
[40] G20 Finance Ministers and Central Bank, *supra* note 35.
[41] Sungjoon Cho & Claire R Kelly, *Promises and perils of new global governance: A case of the G20*, 12 CHI. J. INT'L L. 491, 527 (2012).
[42] JAN PHILIPP NOLTE & DAVID HOELSCHER, WBG, USING THE FSB KEY ATTRIBUTES TO DESIGN BANK RESOLUTION FRAMEWORKS FOR NON-FSB MEMBERS 1-37 (2020).
[43] Wade, *supra* note 37.
[44] Downie, *supra* note 16, at 963.
[45] *About OECD*, OECD, https://www.oecd.org/about/ (last visited Nov. 27, 2022).

objectives.[46] OECD engagements with other international organizations such as the IMF, ILO, WTO and UNDP are facilitated through G20 forums.[47] The G20 Mutual Assessment Process (MAP) was a collaboration of OECD and the IMF that aims to reform the global economy. The organization is charged with assessing the progress of the MAP goals. The organization has advanced international tax policies and addresses the issue of tax havens as recommended by the G20.[48] The involvement of the OECD in G20 initiatives is broad in every policy domain because of its capabilities such as a dedicated tax department.[49] The relationship has been mutually beneficial as it raises the legitimacy of the OECD.[50]

IV. CONCLUSIONS

International financial regulation has been historically influenced by western economies as their national regulatory and supervisory activities have affected other jurisdictions by extraterritorial application of law and indirect influence.[51] This regulation has now been institutionalized by the G20, an illegitimate international organization. The composition, decision making process, and governance structure are areas of criticism. The G20 extension of membership to the EU is an excessive representation of western countries that have already been granted membership. The exclusion of African countries and minimal regional representation from Asia and South America do not hold up to its mission. It is a blatant disregard for proper representation of the global economy.[52] The G20 already dominates the governance of international finance institutions, and regulating these

[46] *Framework-strong-sustainable-balanced-growth*, OECD, https://www.oecd.org/g20/topics/framework-strong-sustainable-balanced-growth/ (last visited Nov. 27, 2022).
[47] *About G20*, OECD, https://www.oecd.org/g20/about/ (last visited Nov. 27, 2022).
[48] Cho, *supra* note 41, at 521.
[49] Downie, *supra* note 16, at 964-65.
[50] *Id.* at 970.
[51] Weber, *supra* note 1, at 695.
[52] Weber, *supra* note 2, at 400.

organizations through reforms undermines accountability and stifles progressive policies.[53] The parallel existence of the G7 also raises questions about the power of emerging economies in the G20. The G20 appears to be a reiteration of G7 goals in the presence of emerging countries packaged as collaboration.

If this modern world of international law is entrenched in informal international law, it must be built upon the traditional policies of international law. The lack of democratic values in the establishment of the G20 contradicts the principles of international law which are based on the notion of required consensus among the governed.[54] International power that governs the world must be established in the collective decisions of global citizens and must represent cultural values. Financial regulation overcomes national barriers when they incorporate common values.[55] Global governance cannot be concentrated in a forum of a few selected nations and expected to work. The ad hoc structure of the G20 is legally weak, and the organization lacks the ability to govern. The group should emphasize the implementation of existing strategies proposed by the IMF and World Bank rather than seeking agreement towards reforms. Soft law through political influence and relationships is already the basis of interaction between western countries and developing nations. Western influence over these countries established from colonization need not be reinforced by the G20's role as a surveyor of the global financial market.

[53] Nancy Alexander & Rick Rowden, *G20 Prepares to Revamp Global Financial Governance*, 61 DEV. (SOC'Y FOR INT'L DEV.) 54, 60 (2018).
[54] Weber, *supra* note 2, at 391.
[55] Weber, *supra* note 1, at 694.

Essay 5

China's Global Ambition—Is China Neo-Colonialist?

I. INTRODUCTION

As a growing hegemon, China has attracted great attention for its ambitious foreign trade and investment policies. The Belt and Road Initiative ("BRI"), among other global investment projects, is the most expansive of those sponsored by the Chinese government. Although the Chinese government has insisted that the goal of BRI is to enhance global connectivity and facilitate regional integration, some scholars criticize BRI as de facto neo-colonialist for causing "debt traps" and enforcing China's hegemony.[1] In response to those critiques, other scholars argue that this criticism is founded on a misunderstanding of China's diplomatic policy and BRI's loan structure. BRI, instead of being neo-colonialist, is instead a new model for South-South cooperation. The proponents of BRI also argue that labeling BRI as neo-colonialist is another narrative for Western countries' "China threat" theory. It is worth the world's attention to interrogate whether BRI is indeed neo-colonialist. BRI is one of the biggest and most influential investment projects across the globe. Meanwhile, by contrast to countries with historically dominant economic and political power, China is in itself a developing country and shares the trauma of colonialism. China's unique national characteristics also perplex our understanding of its diplomatic and foreign investment policies.

[1] *See e.g.*, Amitai Etzioni, *Is China a New Colonial Power?*, THE DIPLOMAT (Nov. 9, 2020), https://thediplomat.com/2020/11/is-china-a-new-colonial-power/; Anthony Kleven, *Belt and Road: Colonialism with Chinese Characteristics*, THE INTERPRETER (May 6, 2019), https://www.lowyinstitute.org/the-interpreter/belt-road-colonialism-chinese-characteristics.

This Paper will begin by introducing the concept of neo-colonialism and the legal structure of several BRI projects. It will then proceed to present and investigate theories from both sides. It will take a comparative approach to highlight the history of the Sino-Africa relationship and the uniqueness of China's diplomatic and economic policies. Ultimately, this Paper will argue that labeling BRI and China's foreign investment policies as neo-colonialist overlooks the fundamental differences between China's and Western countries' perceptions of global cooperation.

II. DEFINITION OF NEO-COLONIALISM

With the global independence movement and the emergence of multilateral cooperation, it is less common for developed countries to swing their military power at the Global South to get control over their resources and labor. However, powerful States still exercise their control over developing countries through economic or political influences. This new form of hegemonic disposition characterized by economic, military, environmental, financial, and technological domination is defined as neocolonialism. In general, neocolonialism can have certain features: (1) a foreign power may station its troops in another State and directly control the government; (2) a foreign power may exercise neo-colonialist control over a developing country via economic or monetary means; (3) the controlled State may be restricted to solely serving as the market for the manufactured products of a neo-colonialist power; or (4) the neo-colonialist power could control governmental policy in a controlled State through financial contributions towards the cost of administering the neo-colonialist State.[2]

Some scholars observe that neo-colonialism often manifests with unregulated aid, trade, and Foreign Direct Investment ("FDI") including agreements that are win-win in nature.[3] These foreign investments and loans often have high interest rates and neo-colonialist conditions such as requiring diplomatic support or implementing unfair trade clauses. Consequently, the host

[2] Osman Antwi-Boateng, *New World Order Neo-Colonialism: A Contextual Comparison of Contemporary China and European Colonization in Africa*, 10 AFRICOLOGY: J. PAN AFR. STUD. 177, 179 (2017).
[3] Glen Segell, *Neo-Colonialism in Africa and the Cases of Turkey and Iran*, 11 INSIGHTS ON AFRICA 184, 184 (2019).

countries of investments will turn into dependent, instead of interdependent countries. In addition, those host countries will be trained to become sources of raw materials and cheap labor.[4]

III. BELT AND ROAD INITIATIVE

Starting in 2013, BRI serves both the geostrategic and geoeconomic goals of China. Through expansive programs crossing Asia, Europe, and Africa, China tries to assert its regional leadership in economic integration.[5] Meanwhile, regional cooperation created by BRI helps China to meet its pressing economic challenges: "encouraging regional development in China through better integration with neighboring economies; upgrading Chinese industry while exporting Chinese standards; and addressing the problem of excess capacity."[6] Major participants in the BRI include both State-owned enterprises ("SOE") and private companies from China.[7]

Notably, China has not defined BRI projects as FDIs; rather, it has called these projects "partnerships."[8] These partnerships often started by signing a "memorandum of understanding" (MOU). It is common for MOUs to contain such language as: "MOU does not constitute legally binding obligations for the two Participants. It is only an expression of their common will to jointly advance the Belt and Road Initiative."[9] However, from an international law perspective, it is unclear whether these MOUs should be treated as treaties that are subject to the Vienna Convention on the Law of Treaties and what the secondary obligations invoked by the MOUs are.[10] In addition, BRI lacks "a dispute resolution system that offers an acceptable level of legal certainty."[11] Although China proposed the establishment of the China International Commercial Court ("CICC") as the dispute resolution center for BRI projects, it is doubtful whether the proceedings that are completely under China's jurisdiction will be fair. The concern arises from

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[4] *Id.*
[5] Peter Cai, *Understanding China's Belt and Road Initiative*, Lowy Institute for International Policy (2017).
[6] *Id.*
[7] As an example, China Railway, a SOE, is heavily involved in many BRI projects in Africa.
[8] Malik R. Dahlan, *Envisioning Foundations for the Law of the Belt and Road Initiative: Rule of Law and Dispute Resolution Challenges*, 62 HARVARD. INT'L L. J. 1, 2 (2020).
[9] Mikkaela Salamatin, *China's Belt and Road Initiative is Reshaping Human Rights Norms*, 53 VANDERBILT L. REV. 1427, 1436 (2021).
[10] *Id.*
[11] *See* Dahlan, *supra* note 8, at 3.

the structure of the CICC: unlike other international tribunals, the CICC is essentially "an outgrowth of the Chinese court system." Since the current judges are Chinese nationals, proceedings must be conducted in Mandarin, and the parties must be represented by Chinese-qualified lawyers.[12]

However, despite skepticism of the procedural fairness of China's use of soft law, the flexibility provided by soft law is also a necessary element for BRI negotiations. Because BRI projects involve countries of different legal cultures and legal norms, it would be more convenient for China to reach agreements through soft law rather than multilateral or bilateral investment treaties. In addition, China tries to promote the neutrality and professionalism of the CICC by establishing the International Commercial Expert Committee ("ICEC"), which is composed of "31 legal practitioners or academics chosen by the SPC (Supreme People's Court of China) from 14 foreign countries[.] . . . The aim has been to choose leading figures in the areas of international trade and investment law with records of professionalism and neutrality."[13]

In short, BRI projects fall in the "gray area" of international trade and investment laws because they are not designated as treaties or FDI. Meanwhile, they have a unique dispute resolution mechanism that raises concerns about the possible disputes arising from BRI projects. The later sections of this Paper will discuss critiques based on loopholes in the BRI's structure.

IV. NEO-COLONIALISM CRITIQUES OF BRI

There are in general three grounds for labeling China's foreign investments as neo-colonialist. First, China exploits other developing countries' raw materials, especially minerals, in exchange for cheap prices. Meanwhile, China persists in sending cheap finished goods to undermine the importing countries' domestic manufacturers.[14] For example, China promised Guinea a loan that was double the size of the country's GDP and awarded infrastructure and

[12] *See* Salamantin, *supra* note 9, at 1445.
[13] *See* Dahlan, *supra* note 8, at 16.
[14] *See e.g,* Alyaa Wagdy el-Shafei & Mohamed Metawe, *China Drive Toward Africa Between Arguments of Neo-Colonialism and Mutual Beneficial Relationship: Egypt as a Case Study*, 7 REV. OF ECON. & POL. SCI. 137, 138 (2022).

smelter projects to Chinese aluminum firms. As a result, Guinea became the largest bauxite exporter for China, but its population did not receive many benefits from the deal as the workers at the mine went on strike and the local population protested over health and environmental issues.[15] China took a similar approach to extract copper from Zambia and oil from Angola.[16] Hence, China's practice of importing copper, nickel, and timber from Africa by using its dominant economic position resembles European colonists who imported timber, ivory, horticultural produce, agricultural produce, and minerals from Africa.[17]

The second evidence of China's neo-colonialism is the "debt traps" caused by the unsustainable debt structure of BRI. The criticism has two aspects: on one hand, African countries face severe financial risks incurred by the great magnitude of the loans offered by China; on the other hand, China often imposes conditions on its loans with the intention of exerting more control over other countries' natural resources and foreign policies. As for the financial risks incurred by China's debts, it is hard to fully assess whether China diligently analyzed the potential financial burdens to its BRI partners before lending them the money. The reason is that China did not disclose the relevant information regarding its loan-making process and requirements to the IMF or World Bank.[18] As mentioned in the above section, it is a prominent feature of BRI that it applies soft laws in making deals.

However, some examples illustrate concerns over the sustainability of the BRI debt structure. As one of the most important partners of China, Kenya owes 66% of the country's global bilateral debts to China because of the Nairobi to Mombasa Standard Railway Gauge ("SGR"), which is an infrastructure plan carried out by a BRI partnership.[19] While the operation of the SGR had incurred a $200 million loss in the past three years, the SGR agreement itself also

[15] *See* Etzioni, *supra* note 1.
[16] *See* Makhura B. Rapanyane, *Neocolonialism and New Imperialism: Unpacking the Real Story of China's Africa Engagement in Angola, Kenya, and Zambia*, 8 J. OF AFR. FOREIGN AFFS. 89, 104-05 (2021).
[17] *See* Antwi-Boateng, *supra* note 2, at 181.
[18] *See* Sebastian Horn et al., *China's Overseas Lending*, National Bureau of Economic Research (2019).
[19] *See* Rapanyane, *supra* note 16, at 104.

caused a $245 million debt owed to China.[20] The combination of economic distress caused by COVID and heavy debts caused by SGR compelled Kenya to seek funding from the G20 and IMF.[21] If Kenya eventually fails to repay its debts to China, Kenya may choose to settle the loan by handing over Mombasa Port to China.[22] Similarly, there is a growing concern that Zambia may collateralize National Strategic assets such as its broadcasting company, airport, and electricity supply corporation to China if it fails to repay its loans from China.[23] These worries are not baseless. In 2017, China required a 75% stake in the dam construction in Nepal through a Chinese SOE, after assessing the financial risks of Nepal.[24]

Another concerning aspect of China's approach to loans is that China often imposes formidable collateral conditions in its loan agreements, with the intention to serve its military expansion and diplomatic purposes. Because of the soft-law nature of BRI projects, China could condition its loans on non-economic grounds. Also because of the lack of transparency in BRI projects, it is unclear what concessions the receiving countries need to make to repay their debts to China. The most troublesome case is Sri Lanka, which conceded its Hambantota port to China on a 99-year lease as a part of its partnership with China.[25] Although Sri Lanka has increased its naval presence at the port, there is still a concern that China may dock its warships in Sri Lanka as it did in Pakistan Gwadar port.[26] In fact, China has entered into agreements with over 30 countries to assume ownership rights over their ports through Chinese SOEs.[27] It is thus a legitimate concern that China may take over these ports for military purposes under the disguise of SOE's commercial investments.

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[20] Council on Foreign Relations, *Belt and Road in Kenya: COVID-19 Sparks a Reckoning with Debt and Dissatisfaction* (Mar. 25, 2021), https://www.cfr.org/blog/belt-and-road-kenya-covid-19-sparks-reckoning-debt-and-dissatisfaction.
[21] *See id.*
[22] *See* Rapanyane, *supra* note 16, at 104.
[23] *See id.*
[24] *See id.* at 105.
[25] Natalie Klein, *A String of Fake Pearls? The Question of Chinese Port Access in the Indian Ocean*, THE DIPLOMAT (Oct. 25, 2018), https://thediplomat.com/2018/10/a-string-of-fake-pearls-the-question-of-chinese-port-access-in-the-indian-ocean/.
[26] *See* Rapanyane, *supra* note 16, at 105.
[27] *See* Klein, *supra* note 25.

Moreover, China often imposes political conditions either in their loan agreements or negotiations with other countries, asking its partners to uphold China's diplomatic policies in the United Nations.[28] China's BRI partners hence are often silent on China's human rights records and side with China on the "One China Policy" insisting that Taiwan is a part of Chinese territory. These non-economic conditions further suggest that China's BRI is in essence a way to affirm its hegemony.

The third criticism is that Chinese companies marginalize domestic workers by bringing a great influx of Chinese workers into new ventures. There are reports of local workers' protests for better working conditions and health rights under China-owned mining projects. In addition, countries like Zambia reported that the influx of Chinese workers had led to a spike in the local unemployment rate.[29] Furthermore, China's loans often contain provisions to "contract all or part of the project with Chinese firms and to use Chinese firms to source materials and labor."[30] Hence, BRI projects do not provide mutual benefits to receiving countries but rather provide both raw materials and new economic opportunities to Chinese companies.

V. IS BRI REALLY NEO-COLONIALIST?

Despite these three criticisms of the neo-colonialist nature of China's BRI, this section argues that these critiques ignore the history of Sino-Africa relationships and the uniqueness of China's diplomatic policy. Also, some of these criticisms are overstatements of the structural problems with BRI. Alternatively, some key features of China's investments suggest that the "Interdependence Theory" may better explain the nature of the BRI. The Interdependence Theory, in contrast to neocolonialism, focuses on reciprocity, "where the relationship among involved actors has the shape of asymmetry in dependence and [does] not necessarily represent an evenly balanced mutual dependence."[31] There are three conditions of interdependence: the

[28] *See* Rapanyane, *supra* note 16, at 106.
[29] *See id.*
[30] *See* Salamantin, *supra* note 9, at 1438-39.
[31] *See* el-Shafei & Metawe, *supra* note 14, at 140.

absence of force, the lack of hierarchy between the parties, and the presence of proliferation of channels of contact between societies.[32]

To see how the Interdependence Theory applies to China's BRI, it is important for the world to understand the history and uniqueness of China's diplomatic policies. Zhong suggests that "'the theory of Chinese neo-colonialism' totally disregards the history of colonialism and globalization, muddying the essential distinction between colonialism and China's participation in globalization."[33] China's cooperation with other developing countries dates back to the late 1950s. In the Bandung Conference of 1955, China and newly independent African and Asian countries established the Non-Aligned Movement ("NAM") to respond to the influences of the Cold War.[34] China's relationships with other African and Asian countries were key for Communist China to obtain its seat on the United Nations Security Council in place of Taiwan in 1971.[35]

This history of China's diplomacy with developing countries explains China's enthusiasm for seeking cooperation with the Global South. More importantly, this history suggests that China's intention behind BRI is not neo-colonialist. One feature of Western colonial powers is that Westerners often put themselves at the higher end of the hierarchy in their relations with developing countries. They justified their colonialism by viewing it as a method to "civilize" the "dark continents." However, China lacks such intent behind its investments and rather "has relative respect for African culture and does not seek to assimilate African people."[36]

Moreover, the hierarchical relationships between countries and the use of force are contradictory to China's long-standing "non-interference policy." China has upheld the "non-interference policy" as its cornerstone in South-South cooperation since the establishment of NAM. Although some may criticize this "non-interference policy" for its tacit approval of the

[32] *Id.*
[33] Chen Zhong, *Global Development Equity: Its Ethical Nature and Historical Construction – With a Discussion of the Essence and Problems of the "Theory of China's Neo-Colonialism,"* 32 SOC. SCIS. IN CHINA 35, 45 (2011).
[34] *See* Antwi-Boateng, *supra* note 2, at 178.
[35] *Id.*
[36] *Id.*

corruption in receiving countries, this "non-interference policy" suggests that China is not interested in obtaining political control over receiving countries through its investments.[37] Unlike Western colonists, China has always perceived itself as a developing country and shares the traumatic history of being colonized with other African and Asian countries. Consequently, China and its people have harbored a deep hatred of any form of colonialism. "This universal cultural mindset and national psychology also make it impossible for the country to have anything to do with colonialism."[38]

Proponents of the neocolonialist theory rebut and point out that China lacks respect for its partner countries. For example, they point to evidence suggesting that Chinese workers are replacing local workers in Chinese companies in Africa, and there is growing racism towards Africans in some of the TV shows in China.[39] However, these criticisms merely cherry-pick a few examples of private entities' lack of respect toward African countries. These examples cannot prove that China, as a country, is disrespecting its BRI partners. It is almost impossible to know whether the Chinese government truly respects its partners, but its documents at least show that China insists on equal and mutually beneficial trade and investment relationships. For example, in the remarks of the conference of the Forum on China-Africa Cooperation, the Ministry of Foreign Affairs of China mentioned "mutual support," "common development," "jointly promot[ing] peace," and "win-win results."[40] Although critics may question if these values are merely propaganda, these stated values have at least illustrated China's commitment to having equal relationships with its partners. Furthermore, even if private entities in China have not shown enough respect for the average African citizen, China has shown great respect to African leaders.[41]

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[37] *Id.*
[38] Zhong, *supra* note 33, at 46.
[39] *See* Rapanyane, *supra* note 16, at 102.
[40] Ministry of Foreign Affairs of People's Republic of China, *China and Africa: Strengthening Friendship, Solidarity and Cooperation for a New Era of Common Development* (Aug. 19, 2022), https://www.fmprc.gov.cn/eng/zxxx_662805/202208/t20220819_10745617.html.
[41] *See* Antwi-Boateng, *supra* note 2, at 184-85.

Besides the lack of historical awareness of China's diplomatic policies, neocolonialism criticisms also misunderstand the Global South's development. Even if they do not form partnerships with China, many of those BRI countries will continue to rely on exports of raw materials and cheap labor for their development. For example, in the case of Angola, its economy already heavily relies on oil exports. Such reliance has complex causes and cannot simply be attributed to China's expansive investment plans in Angola. In fact, it is in the interests of many BRI countries, such as Egypt, to have the investments and expertise from Chinese construction companies because their economic transition relies on that external push.[42] In addition, while Africa is the major exporter of minerals to China, China does not merely dump its cheap and inferior manufactured products on Africa; instead, it invests actively in the manufacturing sector as well. China's investment in Africa's manufacturing industry has already reached USD $3.43 billion.[43]

As for the critique of "debt traps," it is important to underscore that the debt problem is not caused unilaterally by the lender. In the example of Sri Lanka, its debt crisis was caused by the mismanagement of its own regime. Sri Lanka has built an unsustainable debt structure by aggressively seeking out foreign lenders. In fact, Chinese loans to Sri Lanka comprised only 9% of the country's debt by 2016. In addition, even Sri Lankan politicians have repeatedly denied that China would ever take Hambantota Port for its navy.[44] Also, only eight out of sixty-eight BRI-involved States are in debt distress, and none of the examples show that China takes over the ownership of national assets when those countries fail to repay their loans.[45]

The concern of displacement of local workers forgets the fact that these employment opportunities are created by Chinese investments in the first place. For BRI critics, the influx of Chinese workers is reminiscent of the Settler policy—that is, that the colonialist country sends

[42] *See id.* at 186.
[43] *See id.* at 187.
[44] Lee Jones & Shahar Hameiri, *Debunking the Myth of "Debt-trap Diplomacy,"* Chatham House (Aug. 19, 2020).
[45] *See* Antwi-Boateng, *supra* note 2, at 189.

their citizens to relocate and settle in colonies. However, the Chinese government does not encourage these workers to permanently settle in Africa or has control over those workers. Most of those workers decide to go to Africa in pursuit of economic fortune and have no intention of living there in the long term.[46] Additionally, although the number of Chinese workers in BRI countries is steadily increasing, it is unclear how much they will represent in the total worker population. For example, in Sri Lanka, the number of Chinese workers remains a very small percentage of the total labor force, despite the increasing influx of Chinese workers and Chinese investments.[47]

VI. CONCLUSION

China's BRI should better be explained by the interdependence theory rather than the neo-colonialism theory. In essence, China's history of being the victim of colonialism and its commitments to equal and fair investment relationships with other developing countries will effectively prevent itself from becoming a neo-colonialist State. It is inevitable that China is in a dominant position in its trade and investment relations because of its economic power and technological edge. However, this dominance cannot be interpreted as a lack of mutual respect in China's relations with other countries. China's interdependent relations with other developing countries are historical and strategic. On the one hand, China has historically relied on its alliance with other developing countries in retaining its seat and influence in the United Nations. On the other hand, China needs an export market to release its overflowing infrastructure development and an import market to get essential raw materials for its electronic car industry. In short, it would be too hasty to conclude that the sole intention behind China's outreach to Asian and African countries is to gain political and military control over those regions.

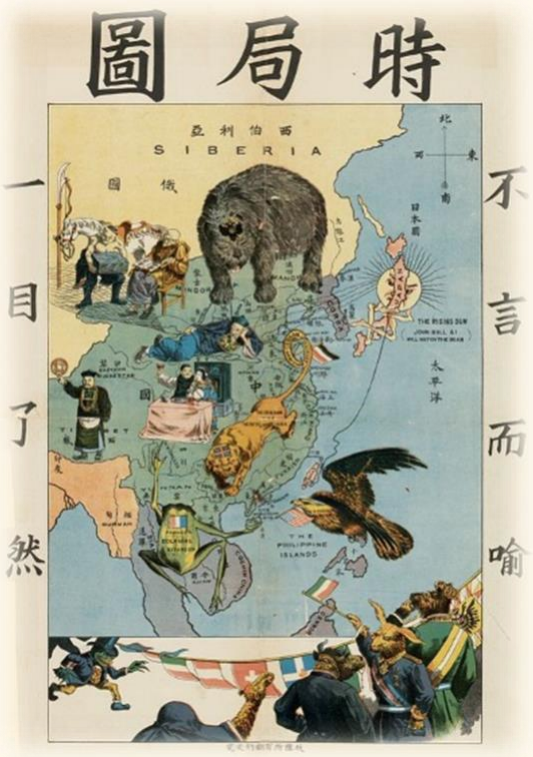
Although this Paper has debunked the neo-colonialist criticism of China's BRI by arguing that such criticism is based on a misunderstanding of the history of China's diplomatic policies

[46] *See* el-Shafei and Metawe, *supra* note 14, at 148.
[47] Ganeshan Wignaraja et al., *Chinese Investment and the BRI in Sri Lanka*, Chatham House (Mar. 24, 2020).

and cooperative strategies, the world should still be cautious about the use of soft laws in BRI. The use of soft laws exposes BRI countries to the risks of a lack of neutral tribunals for future disputes and a lack of clarity on provisions in partnership agreements with China. The lack of transparency in BRI's debt analysis also leaves observers puzzled about the financial risks involved in the BRI projects and the potential consequences of default. More importantly, the excessive use of soft law may reshape customary international law because widespread state practice is a necessary condition for the change of customary international law.

Chapter 2:

Colonial Residues on National & Regional Security



A cartoon showing imperial encroachment into China ca. 1900. Credit: Wikimedia Commons/National Archives

Essay 1

Semi-Autonomy & (In)security: Ambiguity in the Hong Kong SAR's Basic Law

I. INTRODUCTION

When the Queen of England died on September 8, 2022, the United Kingdom of Great Britain and Northern Ireland lost its last remaining vestige of the British Empire. Though the country had retained a monarch who had reigned, for multiple decades, over an empire "of such geographical reach that it was said the sun never set on it,"[1] it had relinquished its last actual colony back in July 1997, when it formally transferred Hong Kong's sovereignty to the People's Republic of China (PRC). In so doing, the PRC allowed Hong Kong (for a period of 50 years) to keep the economic and social freedoms it enjoyed under British rule, and that were responsible for making it such a successful hub of international trade and finance. This year, 2022, marks the halfway point to 2047, the slated date for Hong Kong's 50-year autonomy allowance to expire. In the latter half of the allowance, as each party contemplates the potential structure of their post-2047 bilateral relationship, it is very likely that aspects of the relationship will begin to shift. This Paper analyzes Hong Kong's development as a semi-autonomous region under the British empire, the legal regime it enjoys today as a legacy of British

[1] Alan Cowell, *Queen Elizabeth II Dies at 96; Was Britain's Longest-Reigning Monarch*, N.Y. TIMES (Sept. 8, 2022), https://www.nytimes.com/2022/09/08/world/europe/queen-elizabeth-dead.html [https://perma.cc/M83J-8BD9].

colonialism, and ambiguities in that regime that may threaten Hong Kong's autonomy and security, even prior to 2047.

II. HONG KONG AS A BRITISH COLONY AND ITS DEVELOPMENT OF INTERNATIONAL LEGAL PERSONALITY

During the first Opium War (1839–42), the British "founded what was to become Hong Kong on one of the 260 islands lying off the coast of China bordering the north end of the South China Sea."[2] On August 24, 1842, Emperor Daoguang ceded the island in perpetuity to the United Kingdom as part of the Peace Treaty of Nanking, formally ending the war.[3] The colony was later expanded to include the Kowloon Peninsula (ceded in perpetuity to the United Kingdom on October 24, 1860 as part of the Convention of Peking to end the Second Opium War) and the New Territories, a 200 mile stretch of additional land and islands (leased rent-free to the United Kingdom on June 9, 1898 as a result of pressure from the British empire).[4] Under British rule, these three then-distinct territories were collectively treated as "Hong Kong," and became what we know as Hong Kong today.

Though there is no universally accepted modern legal definition of statehood, Article I of the 1933 Montevideo Convention on Rights and Duties of States lists certain characteristics that an entity should demonstrate to evince possession of an international legal personality: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."[5] Under British rule, Hong Kong possessed a permanent population within defined borders and a local government that exercised jurisdiction over its population and territory. In addition, the United Kingdom afforded Hong Kong very wide latitude to engage in international action autonomously, thus bestowing tremendous international legal personality on the region.[6]

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[2] Eric C. Ip, *Comparative Subnational Foreign Relations Law in the Chinese Special Administrative Regions*, 65 INT'L & COMPAR. L. Q. 953, 955 (2016).
[3] *See id.*
[4] *See id.*
[5] *See* Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 1165 L.N.T.S. 19, 25.
[6] Roda Mushkat, *Hong Kong as an International Legal Person*, 6 EMORY INT'L REV. 105, 107 (1992).

For example, it was allowed to join and independently participate in international organizations like the International Monetary Fund, International Labor Organization, World Health Organization, among many others.[7] It negotiated and concluded agreements with foreign governments[8] and joined multilateral conventions, like the General Agreement on Tariffs and Trade, frequently sending its own representatives to discussions.[9] It imposed unilateral sanctions on South Africa and Iraq in 1986 and 1990 respectively, independent of the United Kingdom.[10] In addition, Hong Kong's governmental offices and official representatives were accepted abroad, and Hong Kong directly engaged with foreign consular officials within its borders.[11] All of these actions show Hong Kong had substantial capacity to engage in international relations and, thus, that it developed a significant international legal personality.

By adopting a laissez-faire approach to administration of the Hong Kong region, the United Kingdom slowly, but increasingly, permitted the city to acquire its international legal personality. After 1913, no bill enacted by the Hong Kong government was invalidated by the British government.[12] In 1932, the United Kingdom granted Hong Kong a right to special trade and tariff status.[13] In 1959, the city was granted independence from the United Kingdom in finance and taxation.[14] The United Kingdom repeatedly indicated to the Hong Kong government that it need not seek permission to attend its international meetings or otherwise communicate in an official capacity with foreign

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[7] *See id.*
[8] *See* Arrangements Regarding International Trade in Textiles, Feb. 25, 1974, *in* M.J. BOWMAN & DAVID J. HARRIS, MULTILATERAL TREATIES: INDEX AND CURRENT STATUS.
[9] *See* Mushkat, *supra* note 6, at 107.
[10] K. Richard, *A High Degree of Ambiguity: Hong Kong as an International Actor After 1997*, 10 PAC. REV. 84, 89 (1997).
[11] *See* Mushkat, *supra* note 6, at 109.
[12] *See* Ip, *supra* note 2, at 955.
[13] L.F. Goodstadt, UNEASY PARTNERS: THE CONFLICT BETWEEN PUBLIC INTEREST AND PRIVATE HONG KONG 64–69 (2005).
[14] Hsin-Chi Kuan, *Political Stability and Change in Hong Kong* 9 INT'L J. SOCIO. 121, 121 (1979).

officials.[15] By the 1980s, United Kingdom "diplomats occasionally found adversaries in Hong Kong officials in international fora, even though many of the latter were themselves of British origin."[16]

In addition, though Hong Kong's components were each ceded (and loaned) to the British by emperors of imperial China, the Republic of China's (ROC) nationalist government (the Kuomintang, which ruled mainland China from 1912 to 1949) and the People's Republic of China's communist government each treated British authorities in Hong Kong as legitimate, protestations notwithstanding.[17] For example, they recognized treaties between Hong Kong and the rest of the world and acknowledged the United Kingdom's right to provide consular services to Hong Kongers within the region.[18]

The Hong Kong government's economic acumen, the British empire's relaxed administrative decisions, and the rest of the world's acknowledgment of Hong Kong's developing international legal personality vested the city with all the trappings of a near-autonomous State when conversations began to transfer the region back to China.

III. HONG KONG'S TRANSFER BACK TO CHINA: THE "ONE COUNTRY, TWO SYSTEMS" MODEL

China, both as the ROC and the PRC, long considered the treaties that relinquished control of Hong Kong to be unequal, illegitimate products of foreign aggression that rendered the United Kingdom's presence tantamount to occupation.[19] The Kuomintang actually asked the United Kingdom to return Hong Kong on at least two occasions between 1942 and the end of World War II.[20] In 1971, when China took over now-Taiwan's place in the United Nations, it requested the U.N.

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[15] *See* Ip, *supra* note 2, at 956.
[16] Goodstadt, *supra* note 13, at 65.
[17] *See* Ip, *supra* note 2, at 956.
[18] *See id.*
[19] *See* Shi Jiuyong, *Autonomy of the Hong Kong Special Administrative Region*, 10 LEIDEN J. INT'L L. 491, 492 (1997).
[20] *See id.*

Special Committee on Decolonization to adopt a resolution recommending deletion of Hong Kong from its list of colonies; the resolution was approved by the U.N. General Assembly in 1972.[21]

The British, meanwhile, considered the treaties to have been validly concluded amid the international law framework that existed at the time, thus forming a legitimate basis for their presence in the region.[22] Nevertheless, they knew the lease over the New Territories would expire in 1997 and, with all three formerly-distinct regions now fully integrated economically and socially, considered them practically inseparable and in need of overall resolution.[23]

Though China had long desired for the United Kingdom to return control of Hong Kong, it was, in a sense, not in an actual rush to formalize the exchange. During the Cold War, Hong Kong served as a window between the East and West; "[w]hile Hong Kong was governed by the U.K., which maintained an embargo against the PRC from early in the Korean War on, Hong Kong continued to trade with China and became an important source of foreign currency and material goods for the latter."[24] Plus, by the 1980s, Hong Kong had become, economically and socially, a very different place from mainland China and its socialistic policies and authoritarian government. Hong Kongers spoke English and held foreign passports which streamlined international contact, while the city itself was home to scores of foreign nationals and businesses and maintained an externally oriented economy.[25] Beijing recognized that these allowances had helped transform Hong Kong into the international financial, business, and trade center that it was.[26] To balance their desire to reunify China by peaceful means and preserve the economic and historical realities that would allow Hong Kong to maintain its

[21] G.A. Res. 2908 (Nov. 2, 1972).
[22] *See* Jiuyong, *supra* note 19, at 492.
[23] *See id.* at 492–93.
[24] Xiaobing Xu & George D. Wilson, *The Hong Kong Special Administrative Region as a Model of Regional External Autonomy*, 32 CASE W. RES. J. INT'L L. 1, 15 (2000).
[25] *Id.* at 11.
[26] *Id.*

prosperity and stability, Deng Xiaoping, then-leader of China, proposed the "One Country, Two Systems" (OCTS) governmental model.[27]

Article 31 of the Constitution of the PRC says "[t]he state may establish special administrative regions when necessary. The systems instituted in special administrative regions shall, in light of specific circumstances, be presented by laws enacted by the National People's Congress."[28] To implement the OCTS model, China resolved to create its first Article 31 special administrative region: the Hong Kong Special Administrative Region (HKSAR).

On December 19, 1984, the United Kingdom and the PRC signed the Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (Joint Declaration)—an internationally binding framework document to ultimately transfer Hong Kong on July 1, 1997.[29] The Joint Declaration reflected the intention of the signatories to give the HKSAR not only very autonomous domestic freedoms, but also to preserve much of the international legal personality it had developed under British rule. For example, it would vest the HKSAR with "executive, legislative, and independent judicial power, including that of final adjudication"[30] as well as the power to "establish mutually beneficial economic relations with the UK and other countries. . . ."[31] The Joint Declaration created a Joint Liaison Group tasked with facilitating discussions to ensure a smooth transfer of government; a Basic Law Drafting Committee (BLDC) was also formed to draft the future HKSAR's mini-constitution.[32]

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[27] *Id.* at 1–2.

[28] ZHONGHUA RENMIN GONGHEGUO XIANFA (中华人民共和国宪法) [CONSTITUTION] Dec. 4, 1982, art. 31 (China).

[29] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, Cmnd. 9543, *reprinted in* 23 I.L.M. 1366 [hereinafter Sino-British Joint Declaration].

[30] *Id.* § 3(2).

[31] *Id.* § 3(9).

[32] *Id.* § 5; *see* Tom Kellogg, *Legislating Rights: Basic Law Article 23, Human Rights, and Hong Kong*, 17 COLUM. J. ASIAN L. 307, 310 (2007).

Six years later, on April 4, 1990, the PRC's National People's Congress (NPC) enacted the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Basic Law).[33] It was promulgated by the president on the same day and slated to take effect immediately upon transfer on July 1, 1997.[34]

While the Joint Declaration and the Basic Law each and jointly preserved an unprecedented number of freedoms for a sub-State actor,[35] and guaranteed those freedoms for at least 50 years,[36] the Basic Law contains a number of ambiguities that could allow, and have allowed, Beijing to impose upon Hong Kong's autonomy and security, including even before 2047.

IV. THREE MAJOR SECURITY-RELATED AMBIGUITIES IN THE BASIC LAW

The three major security-related ambiguities in the BL, presented in order of least to most problematic, are: the difference between "external affairs" and "foreign affairs," the difference between "public safety" and "defence," and the lack of both an implementation timeline and clear purpose for including Article 23, commonly known as the "National Security Law" article.

A. "External Affairs" vs. "Foreign Affairs"

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[33] XIANGGANG JIBEN FA (香港基本法) [BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA] (promulgated by Office of Hong Kong and Macao Affairs of the State Council of the People's Republic of China, Apr. 4, 1990, effective July 1, 1997) (H.K.), *reprinted in* 29 I.L.M 1511–51 (1990) [hereinafter Basic Law].

[34] *Id.*

[35] Xu & Wilson, *supra* note 24, at 3 ("The HKSAR arguably enjoys *in real terms* more far-reaching external autonomy than any other autonomous region in the world.").

[36] Sino-British Joint Declaration, *supra* note 29, § 3(12); Basic Law, § 5; *see also* a statement by Deng Xiaoping at the "International Conference on China and the World in the Nineties" suggesting the freedoms would last for at least 100 years:

> We have solemnly promised that our policy towards Hong Kong will remain unchanged for fifty years after 1997. Why 50 years? There is a reason for that. We need not only to reassure the people of Hong Kong but also to take into consideration the close relation between the prosperity and stability of Hong Kong and the strategy for the development of China. The time needed for development includes the last 12 years of this century and the first 50 years of the next. So, how can we change our policy during those 50 years? Now there is only one Hong Kong, but we plan to build several more Hong Kongs in the interior. In other words, to achieve the strategic objective of development, we need to open wider to the outside world. Such being the case, how can we change our policy towards Hong Kong? As a matter of fact, 50 years is only a vivid way of putting it. Even after 50 years our policy will not change either. *That is, for the first 50 years it cannot be changed, and for the second there will be no need to change it. So this is not just idle talk.*

Xu & Wilson, *supra* note 24, at 31 n.125 (emphasis added).

Article 13 of the BL "authorizes the [HKSAR] to conduct relevant external affairs on its own in accordance with this Law," while simultaneously reserving for Beijing responsibility "for the foreign affairs relating to the [HKSAR]."[37] The PRC's Constitution makes no distinction between "external" and "foreign" affairs,[38] and the BL does not define either term.[39] So, what exactly falls within the scope of Hong Kong's permissibly-pursued external affairs, and what qualifies as forbidden foreign affairs? At first, the answer seems apparent.

Chapter VII of the BL is titled "External Affairs" and includes seven articles of expressly permitted externally facing actions. The HKSAR can participate in diplomatic negotiations Beijing undertakes that directly affects its region.[40] It can conclude and implement agreements on its own with foreign States and international organizations in appropriate fields, including the "economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields."[41] It can participate in organizations and conferences that are both limited to States and not limited to States, regardless of whether China is a member, and express their views independent of China using the name "Hong Kong, China."[42] It can issue its own travel documents and passports and control its own immigration,[43] conclude visa abolition agreements with foreign States,[44] establish official economic and trade missions in foreign States,[45] and maintain consular relations with States that have no diplomatic ties to Beijing.[46]

Do those comprise all "external affairs" allowances? The existence of an appropriately labeled chapter on the subject suggests its seven articles do indeed comprise all allowances, enabling one to

[37] Basic Law, art. 13.
[38] *See generally* China's Constitution.
[39] *See generally* Basic Law.
[40] *See id.* art. 150.
[41] *See id.* art. 151.
[42] *See id.* art. 152.
[43] *See id.* art. 154.
[44] *See id.* art. 155.
[45] *See id.* art. 156
[46] *See id.* art. 157.

conclude any unlisted tangentially international actions are subsumed instead by the "foreign affairs" powers reserved for China. Without definitions, however, there can still be problems. Take one security-related hypothetical: if China sanctions another country that has major holdings in Hong Kong, is Hong Kong obligated to enforce the sanctions? Can the HKSAR conclude an Article 151 "economic" agreement with the sanctioned State waiving sanctions within its territory, or would China see sanctions as more a province of national security than standard economic relations? Take a second security-related hypothetical: if China refuses asylum to a group of people, can the HKSAR grant asylum to that same group of people? Admission of asylum seekers and refugees can be politically charged; does the HKSAR's Article 154 allowance to control its own immigration allow it to pursue distinct asylum policies from the mainland?

B. "Public Order" vs. "Defence"

Article 14 of the BL says:

> The Central People's Government shall be responsible for the defence of the [HKSAR]. The Government of the [HKSAR] shall be responsible for the maintenance of public order in the Region. Military forces stationed by the Central People's Government in the [HKSAR] for defence shall not interfere in the local affairs of the Region.[47]

As in the previous dilemma, neither "public order" nor "defence" is defined in the BL.[48] An initial reading of the article, particularly in light of the last sentence that contrasts "defence" with "local affairs," suggests that "public order" is internal to Hong Kong while "defence" concerns external actors that may threaten the nation's political autonomy or territorial integrity. But what about when matters of public order and defense blend—when local affairs threaten the mainland's political autonomy or territorial integrity, or are perceived by Beijing to do so?

[47] *Id.* art. 14.
[48] *See generally id.*

Where Western countries largely think about national security in terms of external threats, President Xi and the Chinese Communist Party (CCP) tend to think more heavily about ideas or ideologies, including from its own populace, that may threaten the survival of the regime.[49] If a matter of seeming public order, like a major local protest for democratic principles, makes the CCP feel existentially threatened, it may feel empowered to intercede, despite clear assurance in the third sentence of the article that the military shall not do so.

C. Article 23

Article 23 of the BL says:

> The [HKSAR] shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies.

Since its inception, Article 23 has been controversial. The Basic Law Drafting Committee released its first draft of the BL two years after its formation, originally with language (in lieu of Article 23 presented above) that the Chinese government would "prohibit by law any act designed to undermine national unity or subvert the Central People's Government" in the HKSAR.[50] Following public commentary, the language was watered down, and the word "subvert" was removed in a second draft released in February of 1989.[51] However, shortly after, Beijing brutally cracked down on student-led protests in its Tiananmen Square, resulting in anywhere from 241 (China's claim)[52] to 10,000 (Western

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[49] *See generally* Tang Aijun, *Ideological Security in the Framework of the Overall National Security Outlook*, SOCIALISM STUD. (Dec. 12, 2019), http://socialismstudies.ccnu.edu.cn/bencandy.php?fid=71&id=1985, *translated in* Jude Blanchette, *Ideological Security as National Security*, CTR. FOR STRATEGIC & INT'L STUD. (2020), https://www.csis.org/analysis/ideological-security-national-security [https://perma.cc/S25T-XG4E] (assessing the importance of "ideological security" in President Xi's 2014 Overall National Security Outlook).

[50] Kellogg, *supra* note 33, at 310.

[51] *Id.*

[52] *See* Bang Xiao, *Tiananmen Square Massacre Still Remembered by Chinese Soldier and Witnesses 30 Years On*, ABC NEWS (Jun. 1, 2019), https://www.abc.net.au/news/2019-06-02/tiananmen-square-massacre-30-year-anniversary/11163332 [https://perma.cc/L5VM-97NP].

estimates)[53] deaths, and leaving the Central People's Government highly sensitive to the possibility of future internal unrest.[54] Soon after, Beijing reinserted "subversion" and otherwise expanded the scope of the article's language (over some BLDC members' objections) just before enacting the full BL in 1990.[55]

Importantly, Hong Kong (before becoming the HKSAR) already had laws on the books covering all of the national security areas mentioned in Article 23.[56] Therefore, Article 23's enactment suggested that the BL required the HKSAR to pass *new* legislation covering those areas, though the term *new* is not used. A fair interpretation of Article 23 might conclude that, given Hong Kong's pre-transition laws covered these areas, they needed only be maintained to comply with the requirement. The PRC, however, does not take that view; it instead argues the article indeed requires the HKSAR to pass a new national security law to even more strongly deal with those areas.[57] However, the article fails to specify either a timeline to do so or repercussions for failing or declining to do so.

Because the BL is subject to Beijing's interpretation,[58] each of the above-noted interpretive quandaries, whether purposely left in the BL's text or not, invites Beijing to encroach on the HKSAR's remaining pre-2047 autonomy and, thus, its security. In some ways, Beijing has already done so.

V. UNDEFINED AUTONOMY INVITES ABUSES

Article 17 provides that "[i]f the Standing Committee of the National People's Congress, after consulting the Committee for the Basic Law of the [HKSAR] under it, considers that any law enacted by the legislature of the Region is not in conformity with the provisions of this Law," it "shall immediately be invalidated," vesting supreme and final interpretive authority of any legislation passed

[53] *See* Editorial, *Tiananmen Square protest death toll 'was 10,000'*, BBC NEWS (Dec. 23, 2017), https://www.bbc.com/news/world-asia-china-42465516 [https://perma.cc/B4RN-N5XV].
[54] Kellogg, *supra* note 33, at 310.
[55] *Id.* at 310–11.
[56] *Id.* at 312.
[57] *See* Editorial, *A New National-Security Bill to Intimidate Hong Kong*, ECONOMIST (Jul. 2, 2020), (https://www.economist.com/china/2020/07/02/a-new-national-security-bill-to-intimidate-hong-kong).
[58] *See infra*, Part 4.

in the HKSAR in Beijing.[59] If Beijing wishes to change the BL itself, it can, unilaterally.[60] China also can, through Article 18, unilaterally apply its own law to the HKSAR for matter relating to "defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law[;]" where previously demonstrated that the HKSAR's bounded autonomy is unclear, China has wide latitude to impose its law on the region whenever it sees fit to do so.[61] Finally, in the event that the NPC's Standing Committee decides the HKSAR is in a state of emergency because of "*turmoil* within the [HKSAR] which endangers *national unity* or *security* and is *beyond the control of the government of the Region*," the mainland may intervene and impose its own law on the region.[62] Unsurprisingly, none of "turmoil, "national unity" or "security" is defined in the BL, and Beijing has unilateral authority to subjectively determine when the turmoil may cross the Rubicon into becoming unmanageable.

The abovementioned interpretive ambiguities and legal roadmap mainland China may access to impose its will upon the HKSAR have already begun to be explored.

In 2019, in response to a proposed bill that would have streamlined extradition of fugitives in Hong Kong to Macao, Taiwan, and mainland China, hundreds of thousands of Hong Kongers marched in protest,[63] largely out of fear of becoming caught up in the mainland's opaque criminal justice system.[64] Despite Article 14's explicit promise in its third sentence that local garrisoned troops would not interfere with local affairs, which the previous section identified likely refers to matters of "public order," the mainland interfered for the first time in response to the 2019 protests in a small

[59] Basic Law, arts. 17, 158.
[60] *See id.* art. 159.
[61] *See id.* art. 18.
[62] *Id.* (emphasis added).
[63] Editorial, *Hong Kong's Protests Explained*, AMNESTY INT'L, https://www.amnesty.org/en/latest/news/2019/09/hong-kong-protests-explained/ [https://perma.cc/2BZ4-U4R2].
[64] *See generally* Marcelo Duhalde, *The Rule of Law: Hong Kong vs. China*, S. CHINA MORNING POST (Aug. 20, 2019), https://multimedia.scmp.com/infographics/news/world/article/3023351/rule-of-law/?src=social [https://perma.cc/U46H-KZ2L].

but significant way. People's Liberation Army (PLA) soldiers, dressed in jogging attire, left their base to remove roadblocks that had been set up by protesters.[65] In 2018, the city's security secretary John Lee had given the PLA blanket permission to conduct "charitable activities" without communicating with the HKSAR government.[66] After the fact, a Hong Kong government spokesperson retroactively declared the PLA's intervention had been "charitable," and thus permitted.[67] Meanwhile, a PLA soldier said in a video the day of the clean-up: "We initiated this. Stopping violence and ending chaos is our responsibility,"[68] grossly mischaracterizing the PLA's purportedly limited purpose for its presence in the region and ringing of a far more authoritative, autonomous response to unwelcomed social unrest than a mere charitable offering.

During that same wave of unrest, the Hong Kong police were accompanied by the mainland's People's Armed Police (PAP) to the front lines of the protests, according to veteran Hong Kong democratic legislator James To.[69] The PAP is a Chinese paramilitary organization of 1.5 million strong that is primarily responsible for internal security, riot control, and law enforcement.[70] Chinese and Hong Kong authorities have never before confirmed the presence of the PAP in the HKSAR, and when pressed by Reuters, both the Chinese Defence Ministry and a Hong Kong police spokesman denied the PAP had been present.[71] Does the PAP's very presence in Hong Kong breach the BL's promise that the HKSAR was to handle its own public order? Where the PAP has been used to

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[65] John Lyons, Steven Russolillo, & Jeong Eun-Young, *Mainland Chinese Soldiers Take to Hong Kong Streets for First Time During Protests; People's Liberation Army Troops Make Rare Appearance Outside Barracks to Clear Demonstrators' Roadblocks, Raising Questions about the Army's Future Role in the City*, WALL ST. J. (Nov. 16, 2019), https://www.wsj.com/articles/mainland-chinese-soldiers-take-to-hong-kong-streets-for-first-time-since-protests-began-11573907250.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *See* Greg Torode, *Exclusive: China's Internal Security Force on Frontlines of Hong Kong Protests*, REUTERS (Aug. 29, 2019), https://www.reuters.com/article/uk-hongkong-protests-military-exclusive/exclusive-chinas-internal-security-force-on-frontlines-of-hong-kong-protests-idUKKBN2150JP.

[70] Ivan Y. Sun & Yuning Wu, *The Role of the People's Armed Police in Chinese Policing*, 4 ASIAN J. OF CRIMINOLOGY 107, 107–28 (Dec. 2009).

[71] *See* Torode, *supra* note 69.

suppress insurrection and riots in other parts of China, like Xinjiang and Tibet (which admittedly do not have the same autonomy guarantees), Hong Kongers may be rightly concerned the OCTS principle is eroding. Lawrence Li, a spokesman for the Hong Kong government's security bureau, confirmed that outside law enforcement agencies (including the PAP) had no place or authority to enforce laws within the HKSAR.[72] He failed, however, to allay concerns that, invited or not (it is unknown whether the PAP were invited or were forcefully embedded with the PLA by the PRC), the PAP's encroachment signals a declining mainland adherence to the BL's guarantee that the HKSAR would handle its own public order.

As stated previously, the Article 23 requirement suffers from both ambiguity and a lack of both a timeline and enforcement language. In September 2002, the HKSAR government released a consultation document that would create new criminal offenses of subversion and secession, extend "the definition of 'state secrets' to include all communications between the SAR government and the central government in Beijing," and widen Beijing's law enforcement role in the city.[73] Though it was introduced by the local government, it came after five years of post-transition calm in the city, with no major criminal issues, leading experts (among other reasons) to believe Beijing had a heavy hand in pressuring the local government to push for new legislation.[74] The announcement was met with more than 500,000 protesters marching in the streets of Hong Kong, and after some time, the nascent bill was pulled.[75]

Seventeen years later, amid the major 2019 Hong Kong protests, Hong Kong had still not passed a new Article 23-enabling national security law. Evidently concerned about the unrest on display, in May of 2020 Beijing announced that, due to the HKSAR's failure to enact a new national

[72] *Id.*
[73] Kellogg, *supra* note 13, at 309, 311.
[74] *Id.* at 313–14.
[75] *Id.* at 308, 314.

security law in the previous 23 years, and in light of circumstances, it would take matters into its own hands.[76] Legislators in Beijing proceeded to draft a new national security law in secret and pass it through its own parliament before the Hong Kong government was even shown its contents.[77] It was imposed, and took effect, on the eve of the 23rd anniversary of the transition back to China. The law broadens and more robustly criminalizes acts that could be construed as secession, subversion, terrorism, or collusion with foreign or external forces, and also embeds more mainland Chinese influence in law enforcement, including in the region's judicial process,[78] without regard to any purported nexus with foreign affairs or defense. To oversee its implementation, the mainland opened an "Office for Safeguarding National Security of the CPG in the HKSAR," the first "open operation in Hong Kong involving the mainland's civilian security forces."[79] It is not subject to Hong Kong jurisdiction, can initiate law enforcement actions without regard to the Hong Kong police or legal establishment, and is staffed entirely by mainland officials.[80]

Whether the PAP continues to expand and operationalize in the region, the PLA ventures out from its garrison more regularly, or new security laws are imposed from Beijing, it is clear that Hong Kong's extensive autonomy, purportedly guaranteed for another 25 years, is already being infringed upon. Legal ambiguities may not be the only cause of the blurring lines between autonomy, security, and sovereignty, but they certainly contribute an element of increasing deterioration by enabling Beijing to insert itself while claiming to stay compliant with its agreements.

VI. CONCLUSION

[76] Editorial, *supra* note 57.
[77] *Id.*
[78] Editorial, *Hong Kong National Security Law: What Is It and Is It Worrying?*, BBC NEWS (June 28, 2020), https://www.bbc.com/news/world-asia-china-52765838 [https://perma.cc/G9N8-MRC4].
[79] Editorial, *supra* note 57.
[80] Morrison & Foerster, *Hong Kong National Security Law Promulgated, Came into Effect June 30, 2020* (July 01, 2020), https://www.mofo.com/resources/insights/200701-hong-kong-national-security-law [https://perma.cc/S83Z-SHP7].

Under British administration, Hong Kong thrived as a global economic, trade, and finance juggernaut. Hong Kong's own drive, the United Kingdom's laissez-faire policies, and the rest of the world's cooperation thrust the region into development of a substantial international legal personality. This was largely preserved in the 1984 Joint Declaration and the 1997 Basic Law in order to balance Chinese interests in reestablishing territorial integrity with the very different and real conditions on the ground in Hong Kong. However, Hong Kong's autonomy in the new HKSAR was left sufficiently ambiguous in multiple respects to enable Beijing to reinterpret, amend, and expand the BL along the way if it deemed necessary to do so. The world has already seen instances of China doing just this. This year marks the halfway point to the end of the 50-year promise of insulation from mainland China's way of life; if the HKSAR is to make it to 2047, Hong Kongers must be vigilant to ensure their representatives, and their laws, reflect their promised way of life, to whatever degree they can.

Essay 2

Security After Empire: Law Formation in the Postcolonial Space

I. INTRODUCTION[1]

The exit of a colonial power leaves behind fragmented States with domestic and foreign vulnerabilities. The security apparatus of a powerful empire is not only used to subdue the population: an element of domestic peace is also provided by the empire's peacekeeping apparatus, frequently military police. When subjugated peoples throw off the bonds of empire, they also lose the peacekeeping apparatus of the colonizing State. This unstable situation of "zero governance" must be remedied quickly by the institution of laws and appropriate enforcement. This essay surveys the creation of a new legal order, sources of law, and the interaction of law and force during the interval following empire. How do former colonies fill the power vacuum? Do armed forces raised to force colonial exit have a role to play in postcolonial peace?

This Paper evaluates the formation of law and foundational statehood in two post-colonial nations: the United States and India. It also evaluates the durability of the post-imperial legal order. Both North America and India were subjugated by the British Empire from the seventeenth century onward. The British Empire instituted extractive industry, steep taxes, and martial law in its colonies.

[1] The purpose of this project is to examine residues of colonialism in a variety of legal contexts and from an international perspective. As part of the Security Law working group, I chose for this Paper an evaluation of the formation of law in transitioning and postcolonial nations. My subjects are British India and the United States. The Paper is a comparative study of the establishment of initial legal/security apparatus by decolonizing nations.

The United States and India each eventually escaped British rule under different circumstances. In both countries a combination of mounting social pressure, anti-imperial violence, and great power fatigue contributed to imperial exit. This Paper begins by discussing the background of American and Indian exit from the British legal regime, including the topic of securitization. It then turns to an evaluation of the formation of a new State, new legal apparatus, and new domestic security measures in the United States and the Republic of India. This analysis lies at the intersection of the politics of colonialism and emancipation, the international law of war, and foundational statehood. This Paper thus concerns itself with the foundational legal and pre-legal ethics of statehood, government, and citizenship.

II. THE SPACE BETWEEN LAW AND HEAVEN: STATE FORMATION AND LEGAL AUTHORITY

What is meant by a "pre-legal" ethic? Legal regimes incite criticism when they are understood to be inherently unjust. Discourse in the realm of State formation and State dissolution must rely on appeals to a higher ethic than basic conformance with the law(s) that may be in the process of being created or of being discarded. Rather, laws must be just because the basic law of the State must comply with a law known to all humanity. The Declaration of Independence begins with an appeal, over tyranny, to a higher power:

> When . . . it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the Earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them . . . [2]

For nearly a millennium, the peoples of the earth have recognized the law that lies above State law. Today we often speak of "normative" considerations. The name for the well-established normative concerns that humankind throughout the ages has reasoned out has been known since the

[2] THE DECLARATION OF INDEPENDENCE, para. 1 (U.S. 1776).

thirteenth century as the "natural law."[3] Nations appeal to the natural law when they seek the fundamental rights of sovereignty and self-representation. Peoples appeal to the natural law when they are wronged and exploited. For the purposes of this Paper, the "pre-legal" space is understood to be the rational moral understanding of ethical conduct (and governance) that constitutes the "natural law," and has been an explicit guide for the formation of States on the world stage since 1776.

III. SECURITIZATION AND GALVANIZING RESISTANCE IN COLONIAL NATIONS

The modern field of security studies frequently addresses the topic of securitization, or securitization narratives. Securitization as practiced by resistance leaders is a step along the road to rebellion against the colonial power. As understood in this discourse space, securitization is distinct from the notion of establishing a security apparatus. Securitization is a rhetorical endeavor designed to create a demand for action. Securitization is defined as:

> [t]he framing of a political problem in terms of extraordinary measures, survival and urgency that renders the politics of security unique and constitutes it as something beyond normal politics. In this form, securitization is a specific modern speech act, an utterance by which we construct an issue as a matter of security.[4]

Securitization is often considered in the context of established, powerful States.[5] But securitization may also be a fundamental process of States-in-formation, especially at times of colonial

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[3] MICHAEL P. SCHUTT, REDEEMING LAW 28 (Westmont: Intervarsity Press 2007). The natural law is understood to be the best that finite human reason can discern regarding the truest form of law: the eternal law. The colonists who seceded to form the United States not only discussed this natural law ("the Laws of Nature and of Nature's God") in their founding documents, they also drew on direct precedent from half a millennium earlier. "In 1215 when Archbishop Stephen Langton and a group of English nobles coerced the signature of King John onto the dotted line of the Magna Carta, they were simply acting on a principle that had been known to the Western world since Moses descended from Mount Sinai with the Ten Commandments: even human rulers are under the law." *Id.* at 23.

[4] Ulrik Pram Gad & Karen Lund Petersen, *Concepts of Politics in Securitization Studies*, 2 SECURITY DIALOGUE 315, 316 (internal citations omitted). *See also* Akinbode Fasakin, *Subaltern Securitization: The Use of Protest and Violence in Postcolonial Nigeria*, 2 STOCKHOLM STUD. IN INT'L RELATIONS (2022) ("ST [securitization theory] is not primarily concerned with the meaning of security but rather its nature and essence. ST focuses on how the security concept is instrumentally – and perhaps manipulatively – deployed in politics and practices . . . ").

[5] *E.g.*, Joanne Smith Finley, *Securitization, Insecurity and Conflict in Contemporary Xinjiang: Has PRC Counter-terrorism Evolved into State Terror?* 38 CENTRAL ASIAN SURVEY 1, 1 (2019) ("The workshop conceived of state securitization in a broad sense, including not just obvious manifestations like increased deployment of military and public security personnel but also demographic securitization (accelerated Han in-migration, ethnic displacement), linguistic securitization (imposition of Chinese-medium education) and religious securitization (repression of Islamic practices)."). Such discussion of the

transition. The leaders of revolutionary movements use securitization to foment discontent and concern and marshal the will to transition to outright resistance.

Securitization practices were adopted by both colonial American and British Indian resistance leaders. The definition of securitization presented refers to the "framing" of a political problem in "extraordinary" terms that exceed "normal" politics, but this does not necessitate the conclusion that the framing is false. If it is true that there can be extraordinary political problems that relate to survival, then some securitization can be understood as sincere and necessary. Thus, there is no opprobrium in the observation that both American and Indian leaders used securitization narratives to galvanize resistance against the colonial overlords at opportune and/or necessary times.

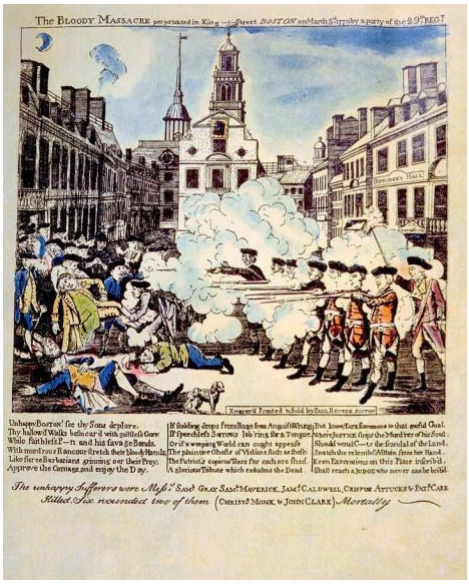
A. Early American Securitization

Discussions of "securitization" have been recognized in early development during the 1990s, with the term achieving its current prominence only in the 2000s.[6] But at the very beginning of U.S. history, the leaders of the American revolutionary movement knowingly employed securitization strategies. American securitization can be seen in the response to the "Boston Massacre" by resistance leaders among the American colonists. The memory of this well-known event, and even its name, are a result of conscious decisions by shrewd political operators, who used newsprint and art to steer narratives toward an understanding of British colonialism as tyrannical and arbitrarily violent. This was so even as British officials largely tried to prevent violence in order to fulfill their provincial mandate, and attacks on British soldiers by mobs were the rule, with soldiers firing back as at Boston—

various measures instituted by the central planning bureaucracy of powerful, established states is much more typical of discussions of securitization.

[6] Pram Gad & Lund Petersen, *supra* note 4, at 316 ("During the 1990s, when debated in international relations, 'securitization' was considered as just one among three terms designating what has become known as the Copenhagen school, the other two being 'regional security complexes' and 'sectors'. [sic] Yet . . . it was not until the beginning of the 2000s that the concept of securitization became widely used to describe the articles published in international relations journals.").

the exception.[7] Paul Revere, a silversmith, created an engraving of the scene from a drawing with the title "Fruits of Arbitrary Power, or The Bloody Massacre Perpetrated in King Street."[8] Revere's print "helped to create an image of British tyranny and American innocence that still shapes our memory of the event."[9]



THE BLOODY MASSACRE perpetrated in King Street *BOSTON* on March 5th 1770 by a party of the 29th REGT
Engrav'd Printed & Sold by PAUL REVERE *BOSTON*

Revere also created works in silver to commemorate rebellion heroes and released prints for publication on other prominent events.[10]

Boston luminaries such as John Hancock, Samuel Adams, and Paul Revere intentionally influenced public perceptions through local political actions shaped around curating an image of responsible, reasonable, and peaceful citizens who would use violence only as a last resort. Despite their revolutionary inclinations, they carefully preserved this veneer of themselves as peaceable

[7] "The coming of the Regulars increased the violence in Boston. The soldiers were sometimes the aggressors, but more often they were the victims of assaults by angry townsmen." DAVID HACKETT FISCHER, PAUL REVERE'S RIDE 23 (New York: Oxford University Press 1994).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 20-25.

townspeople even as they actively worked, in secret societies and the public square, to undermine the British government and incite rebellion.[11]

B. Securitization in India: Escaping Empire

Indian resistance to British rule dates from at least the nineteenth century. However, India did not escape from the British empire until after World War II. Powerful revolutionary movements acted, amidst the destabilizing influence of both world wars, to move India closer to freedom from colonial rule. These efforts were ultimately successful toward the latter end of World War II, with the end of British suzerainty in 1950 establishing the modern Republic of India.

i. World War I

Indian revolutionary movements sponsored by external actors occurred already in World War I. Indian revolutionaries found the United States an excellent base of operations for both tactical reasons and for the strong anti-colonial support they found there. Thomas Fraser notes that the United States' "anti-colonialist traditions ensured that many public figures, including the Secretary of State, William Jennings Bryan, and influential Irish-Americans, sided with Indian nationalism."[12] German agents working to incite and aid the Indian Revolution also appear to have violated U.S. neutrality legislation to send arms to Indian fighters.[13] German intelligence organized two massive shipments of American arms: one shipment consisted of over ten thousand Springfield rifles and carbines, four million rounds of ammunition, and several hundred pistols; the second contained over seven thousand

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[11] "Revere and his fellow Whigs did not hesitate to use violence to promote their ends, but they did so in a very careful way. The Boston Massacre threatened to alienate moderates from their cause. Instantly they took counter measures. They made certain that the British soldiers received a fair trial and Paul Revere helped to supply the evidence. . . . The Boston Massacre was accompanied by other acts of violence which the Whig leaders channeled toward their own ends. . . . In 1770 a frightened customs official fired into a mob that had gathered before his house, and killed a boy named Christopher Seider. The town made the child into a martyr. On the anniversary of his death a huge crowd gathered in silent demonstration. The chosen place was the home of Paul Revere, which was specially illuminated for the occasion. Every window in the house showed a brightly lighted scene—on one side the Boston Massacre; on the other, the ghost of the murdered boy; in the center an allegorical female figure of America with a liberty cap on her head, grinding a British grenadier beneath her heel." *Id.* at 24-25.

[12] Thomas G. Fraser, *Germany and Indian Revolution, 1914-1918*, 12 J. OF CONTEMP. HISTORY 255, 260 (Apr. 1977).

[13] *Id.*

rifles, two thousand pistols, ten Gatling guns and three million rounds of ammunition.[14] Both shipments failed to reach the hands of Indian revolutionaries, due to betrayal, and effective British counter-intelligence.[15] Had they succeeded, it is possible that a "major revolutionary outbreak" could have occurred in India during the First World War.[16]

Although India would not escape British rule in World War I, the revolutionary movements begun at that time laid the groundwork for continued efforts into the future. The remnants of World War I's failed revolutionary organizations found new inspiration in the nascent communist revolution in Russia.[17] They rebranded themselves as communist revolutionaries and continued their work throughout the 1920s and beyond.[18]

ii. World War II

Mahatma Ghandi brought non-conformity to the Indian revolutionary struggle as early as the 1920s. In the 1930s, the self-rule movement became influential, with domestic elections in India's provinces eventually demonstrating a strong preference for self-rule. During World War II, increasing demands for self-rule, including Ghandi's 1942 ultimatum, led to mutinies and rebellions, including by volunteer Indian divisions serving the British Empire. In 1947 India was partitioned into India and Pakistan, and in 1950 British suzerainty over India ended.

iii. India's Emancipation and Postcolonial Legal Formation

After centuries of colonial exploitation, the Republic of India became a British dominion in 1947 and achieved full independence in 1950. India began the process of adopting a unified government with the drafting of the constitution at Delhi, begun in 1946. In establishing a new system

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[14] *Id.* at 261, 263
[15] *Id.* at 261-62, 263-64.
[16] *See id.* at 263 ("[T]he basic German calculation that a major revolutionary outbreak in India would need the assistance of a large scale arms shipment was correct."); *see also id.* at 264 ("Had the *Maverick's* intended cargo reached the volatile youth of Bengal, it could have given the British government quite a shock.").
[17] *Id.* at 268.
[18] *Id.*

of law, many of India's founding fathers were concerned to avoid paternalistic categories that had aided the British Empire. At the same time, the impulse to protect vulnerable populations led some of India's foundational leaders, including Jawaharlal Nehru, to take "protectionist" actions that invited criticism from their contemporaries.

Great Britain claimed the right to rule India through a "civilizing" mission. The justification for imperial dominion is both a legal and a pre-legal, foundational ethical question. The British Empire justified its expansion into India and subjugation of the population using the distinction between fully formed, "adult" peoples (civilized) and uncivilized peoples. This "ideology of rule" is a fundamental pre-legal claim to citizenship rights for certain persons classified as "citizens," but not others.[19] "[N]ot everyone in society is a citizen. J.S. Mills' *On Liberty* (1859/2008), for instance, famously disqualified children and child-like savage races from his liberal doctrines because, he asserted, they could not govern or improve themselves."[20]

Certain early thrusts by the architects of the new Indian State encountered opposition for purportedly adopting just such a distinction between civilized and uncivilized. Indian leaders who had just displaced the British Crown saw the danger of future exploitation if their country adopted a distinction that discriminated against "tribal" peoples deemed to exist below the lowest tier of caste society.[21] This distinction would have carried over from India's last colonial constitution adopted in 1935.[22]

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[19] Uday Chandra, *Liberalism and Its Other: The Politics of Primitivism in Colonial and Postcolonial Indian Law*, 47 L. & SOC'Y REV. 135, 137-38 (2013).

[20] *Id.* at 138.

[21] In 1935, the Indian Congress criticized the distinction between caste and tribes in the 1935 Indian Constitution, the "Government of India Act," describing "yet another attempt to divide the people of India into different groups, with unjustifiable and discriminatory groups, to obstruct the growth of uniform democratic institutions in the country" (internal citations omitted). *Id.* at 151-52; *see also id.* at 149 (distinguishing between "aboriginals" and "some who have been absorbed into the lowest Hindu castes").

[22] "The Act required the Governor-General to determine policy directly or via an agent in the "tribal areas[.]" It prohibited legislative council members from 'the asking of questions on, any matter connected with the tribal areas or the administration of any excluded area [.]' No laws passed by federal and provincial legislatures could apply to tribal areas, which were the sole prerogative of provincial Governors. Insofar as the colonial government continued to be responsible for the protection and improvement of over 15 million primitive subjects in 8 totally excluded and 28

When India's new government began, Jawaharlar Nehru intended to protect those designated "tribal" Indian peoples through benevolent despotism.[23] Nehru expressed his desire to help "those unfortunate brethren of ours who are backward through no fault of theirs," and to "make them advance."[24]

Nehru's benevolent condescension toward "tribal" peoples earned him the ire of other Indian founding fathers. Sardar Vallabhai Patel objected to the use of the word "tribes."[25] And Jaipal Singh spoke out against the notion with a demand for equality: "What my people require, Sir, is not adequate safeguards . . . We do not ask for any special protection. *We want to be treated like every other Indian* . . ."[26] In the formative stages of a new India, leaders demanded that discriminatory categories of citizens and noncitizens be refused, in favor of a State with citizenship for all peoples.

IV. CONCLUSION

Although the American Revolution is more prominent in world historical memory than the uprisings that contributed to Indian independence, India also benefited from coalitions of freedom fighters who would risk their lives to throw off the imperial yoke. The American and Indian movements for independence from the British Empire involved securitization, appeals to the natural law as expressly precluding colonialism, and the formation of new legal regimes aspiring to conformity with the natural law.

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partially excluded areas, the Act of 1935 thus represented the most refined form of primitivism in British India." *Id.* at 150-51 (internal citations omitted).

[23] "Much like his colonial predecessors, Nehru, too, reposed faith in the modern state to act as a liberal despot that would simultaneously improve and protect childlike primitive subjects." *Id.* at 152.

[24] *Id.* Chandra notes, "It is difficult to ignore the echoes of primitivism in these lines."

[25] "[W]ith regard to the word 'tribes', [sic] my own feeling is that it is not an appropriate word. The expression 'protection of tribal areas', [sic] similarly, is not a happy one . . . What is the meaning of tribes. What is it that the word means, and is it so? It means something and it is there because, for two hundred years, attempts have been made by foreign rulers to keep them in groups apart with their customs and other things in order that the foreigners' rule may be smooth." *Id.* at 153.

[26] *Id.*

Essay 3

South Korea's National Security Act: Colonial Residues

I. INTRODUCTION

South Korea's harsh National Security Law, enacted in 1958 against "anti-State actors" in order to criminalize the influence of North Korean sympathizers, has stood the test of time despite long-standing accusations of abuse by the government and debate about its constitutionality. Why has this severe law largely retained support with leaders and the public, despite calls from domestic and global actors to repeal it? This Paper analyzes the social factors that led to the law's formation and preservation, pointing to South Korea's history of extended occupation, its division during the Korean War, and the threat from North Korea under which it lives to this day. To highlight the relevance of these factors, this Paper contrasts Korea's National Security Law with Japan's Subversive Activities Prevention Law which, while enacted for analogous purposes, is comparatively much weaker due to the way it is drafted and the decentralized enforcement structure underlying it. This extends from Japan's pre-democratic history with powerful secret police and domestic surveillance, which has led to a fierce social sensitivity to intrusions on civil rights. The resulting public focus on internal threats from the State, rather than on external threats as in South Korean society, serves as a buffer against the overextension of national security laws against domestic citizens, while the latter permits it. Examining the respective structures, applications, and histories of these laws can inform our

understanding of the circumstances that can give rise to laws with greater potential for abuse and the necessary balance between State security and deference to individual liberties.

II. THE KOREAN NATIONAL SECURITY LAW AND THE LIBERTY TRADE-OFF

South Korea's National Security Law (NSL)[1] was enacted in 1958, just three months after the establishment of the Republic of Korea in the wake of Japan's defeat in WWII, and before the Korean War.[2] Its stated purpose is "to secure the security of the State and the . . . freedom of nationals" by outlawing the activities of "anti-government organization[s]" and citizens' participation in and contributions to such organizations. "Anti-government organizations," while defined as those which "aim[] at a rebellion against the State,"[3] was intended at the time of enactment to refer to the left-wing movement, Communists, and North Korean sympathizers.[4]

Chapter II of the Law outlines specific crimes and their punishments, including: joining or leading an anti-government organization; inducing another person to join; collecting or transmitting State secrets; aiding an anti-government organization or its members; receiving money or goods from a member or person working on behalf of an anti-government organization; making contact with a member of an anti-government organization via a meeting or correspondence; providing members of anti-government organizations with firearms, ammunition, other weapons, money, property, or a place for meeting or concealment; or attempting, preparing, or plotting to do any of these things.[5] The penalties assigned to many of the named infractions are steep. Leaders of anti-government

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[1] *National Security Act*, KOR. LEGIS. RSCH. INST.: KOR. L. TRANSLATION CTR. (April 8, 2014), https://elaw.klri.re.kr/eng_service/lawView.do?hseq=26692&lang=ENG [hereinafter National Security Law] (providing an English translation of the South Korean National Security Law). Two different translations of the title, "National Security Act" and "National Security Law" are used interchangeably in the literature to refer to the title of this law. For clarity and consistency, I will use the latter.

[2] Diane Kraft, *South Korea's National Security Law: A Tool of Oppression in an Insecure World*, 24 WISC. INT'L L.J. 627, 627 (2006); Terrence Matsuo, *The Enduring Consequences of South Korea's National Security Law*, KOREA ECON. INST. AM. (Sept. 6, 2022), https://keia.org/the-peninsula/the-enduring-consequences-of-south-koreas-national-security-law/.

[3] National Security Law, Chapter I, art. 2(1).

[4] *See* Kuk Cho, *Tension Between the National Security Law and Constitutionalism in South Korea: Security for What*, 15 B.U. INT'L L.J. 127, 130-32. In this Article, I have cited authors below-the-line as their names are listed on their works. Above the line, I have defaulted to the traditional Korean naming order: family name, followed by first name.

[5] National Security Law, Chapter II, arts. 1-9.

organizations receive the death penalty or imprisonment for life, and high-ranking members receive at least five years in prison and may receive as much as a life sentence or the death penalty. Those who provide anti-government organizations with money, weapons, or facilities are sentenced to up to ten years in prison.[6] Under Article 10, anyone with knowledge of an offender under the NSL who fails to inform a criminal investigation agency or intelligence agency of this fact can be punished by up to five years in prison.[7] One of the most controversial portions of the NSL is Article 7, which states that "[a]ny person who praises, incites or propagates the activities of an anti-government organization" or affiliated person shall be punished by up to seven years in prison. This includes spreading false information (minimum of two years in prison), as well as manufacturing, reproducing, importing, holding, carrying, distributing, selling, or acquiring any documents, drawings, or "other expression materials" with the requisite intent.[8]

While initially adopted to protect the fragile South Korean government from North Korean influence, the National Security Law provided the government broad discretion to prosecute—often resulting in accusations of using the law to silence legitimate opposition. Prior to Korea's final democratization in 1993, the NSL was used by authoritarian leaders to prosecute individuals for "acts ranging from praising North Korea in casual conversation to running as an opposition candidate in presidential elections," in order to preserve their grip on power.[9]

In 1958, popular politician and Progressive Party leader Cho Bong-Am was arrested and sentenced to death under the NSL, largely due to the political threat perceived by then-president Rhee Syngman. His Progressive Party was subsequently dissolved.[10] In 1976, the NSL was used to prosecute all those who signed an opposition group's declaration commemorating a 1919 independence

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[6] *Id.*
[7] *Id.*, art. 10.
[8] Id. art. 7; Kraft, *supra* note 2, at 629.
[9] Kraft, *supra* note 2, at 631.
[10] Andrei Lankov, *Tragic End of Communist-Turned-Politician Cho Bong-Am*, KOREA TIMES (Jan. 9, 2011, 3:48 PM), http://www.koreatimes.co.kr/www/news/nation/2011/01/116_79367.html.

uprising.[11] In 1979, liberal democrat and presidential candidate Kim Dae-Jung was sentenced to death under the NSL for instigating an uprising after military dictator Chun Doo-Hwan seized power in a coup.[12]

Cho Kuk, South Korean jurist and politician, describes the justification for such policies in terms of a "liberty trade-off," whereby individual liberties were subjugated to other concerns for the good of the nation:

> Too much democracy and too many individual rights threatened national security and economic development, and therefore had to be temporarily suspended. Democracy was seen as giving leftists and radicals a chance to hinder governmental policies and procedures. Criticism of the government's policy was not considered an exercise of civil and political rights, but rather a means of making society domestically feeble, creating social division, and bringing international shame to the state. The rule of law was regarded as a principle to emphasize unconditional observance of the law in a legal positivist sense. Constitutional rights were merely accessories for the regime.[13]

South Korea became fully democratic by 1993, and activists began to challenge the National Security Law, in light of its abuses by the military regimes. However, any meaningful changes to the law were ultimately derailed when tensions with North Korea increased in the early nineties after the 1994 death of Kim Il-Sung.[14]

Since that time, the NSL has continued to be used by the government, often leading to domestic and international controversy and the appearance of underlying political motivations. A dramatic ninety-six percent increase in arrests under the National Security Law followed the 2008 election of conservative president Lee Myung-Bak.[15] In 2011, Korean photographer Park Jong-Kun was arrested and interrogated after retweeting tweets from a North Korean Twitter account, behavior

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[11] Kraft, *supra* note 2, at 632.
[12] Choe Sang-Hun, *Kim Dae-Jung, Ex-President of S. Korea, Dies at 83*, N.Y. TIMES (Aug. 18, 2009), https://www.nytimes.com/2009/08/19/world/asia/19kim.html.
[13] Cho, *supra* note 4, at 133.
[14] *Id.* at 136-37.
[15] AMNESTY INT'L, THE NATIONAL SECURITY LAW: CURTAILING FREEDOM OF EXPRESSION AND ASSOCIATION IN THE NAME OF SECURITY IN THE REPUBLIC OF KOREA 3 (2012), https://www.amnesty.org/en/wp-content/uploads/2021/06/asa250062012en.pdf.

the South Korean Justice Ministry announced could garner punishment. Park's photography studio was also raided. He was convicted and given a ten-month suspended prison sentence, despite the judge's acknowledgment that at least some of his posts were in parody.[16] In 2010, Korea's highest court upheld a two-year jail term given to a woman for owning a USB stick containing fourteen North Korean songs.[17] In 2011, eight members of the Socialist Workers League, an aspiring political party espousing socialism, were convicted under Article 7 of the NSL—despite the fact that the Socialist Workers League is highly critical of North Korea.[18] In January 2015, a member of a now-defunct far-left political party, Hwang Seon, was arrested under the NSL for allegedly speaking positively of North Korea during a lecture tour she arranged for a Korean-American author to speak on her book, in which the author discussed her travels in North Korea.[19] In August 2022, police raided the home and office of religious activist Jung Dae-Il, accusing him of violating Article 7 of the NSL by publishing information on North Korean ideology on his website and assisting in the sale of Kim Il-Sung's biography. Jung is the director of a research institute that publishes analysis and policy proposals advocating for reconciliation between North and South Korea.[20] And as recently as January 2023, South Korea's National Intelligence Service carried out an extensive raid of the Seoul offices of the country's main labor group, the Korean Confederation of Trade Unions (KCTU), motivated by alleged violations of the NSL. The KCTU has claimed the raid was politically motivated, and

[16] Cho Sang-Hun, *South Korean Gets Suspended Sentence in Prison Case*, N.Y. TIMES (Nov. 21, 2012), https://www.nytimes.com/2012/11/22/world/asia/south-korean-man-gets-suspended-sentence-for-tweets.html.
[17] Louisa Lim, *In South Korea, Old Law Leads to New Crackdown*, NPR (Dec. 1, 2011, 2:52 PM), https://www.npr.org/2011/12/01/142998183/in-south-korea-old-law-leads-to-new-crackdown.
[18] *Eight South Koreans Convicted for Breaching National Security Law*, AMNESTY INT'L (Feb. 24, 2011), https://www.amnesty.org/en/latest/press-release/2011/02/eight-south-koreans-convicted-breaching-national-security-law/; AMNESTY INT'L, *supra* note 15, at 32.
[19] Alastair Gale, *South Korea Arrests Government Critic Suspected of Breaking National Security Law*, WALL ST. J. (Jan. 13, 2015, 10:43 PM), https://www.wsj.com/articles/south-korea-arrests-government-critic-suspected-of-breaking-national-security-law-1421206407.
[20] Ifang Bremer & Sojin Jung, *Seoul Police Probe Christian Activist for Spreading Pro-North Korea Materials*, NK NEWS (Aug. 12, 2022), https://www.nknews.org/2022/08/seoul-police-probe-christian-activist-for-spreading-pro-north-korea-materials/.

connections have been drawn to the KCTU's role in a recent strike by truck drivers who were subsequently ordered back to work by recently elected President Yoon Suk-Yeol.[21]

As a result of such cases, a number of domestic and international organizations have urged South Korea to abolish or amend the NSL, including Amnesty International, Human Rights Watch, the United Nations special rapporteur on the promotion and protection of the right to freedom of opinion and expression, the UN special rapporteur on the situation of human rights defenders, and the UN Human Rights Committee.[22] Further, critics have long asserted that the NSL is unconstitutional; the most recent of such challenges is currently under consideration by the Korean Constitutional Court.[23]

Given its history of abuses spanning its passage to the present day, why is the NSL, and its liberal use by each administration, allowed to persist? The reason is that the "liberty trade-off," as Cho described it, is still understood and accepted by a substantial portion of the Korean public, informed by the history of the Republic, the trauma of the Korean War, and the constant threat posed by North Korea, the South's adversary in a war that is still ongoing. That this ideology still pervades justifications of the NSL's application is evident in statements from its defenders.

In 2011, conservative President Lee Myung-Bak, elected by a nearly two-to-one margin in 2007,[24] defended his administration's dramatic increase in the use of the NSL, claiming that Korea's "special and unique circumstances" render such a law still necessary:

> For any country that is divided like Korea, I'm sure that those people in such countries will understand the necessity of having such a law . . . . We have been facing for the last 60-plus years one of the world's most well-armed and most belligerent countries. And if you consider that fact, and if you are someone living in such a country every

[21] *S Korean Spy Agency Raids Unions Over Suspected North Korea Link*, AL JAZEERA (Jan. 18, 2023), https://www.aljazeera.com/news/2023/1/18/s-korea-spy-agency-raid-unions-over-suspected-link-to-north-korea.
[22] *South Korea: Cold War Relic Law Criminalizes Criticism*, HUMAN RIGHTS WATCH (May 28, 2015, 5:55 PM), https://www.hrw.org/news/2015/05/28/south-korea-cold-war-relic-law-criminalizes-criticism.
[23] *See Constitutional Court Begins Deliberations on Cold-War Era National Security Act*, KOREA HERALD (Sept. 15, 2022, 10:31 AM), https://www.koreaherald.com/view.php?ud=20220915000166.
[24] Norimitsu Onishi, *Conservative Wins Vote in South Korea*, N.Y. TIMES (Dec. 20, 2007), https://www.nytimes.com/2007/12/20/world/asia/20korea.html.

> day, then you will understand the need to have such laws that will allow us to maintain our way of life. . . . Of course, in the future, when our relationship between the two Koreas begins to improve fundamentally, then accordingly we will look into these laws and determine whether they are still needed or not.[25]

A majority of the Korean public at the time likely shared his view, given the mandate with which Lee and his conservative government were elected.[26]

Similarly, in 2015, Myung-Bak's successor, conservative President Park Geun-Hye, "affirm[ed] the government's push to prosecute those who vocally support the reclusive North's regime," and "rejected the idea that the National Security Law should be abolished because North Korea remained a threat," when questioned regarding the controversial indictment under the NSL of a leftist former member of parliament.[27] Park Geun-Hye has also cited the "unique" situation of South Korea as justification for the NSL, using similar language to her predecessor: "Given the unique confrontation between North and South Korea, this is the minimum law that is required to protect the security of South Korea."[28]

The election of liberal President Moon Jae-In in 2017 brought hope to critics that the NSL may finally be repealed, especially given Moon's relatively conciliatory approach to North Korea.[29] Under his administration, enforcement of the law dropped to its lowest level in ten years. However, this resulted in a rise in far-left, pro-North activism that caused a backlash from both conservatives and ordinary citizens who viewed Kim as a dictator not to be reconciled with.[30] As a result, any planned repeal of the NSL instead materialized as amendments intended to limit the enforcement authority of

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[25] Lim, *supra* note 17.
[26] *See id.* ("'[C]learly the conservative government has been given the mandate to be more conservative, especially on issues pertaining to North Korea. That's why it was elected in a landslide three years ago.'").
[27] Jack Kim, *South Korea Supreme Court Upholds Sedition Ruling Against Ex-MP*, REUTERS (Jan. 22, 2015, 1:50 AM), https://www.reuters.com/article/us-southkorea-northkorea-sedition/south-korea-supreme-court-upholds-sedition-ruling-against-ex-mp-idUSKBN0KV0FL20150122.
[28] *See* Gale, *supra* note 19.
[29] *See* Choe Sang-Hun, *South Korea Elects Moon Jae-In, Who Backs Talks With North, As President*, N.Y. TIMES (May 9, 2017), https://www.nytimes.com/2017/05/09/world/asia/south-korea-election-president-moon-jae-in.html.
[30] *See* Hyonhee Shin & Joyce Lee, *How a South Korean Security Law is Becoming Obsolete Amid Thaw With North Korea*, REUTERS (Dec. 6, 2018, 1:07 AM), https://www.reuters.com/article/us-northkorea-southkorea-securitylaw-ana/how-a-south-korean-security-law-is-becoming-obsolete-amid-thaw-with-north-korea-idUSKBN1O50FV.

the National Intelligence Service under the NSL to just data collection—a move that Human Rights Watch asserted would actually worsen the potential for abuses of the Law.[31] An October 2017 survey of 1,013 South Koreans found that more than half supported the NSL, while only a third thought it should be repealed or replaced.[32]

Even as the constitutional challenge to the NSL is being deliberated in the Korean Constitutional Court, attitudes of acceptance toward the NSL continue to prevail in Korean society. The 2022 election of conservative President Yoon Suk-Yeol was widely seen as a referendum on Moon's government, including his stance on North Korea; Yoon has a much more confrontational stance toward the North.[33] It is unlikely the Yoon government will pursue changes to the NSL; in fact, doing so would be a "political burden" for the party, alienating conservatives and depleting "political capital" with their base.[34] Under Yoon, the recent raid of KCTU offices "has raised fears that the conservative government is reverting to dictatorship-era methods of attacking labor by conflating organizing with threats to national security."[35] In defending the law before the Constitutional Court, Yoon's Minister of Justice Han Dong-Hoon said in his opinion that the issue of the NSL cannot be left to the "'ideological free market' because evil consequences from the spread of rebellious expressions might only be overcome at the cost of massive state damage and national division."[36] This argument echoes explicitly the idea of a liberty trade-off—free expression for security and stability—still in play today.

III. THE JAPANESE ANTI-SEDITION LAW AND THE MEMORY OF OPPRESSION

[31] *See South Korea: Revise Intelligence Act Amendments*, HUMAN RIGHTS WATCH (Dec. 22, 2020, 9:00 AM), https://www.hrw.org/news/2020/12/22/south-korea-revise-intelligence-act-amendments.
[32] Shin & Lee, *supra* note 30.
[33] *See* Choe Sang-Hun, *Yoon Suk-yeol, South Korean Conservative Leader, Wins Presidency*, N.Y. TIMES (March 9, 2022), https://www.nytimes.com/2022/03/09/world/asia/south-korea-election-yoon-suk-yeol.html.
[34] *See* Matsuo, *supra* note 2.
[35] Kap Seol, *South Korea's Conservative Government Is Cracking Down on the Country's Militant Labor Unions*, JACOBIN (Jan. 26, 2023), https://jacobin.com/2023/01/south-korea-conservative-government-labor-unions-cracking-down-national-security.
[36] *See* KOREA HERALD, *supra* note 23.

The "liberty trade-off" justification for the NSL spans the history of South Korea, resulting in a tacit agreement between a government wishing to maintain its political power and a public for which the need to defend the country from external threats extends from the historical trauma of Japanese occupation, the Korean War, and the subsequent national division into North and South. These events, each essential to the Korean national identity, have resulted in a shared cultural prioritization of values such as stability and security, even at the cost of civil liberties.

The role that South Korea's history plays in its attitudes toward the NSL, and domestic national security enforcement generally, is highlighted by contrast with its neighbor, Japan. The Japanese attitude toward domestic security enforcement and its analog to the NSL, the Anti-Sedition Law, differs dramatically from South Korean attitudes as a direct result of their differing histories. While the Korean experience has led to the acceptance of internal threats from the government in exchange for protection from external threats like North Korea, the Japanese experience has led to the opposite—a strong fear of internal threats like the abuse of government power in the name of national security.

Prior to its occupation by Allied forces during WWII in 1945, Japanese citizens were subject to domestic surveillance during wartime by the powerful Special Superior Police, known as the *tokko*. The *tokko* were empowered to arrest those suspected of taking in or spreading subversive ideas, placing the people under surveillance with the aim of uncovering and preventing any anti-government ideas or actions.[37] The *tokko* "thought police" became one of the biggest symbols of pre-democratic Japan, and was accordingly dissolved after Japan's surrender in 1945. Still, "the memory and image of *tokko* . . . stayed in Japanese society," giving "a negative image to any secretive activity by the government," including intelligence gathering activities.[38]

[37] YUKI TATSUMI, HENRY L. STIMSON CTR., JAPAN'S NATIONAL SECURITY POLICY INFRASTRUCTURE: CAN TOKYO MEET WASHINGTON'S EXPECTATIONS? 97 (2008).
[38] *Id.*

The newly democratic Japanese government was made well aware of these concerns when it enacted the Subversive Activities Prevention Law (SAPL) on April 29, 1952. Similar to the Korean NSL, the law was aimed primarily at preventing terroristic acts of the Japanese Communist Party, and now empowers the government to investigate and restrict the activities of organizations involved in anti-government activities.[39] The law faced significant backlash from parts of the legislature and the public due to concerns that it would signify a return to the oppressive laws of pre-democratic Japan and threaten the civil liberties now guaranteed by the new constitution.[40] When it went into effect on July 21, 1952, the government issued "a long statement explaining the necessity for the law," stating that "[r]egrettable as it may seem, dangerous activities have been revealed" and "are being carried out by . . . organized groups in our country," causing a need for the SAPL.[41]

In response to the public's concerns, and in an effort to ensure that the SAPL would not be used to impede democracy or civil liberties, the SAPL includes a number of explicit limitations as safeguards. For example, it only becomes operative against an organization after it has committed "terroristic subversive activities," not before, and the types of activities that qualify are defined in detail.[42] In addition, the law itself has a clause explicitly prohibiting expansive interpretations, providing that it must be applied "only within the narrowest possible limits necessary for the preservation of public safety."[43]

There are also structural safeguards in place. The administration of the SAPL is divided between two agencies: the Public Security Investigation Agency (PSIA), under the Ministry of Justice, and the Public Security Examination Commission, an affiliated agency of the Ministry of Justice.[44] The PSIA is empowered only to collect intelligence on a suspect organization; it must then request that

[39] John M. Maki, *Japan's Subversive Activities Prevention Law*, 6 W. POL. Q. 489, 489 (1953).
[40] *See id.* at 508-10.
[41] *Id.* at 489.
[42] *See id.* at 492-94.
[43] *Id.* at 492.
[44] TATSUMI, *supra* note 37, at 102.

the PSEC place any restrictions against—or in the most extreme situations, meeting predetermined criteria, dissolve—the organization in question. The PSEC is a decision-making commission independent of the PSIA.[45] This decentralized structure was a direct response to abuses of the pre-war system, in which investigative powers and decision-making functions were combined in one government official.[46]

In addition, the PSIA's investigatory powers are limited under the SAPL: it does not have the power to compel cooperation with its investigations, forcing it to rely on voluntary witnesses and the cultivation of insider sources via financial incentives.[47] Further, the SAPL makes it a crime "for any investigator to abuse his authority, to interfere with individual rights, or to force individuals to do things they are not by law required to do."[48] Again, these stipulations were designed to prevent the arbitrary practices and abuses of the pre-war system.[49]

IV. THE SAPL VS. THE NSL

Despite their similar domestic aims and timeframes of enactment, the SAPL and the NSL have clear differences in their contents, administrative structure, and their public perception and context of enactment. Though both were initially enacted with the supposed aim of protecting the security and stability of new, fragile democracies, very different laws resulted.

The SAPL, enacted at a time when the memory of wartime oppression via the *tokko* and other pre-democratic institutions was very strong, was almost reluctantly drafted in the face of clear public concern and some outright opposition. As a result, the law included from its inception measures intended to limit its application and safeguard civil liberties against its intrusion. This was the case, despite the fact that the Japanese government had substantial justification for such a law, given

[45] *Id.* at 102; Maki, *supra* note 39, at 498, 500-501.
[46] *See* Maki, *supra* note 39, at 496.
[47] *See* Andrew L. Oros, *Japan's Growing Intelligence Capability*, 15 INT'L J. INTEL. AND COUNTERINTELLIGENCE 1, 8 (2002); TATSUMI, *supra* note 37, at 102.
[48] Maki, *supra* note 39, at 497.
[49] *Id.*

increasing violence on the part of the Japanese Communist Party and concerns about its international ties in Russia and Korea.[50]

In contrast, the NSL uses a much broader brush to criminalize anti-government activities, lacking the kind of internal controls devised for the SAPL. The resultant potential for abuse is evident from the history of the law and the ways it has been employed by the government, including in recent times, to silence organizations that oppose it—even in cases where this opposition looks to be legitimate speech absent evidence of true national security risk.

The stark differences between these laws can, in large part, be attributed to the public will surrounding them. In the case of the SAPL, public resistance and sensitivity to violations of civil liberties led to a restrained regime. While the NSL was enacted before democracy had taken consistent hold in South Korea, it has endured in the modern era despite calls throughout Korea's history to repeal or amend it. This is likely due to the perception, held by a majority of the Korean public, that the NSL is necessary for the safety and security of the country.[51] The history of South Korea, plagued by foreign occupations, war, and ultimately literal division into North and South, has primed Korean society to accept the liberty trade-off between freedom and security. This perception is constantly reinforced by the specter of North Korea, a hostile enemy with which it shares a border. The long Korean history of falling victim to external threats and being extorted by outside powers has resulted in a prioritization of stability and security, which may acceptably be subjugated to individual rights.

In contrast, Japan was unlikely to fall victim to such a trade-off, even if its new democracy had attempted to impose one via the SAPL. The experience of *tokko* and oppression that existed pre-1945 could not be justified in the absence of much greater threats to Japanese security and identity. As a former aggressor in WWII, now under the protection of the United States, and lacking a direct and

[50] *See id.* at 490-92.
[51] *See supra* text accompanying notes 32-36.

present enemy like South Korea has in the North, Japanese priorities remained the protection of the individual rights embodied in their constitution, even at the expense of reducing their government's power to preserve national security. Unlike South Korea, Japan's lack of historical abuse at the hands of outside powers allows it to focus more intensely on the internal threat of abuses from its own government.

The differences in the structure and origins of these two laws carry lessons about the relationship between a nation's history, its social values, and the balance between security and freedom. Examining the respective structures, applications, and histories of these two laws, and others, can inform our understanding of the historical circumstances that can give rise to laws with the potential for abuse, and the necessary balance between State security and deference to individual liberties.

Essay 4

"Protecting Russians" in the Near Abroad: Russia's Distortion of Jus ad bellum and the Responsibility to Protect Principle in Georgia and Ukraine

I. INTRODUCTION AND BACKGROUND

The Russian invasion of Ukraine in February 2022 not only sparked the largest-scale military conflict in Europe since the Second World War but also constituted a brazen violation of the international legal principles of sovereignty and *jus ad bellum*. Russia portrayed itself as acting on behalf of supposedly endangered inhabitants of Ukraine with cultural, linguistic, and ethnic ties to Russia, using the same rationales it had employed to justify its invasion of Georgia in 2008 and its annexation of Crimea in 2014. Although Russia has alleged that its military actions in Georgia and Ukraine have aligned with international law regarding the use of force in self-defense, humanitarian rescue, and the responsibility to protect (R2P), Russia's arguments fail to pass muster and misrepresent international law, rendering Russia's aggression toward Georgia and Ukraine unlawful.

However, one should not assume the Russian government's motivations for pursuing military action against Georgia and Ukraine are reducible to mere disregard for international law, geopolitical strategizing, or apprehension about NATO expansion.[1] Such a presumption underestimates the crucial impact of Russia's attempts to define its role within the post-Soviet geopolitical space of its "near

[1] *See, e.g.*, GERARD TOAL, NEAR ABROAD: PUTIN, THE WEST, AND THE CONTEST OVER UKRAINE AND THE CAUCASUS 20–21, 26–27, 32–39, 47 (2017).

abroad."[2] The collapse of the Soviet Union as an imperial power in Eurasia rendered its former territory a "space of decolonization,"[3] in which many Russians struggled to come to grips with the new reality that many ethnic Russians were now living in countries independent of Russia.[4] Articulating a narrative that Russia is part of a wider "Russian World" that encompasses ethnic Russians and Russian speakers beyond present-day Russia, the Russian government has pursued imperialistic aggression within the post-imperial space of the former Soviet Union.[5] The Russian World narrative, which functions as a reaction to decolonization in the post-Soviet space, has provided an impetus for Russia to justify its aggression toward Georgia and Ukraine using appeals to *jus ad bellum* and the R2P principle, concepts which themselves share problematic analogs with historical European arguments for colonialism. Thus, Russia's motives for its aggression and distortion of international law and its legal arguments purporting to justify its actions reflect the residues of colonialism.

Given Russia's propensity to continue to distort international law by maintaining the narrative of Russia as a protector and rescuer of ethnic Russian populations in its near abroad, the international community should articulate a revision of the R2P principle. Such a revision is even more crucial given that States have historically used the concept of protecting populations in danger to justify imperialism and its accompanying violence.[6] This revision should explicitly state that the R2P principle does not justify military intervention into another State's territory merely based on supposed but

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[2] *See, e.g.*, *id.*
[3] *See id.* at 34.
[4] *See* Heather Ashby, *How the Kremlin Distorts the 'Responsibility to Protect' Principle*, U.S. INST. PEACE (Apr. 7, 2022), https://www.usip.org/publications/2022/04/how-kremlin-distorts-responsibility-protect-principle.
[5] *See* Volodymyr Vakhitov & Natalia Zaika, *Beyond Putin: Russian Imperialism is the No. 1 Threat to Global Security*, ATL. COUNCIL (Apr. 27, 2022), https://www.atlanticcouncil.org/blogs/ukrainealert/beyond-putin-russian-imperialism-is-the-no-1-threat-to-global-security/; *see also Russkiy Mir: "Russian World,"* DGAP: GERMAN COUNCIL ON FOREIGN RELS. (May 3, 2016, 9:00 AM – 10:30 AM), https://dgap.org/en/events/russkiy-mir-russian-world; Igor Zevelev, *The Russian World in Moscow's Strategy*, CTR. FOR STRATEGIC & INT'L STUD. (Aug. 22, 2016), https://www.csis.org/analysis/russian-world-moscows-strategy; *cf.* TOAL, *supra* note 1, at 31 (addressing Russia's invasions of its neighbors and the strengths and weaknesses of alternative explanations of why Russia has pursued such aggression).
[6] *See* Luke Glanville, *Wrestling with R2P's Colonial Parallels*, 14 GLOB. RESP. TO PROTECT 269, 269–71 (2022).

unsubstantiated threats or because of ethnic, linguistic, or cultural ties between a purportedly threatened population and a State seeking to invoke R2P.

II. THE DEVELOPMENT OF THE "RUSSIAN WORLD" NARRATIVE

Under Vladimir Putin's rule, Russia has reacted to the breakup of the Soviet Union with "homeland nationalism"—a successor State's sentiment that its "spatial identity" extends past the boundaries it inherited following the collapse of its predecessor State.[7] Millions of the former Soviet Union's inhabitants, faced with the "shock" of the unanticipated, "disorienting" dissolution of their "seemingly permanent 'big country,'" reacted to the Soviet Union's breakup with "regret and later humiliation."[8] In particular, many who identified as Russian found themselves citizens of independent post-Soviet States, leaving them politically separated from Russia.[9] Responding to the wrenching implications that have accompanied this separation of people and places with significant emotional, historical, cultural, and psychological appeal to many Russians, Russia has articulated narratives that it has a duty to rescue and protect ethnic Russians living in its near abroad.[10] The Russian government's rhetoric and actions toward Georgia and Ukraine reflect the notion that Russia has nationhood in common with ethnically Russian communities beyond the borders of modern Russia and supposedly has responsibilities toward such communities.[11]

This notion, known as the concept of the "Russian World," contends that Russians constitute a "divided nation" that extends beyond the borders of post-Soviet Russia.[12] The Russian World concept "consciously relativizes the borders between nations [sic] states" and conceptualizes Russia as a "diaspora empire," purporting to place emphasis on "an essentialist, mythical ideal of Russian

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[7] *See* TOAL, *supra* note 1, at 34, 36.
[8] *Id.* at 47.
[9] Zevelev, *supra* note 5.
[10] *See* TOAL, *supra* note 1, at 33-39; *see also* Ashby, *supra* note 4; Robert Coalson, *Putin Pledges to Protect All Ethnic Russians Anywhere. So, Where Are They?*, RADIO FREE EUR./RADIO LIBERTY (Apr. 10, 2014, 10:58 AM GMT), https://www.rferl.org/a/russia-ethnic-russification-baltics-kazakhstan-soviet/25328281.html.
[11] *See* TOAL, *supra* note 1, at 33–34.
[12] *Russkiy Mir: "Russian World," supra* note 5.

language and culture" to a greater extent than Russian ethnicity alone.[13] In early 2014, Putin's spokesman Dmitry Peskov expressed this narrative when he spoke of Russia's purported responsibilities to the "Russian world," claiming that "Russia is the country on which the Russian world is based" and describing Putin as "probably the main guarantor of the safety of the Russian world."[14]

The Russian World narrative's roots in post-Soviet Russia extend significantly farther back than Russia's 2008 invasion of Georgia.[15] Following the Soviet Union's collapse, "significant figures within the intellectual and political opposition," including Alexander Solzhenitsyn and Gennady Zyuganov, contended that the distinction between Russia's new political borders and the borders of the Russian nation, "understood in ethnic terms," constituted "Russia's greatest downfall."[16] Academics, journalists, and intellectuals with ties to the Russian government developed the Russian World concept during the late 1990s, and Putin mentioned the concept as early as 2001,[17] although it "only began to penetrate the political discourse in 2007."[18]

Backing for the Russian World narrative has also come from the Russian Orthodox Church, which has partnered closely with the Russian government and has served as a key promoter of the idea that the Russian World encompasses the "'sacred' East Slavic Orthodox community of Russians, Ukrainians, and Belarusians."[19] By spreading this narrative, the Russian Orthodox Church "deliberately conveys the impression that Russians and Ukrainians are basically the same nation—that Ukrainians do not really form an independent nation."[20] Russian nationalists, too, have advanced the idea of the Russian World by promoting an agenda of the reunification of ethnic Russians living

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[13] *Id.*
[14] Coalson, *supra* note 10.
[15] *See* Zevelev, *supra* note 5; *see also Russkiy Mir: "Russian World," supra* note 5.
[16] Zevelev, *supra* note 5.
[17] *See Russkiy Mir: "Russian World," supra* note 5.
[18] Zevelev, *supra* note 5.
[19] *Russkiy Mir: "Russian World," supra* note 5.
[20] *Id.*

outside contemporary Russia's borders with "the historic homeland."[21] The Russian government's occupation and annexation of Crimea and its effort to spur a revolt of pro-Russian secessionists in Ukraine through the Novorossiya project in 2014 aligned with these radical Russian nationalists' preferences for Russia to seek political unity with ethnic Russians in its near abroad.[22]

The narrative that Russia has a responsibility to defend ethnic Russians beyond its borders has not just received support from within Russia, but also from national minorities within post-Soviet States in Russia's near abroad.[23] Whereas Russia has reacted to the distribution of ethnic and linguistic communities within the post-imperial landscape of the former Soviet Union by portraying itself as a protector of its alleged co-nationals within post-Soviet States, some national minorities living within Russia's near abroad have reacted to the post-Soviet landscape by seeking alignment with Russia.[24] For instance, Abkhaz and Ossetian minorities accused Georgia of perpetrating imperialism within its own borders by pursuing nation-building policies that favored ethnic Georgians; an Ossetian leader even contended that Ossetians felt "much more worried by Georgian imperialism than Russian imperialism" in 1991.[25] Ethnic Russians in countries such as Ukraine that had belonged to the most politically dominant of the Soviet Union's national groups now found themselves facing a "status reversal" in their new role as "national minorities."[26]

In both these cases, the presence of significant ties to ethnic communities in Russia served as a key motivator for ethnic Abkhaz and Ossetians in Georgia and pro-Russian separatists in eastern Ukraine to align themselves with Russia following the Soviet Union's collapse.[27] Perceptions within Russia that national minorities with ties to Russia are in a vulnerable position within independent,

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[21] Zevelev, *supra* note 5; *see also* TOAL, *supra* note 1, at 239–40.
[22] *See* Zevelev, *supra* note 5; *see also* TOAL, *supra* note 1, at 239–40.
[23] *See* TOAL, *supra* note 1, at 35–38, 41–42.
[24] *See id.* at 34–38, 41–42.
[25] *See id.* at 35, 42.
[26] *Id.* at 35.
[27] *See id.*; *see also* Coalson, *supra* note 10.

post-Soviet States have given fuel to the Russian narrative that Russia must "maintain order" and "protect the vulnerable," namely the "'stranded Russians' and Soviet-nation 'compatriots' who had unjustly become 'national minorities.'"[28] Repurposing language that the Soviet Union had used to refer to Nazi Germany during the Second World War and NATO during the Cold War, Russia has consistently invoked an invented narrative that populations with ties to Russia are under threat from "genocidal fascist forces" and has employed this narrative when conducting its aggression against Georgia and Ukraine.[29] For instance, Russia has characterized Ukrainian nationalism as "innately fascist" and a threat.[30] Thus, Russia's framing of its aggression against Georgia and Ukraine as efforts to protect and rescue populations within those countries bears a close resemblance to how both Russia and ethnic Russian minorities in its near abroad have crafted narratives about their identities and roles within the post-imperial space of the former Soviet Union.[31]

III. CONTEXT CONCERNING *JUS AD BELLUM* AND THE RESPONSIBILITY TO PROTECT PRINCIPLE

Russia contended that its aggression against Georgia and Ukraine was licit under international law by invoking *jus ad bellum* and the responsibility to protect (R2P) principle.[32] However, one must compare Russia's self-proclaimed rationales for engaging in military action against Georgia and Ukraine with the prerogatives for using force that *jus ad bellum* and the R2P principle provide. Thus, a brief elucidation of key principles of *jus ad bellum* and the R2P doctrine is in order.

A. Jus ad bellum

[28] TOAL, *supra* note 1, at 42.
[29] *Id.* at 217–18.
[30] *Id.* at 217–20.
[31] *See id.* at 180–181, 252–53, 257; *see also* Marissa A. Mastroianni, *Russia Running Rogue?: How the Legal Justifications for Russian Intervention in Georgia and Ukraine Relate to the U.N. Legal Order*, 46 SETON HALL L. REV. 599, 633–34 (2016); Ashby, *supra* note 4.
[32] *See* Mastroianni, *supra* note 31, at 599–600.

Jus ad bellum constitutes the area of international law that concerns legal justifications for States to employ force on the territory of other States or against other States.[33] Given that the principle of States' territorial integrity occupies a crucial position within international law,[34] Article 2(4) of the United Nations Charter requires that U.N. member States "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State."[35] The U.N. Charter's sole express exceptions to the prohibition on the use of force apply "in situations of Security Council authorization and self-defense."[36] Another principle of *jus ad bellum* is the right of States to defend themselves, individually or collectively, against an "armed attack."[37] The scope of what constitutes an "armed attack" in relation to Article 51 of the U.N. Charter encompasses both offensive and defensive violence toward an opponent,[38] and such violent activity must be the responsibility of a State.[39] *Opinio juris* generally favors the position that "only armed attacks attributable to a State give rise to the right of self-defense under international law."[40]

If an armed attack has occurred against a State, the State must comply with the principle of necessity.[41] According to this principle, it is "objectively and strictly necessary" that a State use force to counter an armed attack when "no pacific alternative [is] reasonably available," the State using force is certain of the attacker's identity, and the U.N. Security Council has not yet pursued "'the measures necessary to maintain international peace and security.'"[42] Also, necessary force in opposition to an

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[33] STUART CASEY-MASLEN, JUS AD BELLUM: THE LAW ON INTER-STATE USE OF FORCE 1 (2020).
[34] *See* Mastroianni, *supra* note 31, at 604–05.
[35] U.N. Charter, art. 2, ¶ 4; *see also* Mastroianni, *supra* note 31, at 604.
[36] Mastroianni, *supra* note 31, at 605.
[37] U.N. Charter, art. 51.
[38] Christof Heyns et al., *The Definition of an "Attack" Under the Law of Armed Conflict*, LIEBER INST. FOR L. & WARFARE W. POINT (Nov. 3, 2020), https://lieber.westpoint.edu/definition-attack-law-of-armed-conflict-protection/.
[39] CASEY-MASLEN, *supra* note 33, at 61.
[40] *Id.*
[41] *See id.* at 69.
[42] *Id.* at 69–70.

armed attack must be proportionate to the objective of repelling that attack; other objectives will not suffice to justify a resort to force in the face of an armed attack.[43]

B. Responsibility to Protect (R2P) and Humanitarian Intervention

The R2P principle is an international norm that asserts that States have a responsibility to protect their populations from mass atrocities such as "genocide, war crimes, ethnic cleansing and crimes against humanity," contending that "the international community, through the United Nations," has a responsibility to employ "appropriate diplomatic, humanitarian and other peaceful means" to secure the protection of populations from mass atrocity crimes.[44] R2P also articulates that States may "take collective action . . . through the Security Council, in accordance with the Charter, including Chapter VII" in the event that "peaceful means be inadequate and national authorities are manifestly failing to protect their populations from" the mass atrocities that the R2P doctrine seeks to avert.[45] Unlike *jus ad bellum*, the R2P doctrine is a new arrival to the sphere of international norms; its adoption at the U.N. World Summit in 2005 followed the international community's failure to avert the mass atrocities perpetrated in both Rwanda and the former Yugoslavia in the 1990s.[46] A common understanding of R2P is that it currently lacks sufficient state practice and *opinio juris* within the international community to constitute customary international law, and thus the R2P principle does not serve as a binding requirement to which States must adhere; at best, it can be regarded as an international legal norm.[47]

International law also allows States to pursue action unilaterally to conduct a "[h]umanitarian rescue" of their nationals who face danger outside their borders, a principle that has its basis in state

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[43] *See id.* at 73.
[44] *What is R2P?*, GLOB. CTR. FOR RESP. TO PROTECT, https://www.globalr2p.org/what-is-r2p/#:~:text=The%20Responsibility%20to%20Protect%20%E2%80%93%20known,cleansing%20and%20crimes%20against%20humanity (last visited Jan. 22, 2023).
[45] *Id.*
[46] *See id.*
[47] *See* Mastroianni, *supra* note 31, at 611.

practice both prior to and following the establishment of the UN; however, this threshold for a lawful humanitarian rescue of a State's nationals is a high one.[48] A State may use force to rescue its nationals in another State when those nationals "face an imminent risk of death," but it must comply with the requirement of proportionality, and a State whose nationals are in danger cannot resort to force until it has "exhaust[ed] all peaceful measures to resolve the situation" first.[49]

IV. RUSSIA'S PURPORTED JUSTIFICATIONS FOR ITS MILITARY INTERVENTIONS IN GEORGIA AND UKRAINE

Although Russia's aggression toward both Georgia and Ukraine might contribute to an impression that Russia acts without any regard for principles of international law,[50] Russia alleges that it "attach[es] great importance to international law" and thus has articulated "carefully crafted arguments" that purport to justify its behavior toward Georgia and Ukraine in accordance with international law.[51] However, Russia's efforts to portray its actions in Georgia and Ukraine as compatible with international law do not stand up to careful scrutiny, even if they may appear "facially consistent with the U.N. legal order."[52]

A. The 2008 Conflict in Georgia

When Russia invaded Georgia in the context of an armed conflict between the Georgian government and the separatist South Ossetian government,[53] the Russian government contended that Russia had the right to invoke its Article 51 right to use self-defense in response to Georgian attacks on Russian peacekeepers and Russian citizens.[54] Russia's justification of its military actions in Georgia using this argument is unsurprising, given that Russia broadly interprets a State's right to use force in

[48] *Id.* at 606–07.
[49] *Id.* at 607.
[50] *See id.* at 599–600.
[51] *Id.* at 600.
[52] *Id.* at 603.
[53] *See* Timothy William Waters, *Plucky Little Russia: Misreading the Georgian War Through the Distorting Lens of Aggression*, 49 STAN. J. INT'L L. 176, 211 (2013); *see also* Michael Toomey, *The August 2008 Battle of South Ossetia: Does Russia Have a Legal Argument for Intervention?*, TEMPLE INT'L & COMP. L.J. 443, 443 (2009).
[54] TOAL, *supra* note 1, at 181.

self-defense as a prerogative that allows it to apply military force to protect Russian nationals and ethnic Russians living outside its borders.[55]

This interpretation aligns with Russia's "privileged interests doctrine," which Russian Foreign Minister Sergey Lavrov and former Russian President Dmitry Medvedev have framed as a doctrine that Russia will foster close, purportedly mutually advantageous relationships with its "'traditional partners,'" including States that once formed part of the Soviet Union, such as Georgia and Ukraine.[56] In 2008, reflecting on the war in Georgia after its conclusion, Medvedev alleged that Russia had special interests that lay within, but were not restricted to, the vicinity of its borders.[57] Thus, Medvedev contended that Russia has a sphere of influence in which it may use military force to counter dangers to Russian nationals' security.[58] Russian domestic law also aligns with the Russian narrative that it may launch military interventions abroad to protect ethnic Russians, for the Russian Constitution's Article 61 stipulates that Russia "'shall guarantee to its citizens protection and patronage abroad.'"[59] Valery Zorkin, the chief justice of Russia's Constitutional Court, alleged that Article 61 provides Russia the prerogative to pursue military action to protect "'compatriots who are permanently living abroad.'"[60] Using the privileged interests doctrine and its interpretation of Article 61 of its constitution, the Russian government has come to hold the view that Russia has the legal authority to intervene unilaterally to effectuate a "humanitarian rescue" of ethnic Russians living outside Russia, "so long as the force used is proportionate."[61]

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[55] *See* Mastroianni, *supra* note 31, at 634.
[56] *Id.* at 633–34.
[57] *See* Andrew E. Kramer, *Russia Claims Its Sphere of Influence in the World*, N.Y. TIMES (Aug. 31, 2008), https://www.nytimes.com/2008/09/01/world/europe/01russia.html (noting that Medvedev not only asserted that Russia "'ha[d] regions where it has privileged interests,'" but also specified that Russia's "sphere of influence" encompassed "'the border region, but not only.'").
[58] *See* Mastroianni, *supra* note 31, at 634.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 633–35.

In the context of the conflict in Georgia, Russia claimed it had the right to carry out its military intervention because said intervention allegedly had the purpose of protecting ethnic Russians living in Abkhazia and South Ossetia.[62] In the 1990s, Russia bestowed citizenship and Russian passports to many residents of Abkhazia and South Ossetia.[63] Given the resulting presence of substantial numbers of Russian citizens in these regions of Georgia, Russia contended that its use of force against Georgia was in self-defense, done in purported accordance with Article 51 of the U.N. Charter and with the ostensible goal of providing protection to ethnic Russians who faced danger.[64]

Despite Russia's characterization of its intervention in Georgia as consistent with international law regarding self-defense, by removing the Georgian government's de facto control over Abkhazia and South Ossetia, Russia contravened both the non-intervention norm and the prohibition on States' use of force.[65] It also violated the territorial integrity of Georgia.[66] Moreover, Russia's military actions against Georgia failed to comport with the criteria for a State to invoke self-defense as a justification for using force in accordance with Article 51 of the U.N. Charter.[67] In *Nicaragua v. United States*, the International Court of Justice (ICJ) articulated that an armed attack triggering the right of self-defense consists of action by a State's military forces "across an international border" or acts of military force by armed groups acting on behalf of or with the involvement of a State.[68] Timothy William Waters has argued that nearly every State views itself as having the right to protect its interests, troops, and nationals beyond its borders within specific circumstances.[69] Rarely do States believe they have no prerogative to defend their populations outside their territory just because said nationals are inside

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[62] *See id.* at 635.
[63] *See id.*
[64] *See id.*
[65] *See id.* at 632.
[66] *Id.* at 632, 635.
[67] *See id.* at 636.
[68] *See* Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 195 (June 27).
[69] *See* Waters, *supra* note 53, at 211.

another State's territory.[70] However, Georgia's military action in South Ossetia that resulted in the deaths of Russian peacekeepers without crossing the Russian border does not fit well with the ICJ's narrow characterization of the grounds for a State to use force in self-defense in the *Nicaragua* case.[71]

Even though Russia conferred Russian citizenship on many inhabitants of Abkhazia and South Ossetia prior to the conflict, that fact did not provide legal justification for Russia's military intervention in Georgia, either.[72] International law does not afford a State the prerogative to use force against another State on self-defense grounds "for the protection of [its] own citizens."[73] Also, Russia's contention that Georgia had the intention to use military force against Abkhazia as it had against South Ossetia did not suffice to provide legal justification for Russia's military action against Georgia as a supposed effort to protect the residents of Abkhazia.[74] Rather, if a State uses force in the ostensible service of self-defense in response to a "presumed" or "abstract" threat, its use of force is not permissible under international law, for a "merely presumed threat of an armed attack" does not provide legal grounds to use force in self-defense.[75]

Moreover, although a State may invoke humanitarian rescue as grounds for engaging in force to protect "nationals abroad who face imminent death," Russia's military intervention did not comport with the prescriptions of necessity and proportionality under international law that would be necessary to justify a humanitarian rescue, and it did not align with the principle of R2P.[76] A resort to force is not justified under *jus ad bellum* if peaceful alternatives to said force are available.[77] In the case of

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[70] *See id.*
[71] *Cf.* Toomey, *supra* note 53, at 464 (noting that the Russian citizens who came under attack were outside Russia when Georgia's military action took place); *but cf.* Waters, *supra* note 53, at 210–11 (contending that Georgia's "use [of] serious force against Russian peacekeepers . . . plausibly implicated Russia's general right to self-defense").
[72] *See* Mastroianni, *supra* note 31, at 636.
[73] Farhad Mirzayev, *Abkhazia, in* SELF-DETERMINATION AND SECESSION IN INTERNATIONAL LAW 191, 206 (Christian Walters ed., 2014); *see also* Mastroianni, *supra* note 31, at 637.
[74] *See* Mastroianni, *supra* note 31, at 635–37; *cf.* CASEY-MASLEN, *supra* note 33, at 65–67 (articulating grounds for a state to use force in self-defense, grounds that do not include unsupported speculation that another state intends to use force).
[75] Independent International Fact-Finding Mission on the Conflict in Georgia, Report, vol II, 254; *see also* CASEY-MASLEN, *supra* note 33, at 66.
[76] *See* CASEY-MASLEN, *supra* note 33, at 69–74; *see also* Mastroianni, *supra* note 31, at 637–39.
[77] *See* CASEY-MASLEN, *supra* note 33, at 69.

Georgia, Russia not only did not have to pursue military action in response to Georgia's attacks on August 7, but it also had an obligation under Article 3(5) of the Sochi Agreement, which provided the grounds for the presence of Russian peacekeepers in Georgia, to pursue a peaceful resolution to any violation of the agreement.[78] Thus, Russia did not comply with the requirement of necessity in regard to its military intervention. Although Georgia killed eighteen peacekeeping troops from Russia when it attacked Tskhinvali on August 7, 2008, instead of pursuing a proportional response, Russia opted to respond with "overwhelming force,"[79] namely, a "full-scale military invasion" that extended beyond just Abkhazia and South Ossetia and saw Russian forces conduct military action in "undisputed Georgian territory."[80]

Russia lacked justification under the R2P principle to conduct its military operation in Georgia as well.[81] The 2005 World Summit Outcome document that endorsed R2P construed the responsibility to protect as applying to contexts in which "'national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'"[82] For there to have been grounds for Russia to intervene according to the R2P principle, Abkhazians and South Ossetians would have had to have "faced an extreme amount of peril at the hands of the Georgian state right before Russia intervened."[83] Though Russia claimed Georgia was perpetrating ethnic cleansing within South Ossetia, and Georgia did indeed put its own citizens in danger through its military action on August 7, 2008, evidence that Georgia was conducting ethnic cleansing or genocide was lacking.[84] The Independent International Fact-Finding Mission on the Conflict in Georgia,

[78] *See* Mirzayev, *supra* note 73, at 206.
[79] Waters, *supra* note 53, at 205–06.
[80] Mastroianni, *supra* note 31, at 637.
[81] *See id.* at 638–40.
[82] CASEY-MASLEN, *supra* note 33, at 117; *see also* Ashby, *supra* note 4.
[83] Mastroianni, *supra* note 31, at 639.
[84] *See id.*

operating on behalf of the EU, determined that Georgia had not carried out genocide,[85] and Human Rights Watch reached the same conclusion in its report.[86]

Also, Russia distorted the R2P principle vis-à-vis Georgia because the 2005 World Summit Outcome document speaks of States taking "'collective action'" within the ambit of R2P in response to mass atrocity crimes,[87] whereas Russia pursued unilateral action against Georgia.[88] In addition, R2P does not articulate grounds for a country to intervene on behalf of a population when the country considers that population connected to its national community or part of its sphere of influence, but rather when "mass atrocities committed against the civilian population" are occurring and state authorities are failing to provide civilians protection from those atrocities.[89] Ethnic Russian residents of Georgia were not Russian nationals in a legal sense, but even if they were, their links to Russia, absent the occurrence of mass atrocities against them, would not have given Russia justification for humanitarian intervention.[90] Thus, Russia's arguments for intervention in Georgia failed to justify its military actions on humanitarian grounds as well as on self-defense grounds.

B. Russia's 2014 Annexation of Crimea and the Conflict in Eastern Ukraine

In 2014, when Russia occupied and annexed Crimea and fomented an insurrection against the Ukrainian government in Donetsk and Luhansk,[91] it employed justifications resembling those it had used toward Georgia in 2008.[92] For instance, Putin presented Russia's occupation of Crimea as justified on the grounds that Russia was acting in self-defense on behalf of ethnic Russians living in Crimea.[93] However, this argument fails to pass muster, given that the circumstances of Russia's 2014

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[85] *See id.*
[86] *Id.* at 639 n.310.
[87] CASEY-MASLEN, *supra* note 33, at 117.
[88] *See* Mastroianni, *supra* note 31, at 640.
[89] *Id.*; *see also* CASEY-MASLEN, *supra* note 33, at 117.
[90] *See* Mastroianni, *supra* note 31, at 637–40.
[91] *See id.* at 645–46.
[92] *See id.* at 646–55.
[93] *See id.* at 649.

intervention in Ukraine, like its intervention in Georgia in 2008, did not implicate an armed attack on Russian territory but did see Russia allege it was defending ethnic Russians outside its territory.[94] Ukraine posed no threat to the "existence or security of the Russian state,"[95] and even if Russia's unsupported assertions that ethnic Russians in Ukraine faced a threat from Ukrainian nationalists had received empirical support,[96] a mere "threat of the use of force" is insufficient to provide a State legal grounds to use force against another State.[97]

Just as it had done vis-à-vis Georgia, Russia also alleged its 2014 intervention in Ukraine was justified on the ground of humanitarian rescue.[98] Russia framed the "appearance of 'little green men' in Crimea" as an effort to "'rescue'" the inhabitants of Crimea from the government that had taken power in Kyiv after former Ukrainian President Viktor Yanukovych had fled the country, with Russia presenting the "little green men" as protectors of the residents of Crimea from a "looming fascist invasion."[99] However, a State's invocation of humanitarian rescue as a justification for using force "requires the [target] state's citizens to be facing imminent death."[100] For his part, Putin portrayed ethnic Russians in Crimea as in danger from purported threats, going so far as to assert that "'[n]ationalists, neo-Nazis, Russophobes and anti-Semites executed'" the coup d'état that ousted Yanukovych from power, alleging that "'those who stood behind the latest events in Ukraine . . . wanted to seize power and would stop short of nothing'" and "'resorted to terror, murder, and riots.'"[101] Contrary to these dramatic and extraordinary claims, not only was there no evidence of imminent danger facing ethnic Russian residents of Crimea, but also Putin's assertions failed to

[94] *See id.*
[95] *Id.*
[96] *Cf.* TOAL, *supra* note 1, at 217–20 (describing Russia's substitution of efforts to frame itself as a rescuer of populations in Ukraine for a faithful representation of the complex realities of events in Ukraine).
[97] CASEY-MASLEN, *supra* note 33, at 67.
[98] *See* Mastroianni, *supra* note 31, at 649.
[99] TOAL, *supra* note 1, at 252–53.
[100] Mastroianni, *supra* note 31, at 650.
[101] *Id.*

articulate how those who supported Yanukovych's ouster from power would endanger the lives of Crimea's ethnic Russians.[102] Moreover, concerns about a potential threat of antipathy toward ethnic Russians, as indicated by Putin's singling out of so-called "Russophobes" in his allegations, does not meet the high threshold needed to justify humanitarian rescue, either, given that the focus of humanitarian rescue is on protecting populations who are in "imminent peril."[103]

In addition, Russia's invocation of historical ties between Russia and Ukraine to justify the annexation of Crimea fails to comport with the R2P principle because Russia emphasized its purported bonds of identity with Russian-speaking Ukrainians as supposed support for its intervention in Ukraine,[104] while the R2P principle emphasizes the continued perpetration of abuses against a State's civilians as support for intervention in that State.[105] Moreover, the R2P principle does not entertain the concept of a State taking unilateral military action, but instead addresses the prospect of collective action that States would pursue "through the Security Council" and "in accordance with the [UN] Charter."[106] Thus, Russia's actions in Ukraine in 2014 failed to line up with the content of the R2P doctrine.

C. The 2022 Russian Invasion of Ukraine

In a tactic that harkened back to its 2008 invasion of Georgia, Russia contended that Article 51 of the U.N. Charter provided it the justification to use force during its 2022 invasion of Ukraine.[107] However, Russia's argument that its invasion was in line with Article 51 does not pass muster because

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[102] *See id.*
[103] *Id.*
[104] *See also* Ashby, *supra* note 4 (noting that Russia related the protection of ethnic Russians to its intervention in Ukraine, using such supposed protection as a justification for its actions); *cf. Russkiy Mir: "Russian World," supra* note 5 (discussing Putin's use of the Russian World concept in the context of Russia's annexation of Crimea and Russia's practice of justifying its actions with regard to the supposed community linking Russians and ethnic Russians in other countries).
[105] *Cf.* Ashby, *supra* note 4 (specifying that the international community "should be prepared to take appropriate action together in accordance with the U.N. Charter" when a State has failed to provide its populations of civilians with protection).
[106] *What is R2P?*, *supra* note 44.
[107] *See* John B. Bellinger III, *How Russia's Invasion of Ukraine Violates International Law*, COUNCIL ON FOREIGN RELS. (Feb. 28, 2022, 2:25 PM EST), https://www.cfr.org/article/how-russias-invasion-ukraine-violates-international-law.

Ukraine had neither perpetrated an attack against Russia nor had threatened to do so.[108] Article 51 makes it clear that a State has the prerogative to pursue self-defense individually or collectively "if an armed attack occurs against a Member of the United Nations."[109] Without such an attack by Ukraine against a U.N. member State, Russia's argument that its invasion aligned with Article 51 fails to comport with the article's conditional language for justifying a resort to the use of force in self-defense.[110] Also, even though armed conflict had been ongoing between the Ukrainian government and pro-Russian separatists in Donetsk and Luhansk since 2014,[111] Russia did not have any justification to ground its military actions in Ukraine on collective self-defense vis-à-vis Donetsk and Luhansk.[112] Article 51 restricts the right to pursue collective self-defense to situations when a member State of the U.N. comes under armed attack, and Donetsk and Luhansk are not member States of the UN,[113] Russia's diplomatic recognition and subsequent annexation of those regions notwithstanding.[114]

Russia also invoked the language of humanitarian intervention to justify its invasion of Ukraine, employing the rhetoric of protection and rescue of supposedly endangered populations as it had done in Ukraine eight years earlier, as well as in Georgia in 2008.[115] Accusing Ukraine of perpetrating genocide against Russian-speaking inhabitants of eastern Ukraine, Russia did not provide evidence to support this assertion, which it had been contending since pro-Russian separatists gained

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[108] *See id.*
[109] U.N. Charter, art. 51, *supra* note 37.
[110] *See* CASEY-MASLEN, *supra* note 33, at 65–66.
[111] *See, e.g.*, Mastroianni, *supra* note 31, at 645–46 (noting that the pro-Russian governments of the Donetsk and Luhansk regions continued to engage in violent conflict with the Ukrainian government – with Russian supplies of logistics and weapons – after the annexation of Crimea).
[112] *See* Bellinger, *supra* note 107.
[113] *See id.*
[114] *See also* Paul Kirby, *What Russian Annexation Means for Ukraine's Regions*, BBC NEWS (Sep. 30, 2022), https://www.bbc.com/news/world-europe-63086767 (addressing Russia's self-proclaimed annexation of the Donetsk, Luhansk, Zaporizhzhia, and Kherson regions of Ukraine); *cf. Ukraine: Putin Announces Donetsk and Luhansk Recognition*, BBC NEWS (Feb. 21, 2022), https://www.bbc.com/news/av/world-europe-60470900 (referring to Russia's recognition of Donetsk and Luhansk as independent states in February 2022).
[115] *See* Paul Kirby, *Why Did Russia Invade Ukraine and Has Putin's War Failed?*, BBC NEWS (Nov. 16, 2022), https://www.bbc.com/news/world-europe-56720589.

de facto control over portions of Donetsk and Luhansk in 2014.[116] Russia's contention that Ukraine was carrying out "genocide" against ethnic Russians in Luhansk and Donetsk served as a particularly brazen and baseless assertion, for the Genocide Convention articulates genocide to mean "certain, specified actions intended to destroy in whole or in part a national, ethnic, racial, or religious group."[117] Not only did Russia's claims of genocide lack empirical support, but they also stood contrary to international law concerning the relationship between genocide and the use of force.[118] States lack the right to employ force to "remedy acts of genocide" under international law, as neither the U.N. Charter nor the Genocide Convention affords States such a prerogative.[119] Finally, Russia's actions in Ukraine in 2022 contravened the content of the R2P principle, just as its actions in 2014 had done, because Russia pursued military action unilaterally without the backing of the Security Council.[120] Russia even used its veto power in February 2022 to prevent the Security Council from adopting a resolution that "would have demanded that Moscow immediately stop its attack on Ukraine and withdraw all troops."[121] Therefore, Russia's invasion of Ukraine in 2022 completely lacks legal support from *jus ad bellum* principles and the R2P doctrine.

V. COLONIAL ANALOGUES OF R2P AND THE POTENTIAL FOR ITS MISUSE

Russia's distortions of R2P when justifying its military actions against Georgia and Ukraine highlights the R2P norm's vulnerability to misuse. After all, even though Russia's argument that it had a right to pursue military action to protect supposedly endangered ethnic Russians in Georgia and Ukraine is inconsistent with R2P, this inconsistency has not stopped Russia from continuing to distort

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116 *See id.*; *see also* Max Fisher, *Putin's Case for War, Annotated* N.Y. TIMES (Feb. 24, 2022), https://www.nytimes.com/2022/02/24/world/europe/putin-ukraine-speech.html; *see also* Bellinger, *supra* note 107.
117 Bellinger, *supra* note 107.
118 *See id.*
119 *See id.*
120 *Cf. What is R2P?*, *supra* note 44 (containing text from the 2005 World Summit Outcome Document that indicates states should go through the U.N. Security Council when taking collective action – not unilateral action – in accordance with R2P).
121 *Russia Blocks Security Council Action on Ukraine*, U.N. NEWS (Feb. 26, 2022), https://news.un.org/en/story/2022/02/1112802.

R2P.[122] However, not only does Russia's employment of the rhetoric of R2P to justify its aggression attest to R2P's susceptibility to distortion, but also R2P's historical analogues in arguments for colonialism demonstrate its vulnerability to abuse.

The concept of protecting populations from purported harm has an extensive history of use as a justification for European colonialism.[123] European States that engaged in colonialism applied a "standard of civilization"—a concept especially prevalent during the nineteenth century—to distinguish States that they deemed entitled to sovereignty and the prerogative of non-intervention from the remainder of the world, which they considered to lack full sovereignty.[124] In the view of European colonizing powers, the States considered "civilized" – and thus entitled to full sovereignty – were those whose inhabitants the imperial powers deemed white Europeans and whose economic, legal, and political systems conformed to Western criteria.[125] Although the "standard of civilization" permitted the inclusion of additional States within the cohort of "civilized" States, such inclusion required the alignment of a State or people's legal, economic, and political systems with the standards of Europe.[126] States and peoples that did not carry out this alignment were, according to European colonizers, insufficiently capable of governing themselves[127] and thus legitimate targets for European countries to subjugate, annex, and exploit.[128] Thus, European imperial powers contended that they had an obligation to "protect and civilise"[129] States and peoples "outside the club" of colonizing States by subjecting them to colonial rule.[130]

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[122] *See* Ashby, *supra* note 4.
[123] *See* Glanville, *supra* note 6, at 270.
[124] *See* Jack Donnelly, *Human Rights: A New Standard of Civilization?*, 74 INT'L AFFS. (ROYAL INST. INT'L AFFS. 1944–) 1, 3–7 (1998); *see also* Jessica Whyte, *"Always on Top"? The "Responsibility to Protect" and the Persistence of Colonialism*, *in* THE POSTCOLONIAL WORLD 308, 316–17 (Jyotsna G. Singh & David D. Kim eds., 2017).
[125] *See* Donnelly, *supra* note 124, at 3–7; *see also* Whyte, *supra* note 124, at 316–17.
[126] *See* Donnelly, *supra* note 124, at 7–8; *see also* Whyte, *supra* note 124, at 316–17.
[127] *See* Whyte, *supra* note 124, at 310.
[128] *See id.* at 314; *see also* Glanville, *supra* note 6, at 271.
[129] Glanville, *supra* note 6, at 270.
[130] *Id.* at 271.

At first glance, European colonial powers' self-serving narrative that they had the responsibility to "protect" peoples that lay outside the "standard of civilization"[131] might seem to have, at most, a tenuous connection to the rationales for intervention that R2P specifies.[132] After all, unlike European powers' arguments for colonialism, R2P centers on stopping atrocities, not justifying them in the name of imparting "civilization" to peoples that supposedly lack it.[133] Also, far from laying out justifications for intervention that would only have the backing of a select group of colonizing States, R2P obtained the support of all States at the 2005 U.N. World Summit.[134] Furthermore, R2P in no way permits imposing colonial rule on populations[135] purportedly deficient in their capacity for self-government.[136]

Despite these differences between arguments for colonialism and R2P, colonial protection narratives for intervention and particular arguments for the R2P norm contain problematic parallels.[137] The International Commission on Intervention and State Sovereignty (ICISS), the body that produced the U.N. World Summit resolution that endorsed R2P, sought to resolve the tension between those who supported a responsibility to protect prerogative for the international community to conduct intervention within States for humanitarian reasons and those who opposed such a prerogative.[138] To advocates of the R2P principle, the twentieth-century perpetration of mass atrocities such as those of the Holocaust, the Rwandan genocide, and the Srebrenica massacre exposed the dangers of allowing States to exercise their sovereignty without sufficient international accountability.[139] However, R2P supporters' arguments for a prerogative of intervention within the ambit of R2P also included critiques

131 *See* Whyte, *supra* note 124, at 316–17.
132 *See id.* at 309–10; *see also* Ashby, *supra* note 4.
133 *See* Glanville, *supra* note 6, at 270–72.
134 *See id.* at 271.
135 *See id.*
136 *See* Whyte, *supra* note 124, at 310.
137 *See* Glanville, *supra* note 6, at 269–72.
138 *See* Whyte, *supra* note 124, at 311–12.
139 *See id.* at 311.

of former colonies' policies alongside the argument that international interventions should be permissible when States, whether by a lack of will or a lack of capacity, do not live up to their responsibilities to protect populations under their rule.[140]

For instance, in their book *Sovereignty as Responsibility: Conflict Management in Africa*, Francis Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild, and I. William Zartman focused on the purported failures of former colonies to safeguard human rights,[141] arguing that sovereignty could only be legitimate if it involved a State's efforts to secure the protection of its people and the provision of their basic necessities.[142] Deng and his co-authors, whose book exerted a major influence on the ICISS's formulation of the R2P norm,[143] argued that postcolonial African States had prioritized development and nation-building over protection for human rights.[144] The authors contended that such States' economic policies fostered greater inequality and dissent, as well as repression of said dissent.[145] This narrative construed former colonies in Africa's human rights violations, as well as "mounting unrest, social tensions, civil violence, and ethnoregional conflicts," as the fault of those former colonies, downplaying the influence of colonialism and its aftereffects on these issues.[146] Thus, R2P supporters like Deng and his co-authors framed the issues inhibiting the protection of human rights in former colonies as chiefly the product of those former colonies' insufficient adherence to their responsibilities as sovereigns,[147] focusing attention away from the role of "Western states and international financial institutions" in "the failures of previous forms of intervention."[148]

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[140] *See id.* at 309.
[141] *See id.* at 309–10; *see also* FRANCIS M. DENG, SADIKIEL KIMARO, TERRENCE LYONS, DONALD ROTHCHILD & I. WILLIAM ZARTMAN, SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA 24–25 (1996).
[142] *See* DENG ET AL., *supra* note 141, at 27.
[143] *See* Whyte, *supra* note 124, at 309.
[144] *See* DENG ET AL., *supra* note 141, at 24–25.
[145] *See id.*
[146] *Id.* at 25.
[147] *See id.* at 24–25; *see also* Whyte, *supra* note 124, at 309–10.
[148] Whyte, *supra* note 124, at 311.

These arguments for R2P have exuded a characterization of many former colonies as having demonstrated a lack of ability to protect human rights adequately within their borders.[149] This inability to ensure sufficient protection for human rights supposedly gives the international community—in particular, Western States that formerly engaged in colonialism—a right to step in and conduct humanitarian interventions in those States.[150] Through its emphasis on the alleged failures of former colonies that purportedly give the international community the prerogative to intervene in those States, this characterization resembles arguments for colonialism that portrayed peoples whom imperial powers targeted as incapable of governing themselves and thus rightfully subject to intervention and colonization.[151] The comparison is even sharper because much of the literature concerning R2P has tended to focus on former colonies' failures to protect human rights sufficiently while treating former colonizers as part of the international community that would hold other States responsible for human rights violations.[152] Certainly, the grounds for intervention under R2P, especially military intervention, differ substantially from those that Western colonizers accepted under the "standard of civilization" narrative.[153] The R2P norm characterizes intervention as a means to secure sufficient protection of a State's inhabitants' human rights, not as a means to impose exploitative foreign rule when a State does not comply with Western standards regarding governmental and economic systems.[154] That said, the R2P norm's focus on the failures of former colonies as justifications for intervention deflects attention away from the impacts of colonialism on the political and economic problems that have complicated many former colonies' capacities to protect human rights.[155]

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[149] *See id.* at 309–10; *see also* DENG ET AL., *supra* note 141, at 24–25.
[150] *See* Whyte, *supra* note 124, at 309–13, 316–17.
[151] *See id.* at 316–17.
[152] *See id.* at 317.
[153] *See* Ashby, *supra* note 4; *see also* Glanville, *supra* note 6, at 271–72; Donnelly, *supra* note 124, at 3–7.
[154] *See* Glanville, *supra* note 6, at 270–72; *see also What is R2P?*, *supra* note 44.
[155] *See* Whyte, *supra* note 124, at 317–19.

This focus on former colonies' behavior also draws focus away from the capacity for States that invoke R2P when justifying interventions to go beyond the goal of stopping atrocities.[156] Defenders of the R2P norm should recognize the potential for States to appropriate the argument that other States are not living up to international standards of human rights to justify interventions that do not limit themselves to the aim of preventing further perpetration of human rights abuses.[157] In particular, Russia's justifications for its aggression against Georgia and Ukraine with the assertion that those States had failed to protect ethnic Russians demonstrates the capacity of States to co-opt the rhetoric of human rights standards that the R2P norm expresses opportunistically.[158] Russia's misuse of R2P illustrates that States carrying out interventions can employ the rhetoric of R2P to frame self-aggrandizing actions as supportive of a purportedly higher goal and allegedly necessary given the supposed failings of target States.[159]

The NATO intervention in Libya illustrated the potential for States to argue that the R2P norm justifies their intervention in another State even when such an intervention can ultimately exacerbate political disorder within the target State.[160] In its Resolution 1973, the U.N. Security Council authorized U.N. member States that would inform the U.N. Secretary-General of their actions and cooperate with him to pursue "all necessary measures . . . to protect civilians and civilian populated areas under threat of attack" in Libya.[161] NATO's actions in Libya did not share Russia's aim of obtaining territory at Ukraine's expense.[162] However, NATO's bombing campaign went beyond the stipulated aim of protecting Libyan civilians, resulting in regime change that did not bring an end to

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156 *See id.* at 312–13.
157 *See id.*
158 *See* Kirby, *supra* note 115; *see also* Mastroianni, *supra* note 31, at 646–55.
159 *Cf.* Ashby, *supra* note 4 (describing Russia's allegations that its aggression toward Georgia and Ukraine supported the goal of protecting ethnic Russians in those two States).
160 *See* Whyte, *supra* note 124, at 312–13; *see also* Glanville, *supra* note 6, at 270–71.
161 S.C. Res. 1973, ¶ 4 (Mar. 17, 2011).
162 *See* Whyte, *supra* note 124, at 312–13; *see also* Bellinger, *supra* note 107.

Libya's internal political turmoil.[163] The example of Libya, Russia's invocations of R2P in Georgia and Ukraine, and the colonial analogues of R2P attest to the determination that R2P, despite its many differences from arguments for colonialism, carries on such arguments' focus on alleged failures of States to comport with outsiders' standards of behavior as a justification for intervention.[164] States can therefore invoke the rhetoric of R2P and its emphasis on other States' compliance with international normative standards of State responsibility to justify interventions that can result in regime change, whether or not they initially intended regime change to occur because of their interventions.[165]

VI. MEASURES TO MITIGATE THE POTENTIAL FOR FUTURE DISTORTION OF THE R2P NORM

Russian distortions of R2P—and R2P's analogues with arguments for colonialism—raise the issue of how the international community may mitigate the potential for opportunistic misuse of the R2P principle as a rationale to engage in the use of force. In particular, Russia's consistency in violating international law while invoking the notion that it must protect the members of a Russian nation beyond Russia's borders highlights the importance of revising the R2P norm to shield it more effectively from further Russian distortion. Given the policy priorities of the Putin regime and the strength of the concept of the Russian World within the Russian government, Russia is highly unlikely to cease invoking the professed justifications for aggression that align with the Russian World narrative while Putin remains in power.[166]

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[163] *See* Whyte, *supra* note 124, at 312–13.

[164] *Cf. id.* at 309–13, 316–17 (analyzing the literature regarding R2P's typical emphasis on the failures of former colonies to safeguard human rights, as well as its failure to apply the same degree of scrutiny toward the actions of former colonial powers).

[165] *Cf. id.* at 312–13 (discussing the use of the R2P norm as a rationale for the NATO bombing campaign that contributed to the overthrow of Muammar Gaddafi's regime in Libya).

[166] *See also Russkiy Mir: "Russian World," supra* note 5 (conveying the widespread support for the Russian World narrative from various Russian interest groups, as well as the Russian government's opportunistic use of the Russian World narrative as a justification for actions it supposedly takes to protect ethnic Russians outside Russia); *cf.* Zevelev, *supra* note 5 (detailing that the Russian World concept has informed official Russian policy, including Russian foreign policy, and enjoys substantial support from Russian nationalists).

Potential revisions of the R2P norm would not necessarily preclude the possibility of States like Russia opportunistically distorting R2P. However, the international community should not merely stand by and not respond to the misuse of R2P when it can more expressly clarify that military intervention on behalf of a supposedly vulnerable population is not acceptable under R2P when empirical evidence of the threats to said population is lacking. Such a revision would not necessarily stop Russia's distortion of R2P. Still, it would provide further clarity to the disconnect between Russia's use of justifications related to R2P and the circumstances under which intervention is actually permissible under R2P. Clarifying that military intervention is not in accordance with R2P when a State pursues it unilaterally, without evidence of mass atrocities, or on grounds of professed bonds of common identity with a particular population would make it more difficult for States distorting R2P to contend that their actions are consistent with R2P. Thus, when States' behavior conflicts with R2P, the misalignment between their arguments for such behavior and the grounds for intervention that R2P countenances would be even starker, and States contravening R2P would have less room than ever to frame their actions as lawful.

Pursuing reform of how the U.N. Security Council's five permanent members, known as the P5, may use their Security Council veto poses one option for bolstering the R2P principle in the face of Russian distortions of R2P.[167] This avenue for responding to Russia's actions contrary to the R2P doctrine holds particular importance, given Russia's use of its veto to prevent the Security Council from approving resolutions to address the war in Ukraine. Specifically, Russia vetoed the Security Council resolution demanding that Russia cease its invasion of Ukraine and remove its forces from the country.[168] Russia also blocked the approval of a Security Council resolution that would have

[167] *See* Richard Illingworth, *Responsible Veto Restraint: A Transitional Cosmopolitan Reform Measure for the Responsibility to Protect*, 12 GLOB. RESP. TO PROTECT 385, 386–91 (2020), https://brill.com/view/journals/gr2p/12/4/article-p385_385.xml?ebody=pdf-63199.
[168] *See Russia Blocks Security Council Action on Ukraine*, *supra* note 121.

condemned and demanded the reversal of Russia's self-proclaimed annexation of four Ukrainian regions in late September.[169]

However, despite Russia's use of the veto to obstruct a Security Council response to aggression,[170] a formal amendment of the U.N. Charter to reform or even abolish the P5 members' veto power would constitute a "politically untenable" non-starter for the P5.[171] The P5 States have a tremendous incentive to maintain their veto prerogative and the authority on the international stage that it brings, for it provides those States a permanent tool to prevent the Security Council from taking measures contrary to their interests.[172] This lack of inducement for the P5 to back a formal Charter amendment concerning the scope of their veto power precludes the U.N. from having the de facto capacity to adopt a formal amendment about the P5 veto.[173] After all, Article 108 of the U.N. Charter requires that all the permanent members of the Security Council be among the two-thirds of the U.N. member States that must ratify amendments to the Charter.[174] Realistically, therefore, securing a formal amendment to the U.N. Charter to counteract the prospect of Russia abusing its veto power to obstruct Security Council action would not be a feasible option.

Nevertheless, reform of the P5 members' prerogative regarding the veto is possible if it were to take the form of "non-formal amendments" that would promote restraint in P5 members' application of their veto power.[175] A reform approach focused on fostering "voluntary restraint" among the P5 in regard to their use of the Security Council veto would necessitate the assent of all

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169 *See Russia Vetoes Security Council Resolution Condemning Attempted Annexation of Ukraine Regions*, UN NEWS (Sep. 30, 2022), https://news.un.org/en/story/2022/09/1129102.
170 *See id.*; *see also Russia Blocks Security Council Action on Ukraine*, *supra* note 121.
171 Illingworth, *supra* note 167, at 388.
172 *See id.*
173 *See id.* at 389.
174 U.N. Charter, art. 108; *see also* Illingworth, *supra* note 167, at 389.
175 Illingworth, *supra* note 167, at 389.

the P5 members, but it would offer the advantage of "not forc[ing] the P5 into a long-term binding commitment."[176]

Both a code of conduct that the Accountability, Coherence and Transparency (ACT) group has developed, as well as France and Mexico's "Political Declaration on Suspension of Veto Powers in Cases of Mass Atrocity,"[177] propose means for influencing the P5 to restrain themselves voluntarily from using their veto to stymie efforts of the Security Council to approve resolutions that aim to address mass atrocity crimes.[178] The ACT code of conduct calls for the P5 to agree to exercise restraint in vetoing Security Council resolutions that pertain to countering mass atrocity crimes.[179] Similarly, France and Mexico's initiative articulates an alternative proposal that fifty members of the U.N. General Assembly should request for the U.N. Secretary-General to make a determination of whether "an issue is one of mass atrocity crime."[180] Such a determination by the Secretary-General would be crucial according to France and Mexico's initiative, for that initiative calls upon all the P5 members to commit themselves voluntarily to "not use the veto in cases of genocide, crimes against humanity and war crimes on a large scale."[181] Thus, if the P5 members were to assume the commitment not to use the veto to block the approval of resolutions that seek to address mass atrocity crimes, they would face the self-imposed obligation to cease using their veto to halt Security Council action focused on circumstances in which the Secretary-General has determined that mass atrocity crimes are afoot.[182]

Although the notion of promoting veto reform through a strategy focused on securing P5 members' voluntary restraint has garnered considerable support from U.N. member States, with 122

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176 *Id.* at 396.
177 *In Hindsight: Challenging the Power of the Veto*, SEC. COUNCIL REP. (Apr. 29, 2022), https://www.securitycouncilreport.org/monthly-forecast/2022-05/in-hindsight-challenging-the-power-of-the-veto.php#:~:text=In%20August%202015%2C%20France%2C%20with,crimes%20on%20a%20large%20scale.
178 *See* Illingworth, *supra* note 167, at 395–97.
179 *See In Hindsight: Challenging the Power of the Veto*, *supra* note 177.
180 Illingworth, *supra* note 167, at 396.
181 *In Hindsight: Challenging the Power of the Veto*, *supra* note 177.
182 *See id.*

U.N. member States signing the code of conduct as of February 10, 2022 and 103 member States signing France and Mexico's declaration as of April 2022,[183] the international community would be unwise to place too much faith in the success of this approach to applying more pressure on Russia.[184] In contrast to the vast numbers of U.N. member States that have signed onto the ACT and French-Mexican proposals, as of early 2022, France and the United Kingdom were the only Security Council members that supported either of these proposals.[185] Seeking reform of the veto through voluntary restraint proposals would entail extensive difficulties, particularly the lack of likelihood of obtaining the support of remaining P5 members like Russia.[186] Thus, it would be too risky and too limited to hinge efforts to protect the R2P principle from Russian actions contrary to that principle's effectuation solely on the pursuit of veto reform.

Furthermore, veto reform would not adequately address the issue of Russia's distortion of R2P to provide a purported justification to its uses of force against Georgia and Ukraine. After all, Russia has not just taken action to prevent the international community from being able to pursue measures that would advance the aims of the R2P doctrine, but also has affirmatively presented its aggression against Georgia and Ukraine as means to protect ethnic Russians from alleged harm at the hands of the Georgian and Ukrainian governments.[187] Thus, the prospect of pursuing veto reform centered on voluntary restraint, by itself, is unlikely to suffice to stem Russia's self-serving use of its Security Council veto, let alone apply significant pressure on Russia in the wake of its distortion of the R2P principle.

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[183] *See id.*
[184] *Cf. id.* (conveying the difficulties of securing reform of the P5 States' Security Council veto and the limits to the backing that France and Mexico's initiative received).
[185] *See id.*
[186] *See* Illingworth, *supra* note 167, at 397.
[187] *See, e.g.*, Mastroianni, *supra* note 31, at 649.

Resolution A/RES/76/262, which the U.N. General Assembly adopted by consensus on April 26, 2022,[188] offers a more promising means to apply pressure on Russia to not use its veto power to prevent the Security Council from taking action to address mass atrocity crimes.[189] This resolution requires that whenever a P5 member vetoes a resolution in the Security Council, the General Assembly must convene within ten days to hold a debate concerning that particular use of the veto.[190] In doing so, the General Assembly has the means to apply scrutiny to how the P5 member in question has made use of its veto power. The General Assembly debate offers an opportunity for a P5 member that has vetoed a resolution to "account for the circumstances behind the use of the veto."[191]

Although the adoption of the April 26 resolution does not guarantee that P5 members such as Russia will feel more pressure to be circumspect in their use of the veto, especially given that Security Council member States already explain their votes publicly,[192] the resolution's requirement that a debate occur within ten days of any use of the veto provides for P5 members like Russia to face scrutiny for the application of their veto power more frequently.[193] Moreover, even if having more frequent General Assembly debates concerning the use of the veto does not necessarily inhibit Russia from using its veto power in a way that is inconsistent with the spirit of the R2P principle, the provisions of the April 26 resolution amount to an affirmative action that allows for U.N. member States to voice their disapproval of Russia's aggression toward Ukraine and its self-serving use of the veto.[194] Such rhetoric has the potential to reinforce international norms against Russia's opportunistic

[188] *In Hindsight: Challenging the Power of the Veto*, *supra* note 177.
[189] *Cf. id.* (communicating the potential for Resolution A/RES/76/262 to spur further accountability concerning P5 States' use of their veto prerogative and counteract gridlock on the issue of veto reform).
[190] *UN General Assembly Mandates Meeting in Wake of Any Security Council Veto*, UN NEWS (Apr. 26, 2022), https://news.un.org/en/story/2022/04/1116982.
[191] *Id.*
[192] *See In Hindsight: Challenging the Power of the Veto*, *supra* note 177.
[193] *See id.*
[194] *See id.*

behavior, and it is far superior to the option of passively refraining from taking any action in the face of Russia's troubling use of the veto power and distortion of the R2P principle.

The international community should also respond to Russia's misuses and misrepresentations of international law by articulating additional provisions within the R2P principle that would expressly state that unilateral military action, undertaken without the support of the U.N. Security Council and pursued without empirical evidence of the perpetration of mass atrocities against civilians, is impermissible under R2P. Although this clarification is unlikely to deter Russian aggression, especially given the deep-seated motivating factors that animate the Russian World narrative[195] and beliefs such as Putin's allegation that Ukrainians and Russians constitute a single nation,[196] it would provide an additional demonstration to the international community that unilateral action of the sort that Russia has pursued in Georgia and Ukraine is a flagrant violation of international legal norms.

Such an articulation of the R2P principle would also have the advantage of countering potential claims of R2P being too susceptible to arbitrary, cynical use. Russia itself has regarded the implementation of the R2P principle by Western countries with skepticism.[197] Many Russian analysts have distrusted the "altruistic motivations of Western leaders and R2P entrepreneurs" and have suspected that the "real reasons for intervening [in accordance with the R2P principle] have more to do with securing oil, advancing strategic interests, and attempting regime change than with saving lives."[198] This criticism from Russia provides even more impetus for the international community to

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[195] *Cf.* Zevelev, *supra* note 5 (detailing that the Russian World concept has informed official Russian policy, including Russian foreign policy, and enjoys substantial support from Russian nationalists); *Russkiy Mir: "Russian World," supra* note 5 (conveying the widespread support for the Russian World narrative from various Russian interest groups, as well as the Russian government's opportunistic use of the Russian World narrative as a justification for actions it supposedly takes to protect ethnic Russians outside Russia).

[196] *Cf.* TOAL, *supra* note 1, at 207–08 (analyzing comments by Putin that portray millions of Ukrainians as supposedly having a Russian identity).

[197] *See* Charles E. Ziegler, *Contesting the Responsibility to Protect*, 17 INT'L STUD. PERSPS. 75, 83 (2016), https://www.jstor.org/stable/44218892.

[198] *Id.*

pursue a revision of the text of the U.N. World Summit resolution that spelled out the three pillars of the R2P principle.

Therefore, the U.N. General Assembly should adopt a new resolution to supplement the U.N. World Summit resolution's characterization of R2P. Such a resolution should explicitly declare that the R2P norm does not countenance unilateral military action by a State within another State's territory when there is no empirical evidence that mass atrocity crimes are ongoing in the target State. Moreover, this General Assembly resolution should specify that regime change is not the goal of collective military action in accordance with the R2P norm. A resolution revising the content of the R2P principle also should note that R2P does not give States a special prerogative to pursue military action to protect populations in another State based on considerations of common ethnic, linguistic, or national identity. These clarifications should apply even where a State pursuing military action purports that it is protecting populations it claims are in danger of suffering atrocities.

Such a revision of the R2P norm would counter Russia's critiques of R2P by leaving less ambiguity in the doctrine for countries to exploit opportunistically, and it would demonstrate Russian hypocrisy, given Russia's failure to provide evidence that ethnic Russians in Georgia and Ukraine were suffering from mass atrocity crimes in 2008, 2014, or 2022.[199] Also, clarifying that the R2P norm does not concern itself with providing justifications for regime change would emphasize the distinctions between the principles of R2P and arguments that imperial powers have employed to justify colonialism. Unlike the European colonial powers' argument that they had the prerogative to colonize[200] and thereby extinguish other States' sovereignty,[201] R2P does not justify aggression that seeks to eliminate a State's sovereignty over its territory or overthrow a regime,[202] such as Russia's

[199] *See* Mastroianni, *supra* note 31, at 637–40, 650.
[200] *See* Glanville, *supra* note 6, at 270.
[201] *See id.* at 271.
[202] *See id.*

ongoing war in Ukraine,[203] for target States of collective action undertaken in alignment with R2P are to retain their sovereignty.[204] Finally, Russia's use of the Russian World narrative to justify its aggression toward Georgia and Ukraine highlights the importance of revising the R2P norm, for Russia has portrayed itself as having a duty to protect ethnic Russians in Georgia and Ukraine.[205] Such a construal of the responsibility to protect is inconsistent with the R2P norm's focus on holding States to account for mass atrocities.[206] After all, R2P does not concern itself with considerations of shared identity between the populations of intervening States and target States.[207] Thus, a General Assembly resolution revising the R2P norm should explicitly declare that ties of common identity between a State and allegedly vulnerable populations in another State do not justify military intervention under R2P. Given these considerations, the international community would do well to respond to Russia's misuse of R2P by articulating that R2P does not countenance military interventions pursued absent Security Council authorization, legitimate evidence of mass atrocity crimes, or a good-faith goal of stopping said crimes.

VII. CONCLUSION

By invading both Georgia in 2008 and Ukraine in 2014 and 2022, Russia violated and distorted international legal principles of *jus ad bellum*, as well as the R2P principle, its assertions that its actions were justified under international law notwithstanding. Though the Russian assertions that its aggression toward Georgia and Ukraine align with international law fail to pass muster, Russia's arguments reflect the impact of decolonization in the former Soviet Union. Faced with the difficult circumstances of adjusting to new geopolitical circumstances in which many communities and places

[203] *Cf.* Mark Trevelyan, *Russia Declares Expanded War Goals Beyond Ukraine's Donbas*, REUTERS (July 20, 2022, 10:43 AM CDT), https://www.reuters.com/world/europe/lavrov-says-russias-objectives-ukraine-now-go-beyond-donbas-2022-07-20/ (conveying Russia's intention to seize Ukrainian territory through its war in Ukraine).
[204] *See* Glanville, *supra* note 6, at 271.
[205] *See* Ashby, *supra* note 4.
[206] *See id.*
[207] *See id.*; *see also What is R2P?*, *supra* note 44.

with historical, ethnic, or linguistic ties to Russia were now disconnected from Russia politically, Russia opted to construe ethnic Russians outside its borders as part of its national community and asserted it had the prerogative to pursue military interventions to "protect" said ethnic Russians from supposed threats.

Russian motivations for carrying out its invasions of Georgia and Ukraine – and its purported legal justifications for doing so – reflect Russia's adjustment to the post-Soviet landscape in its near abroad. Neither representations of Russia's behavior as stemming from an "essential disposition toward territorial expansionism"[208] nor estimations that Russia has acted with "a strategic logic grounded in a relationship between geography and security"[209] fully characterize Russia's impetuses for breaching and distorting *jus ad bellum* and the R2P principle.[210] Recognizing that Russia's motivations for carrying on its aggressive behavior toward Georgia and Ukraine are unlikely to shift for the time being, the international community should articulate a more detailed iteration of the R2P principle to lessen the likelihood that States may use the ambiguities in the R2P principle to justify acts of aggression that violate international law.

[208] TOAL, *supra* note 1, at 26.
[209] *Id.* at 30.
[210] *See id.* at 33–47.

Chapter 3:

Colonial Residues on Comparative Legal Systems

A drawing showing a session of a regional court in Indonesia at the height of colonial power in 1865. Credit: Leiden University Libraries

Essay 1

Judicial Dependency: American Building, Breaking, and Re-Building of Philippine "Democracy"

I. INTRODUCTION

The United States colonized the Philippines in 1902 and shaped the Philippine legal system to mirror America's legal system. After World War II and the Japanese occupation of the Philippines, the United States ceded the islands as a colony. Nonetheless, American influence over the Philippines persisted. In 1986, the U.S. government helped facilitate Ferdinand Marcos' proclamation of Martial Law. Despite the United States' support for Marcos, after Martial Law ended, Filipinos relied on U.S. courts to litigate civil claims against Marcos.

Perhaps this tension—between the United States supporting Martial Law but also adjudicating claims against Martial Law—is a "colonial residue." The United States' colonial history in the Philippines made it the ideal venue to bring claims against Marcos. Foundationally, during their colonial rule, the United States molded the Philippine legal system to match the American. In doing so, the United States maintained consistent public messaging about spreading "democracy" on the islands. When Marcos established Martial Law, his message was consistent with the United States': to spread democracy. Then, the United States seamlessly became the ideal venue to try civil claims against Marcos.

This Paper analyzes the chronological progression of the United States' legal influence in the Philippines. In sum, the United States' influence may be analyzed in three phases: the "building,"

"breaking," and "re-building" of Philippine democracy. Under the guise of spreading "democracy," each phase reveals colonial intent: to extract Philippine resources for the United States' benefit. To start, this Paper discusses America's colonization of the Philippines and establishment of a "democracy" based on American law. This first phase of "building democracy" molded the Philippine legal system after the United States' and created a strong foundation for continuing American presence in the Islands. Second, this Paper analyzes America's role in "breaking democracy" by supporting the dictator, Ferdinand Marcos. Indeed, this phase reveals some of the United States' underlying intentions in the Philippines: to leverage Philippine land and positioning in the Pacific. Third, this Paper argues that despite the United States' support for Marcos, American courts became venues to litigate civil claims against Marcos. In doing so, the United States appeared to be part of "re-building democracy" and administering justice to those harmed under the dictatorship. The tension between American support for Philippine democracy and a Filipino dictator demonstrates the colonial goals of the United States in the Philippines.

II. BUILDING DEMOCRACY: THE BEGINNING OF UNITED STATES' COLONIAL RULE

The United States successfully controlled the Philippines, at least in part, because of the legal system they established. American diplomatic relations with the Philippines intensified during the Filipino rebellion against Spain—the first colonial power in the Islands. In 1898, Emilio Aguinaldo led Indigenous Filipinos to declare independence from Spain.[1] The United States supported Aguinaldo's rebellion, and a U.S. representative regularly met with Aguinaldo. However, when Aguinaldo took control of the government, the United States "refused to recognize his civil authority."[2]

[1] Timothy J. Foley, *The Jud. Failsafe: Am. Legal Colonialism in the Philippines*, 62 AM. J. OF LEGAL HIST. 158, 165 (2022).
[2] *Id.*

In fact, following the Battle of Manila Bay, Spain ceded the Philippines to the United States. As the United States settled into its imperial role, American leaders offered varying strategies for governing the Philippines.[3] Most prominently, President McKinley, who "annex[ed] the entire archipelago,"[4] solidified the United States' mission in the Philippines. He, perhaps superficially, rejected other notions of colonialism as the "British 'white man's burden'" or "French 'civilizing mission.'"[5] Instead, President McKinley perceived an American mandate to "create a democratic state," in the Philippines.[6] President McKinley also appointed William Howard Taft the Governor-General of the Philippines. Taft "thought his role resembled that of a missionary, spreading the gospel of 'American democracy' to the Pacific world."[7] Although "US officials like McKinley and Taft professed a strong allegiance to democratic tutelage, this theory of colonialism quickly became a facade to justify long-term, if not perpetual control of the islands."[8]

McKinley and Taft asserted control by re-structuring the Philippine government. The re-structured government closely mirrored the United States' own government and empowered American officials to monitor the islands. The structure also made the Islands highly dependent on American officials, laws, and courts. To start, the U.S. Constitution was recognized as the Philippine's governing constitution for over three decades. In 1935, United States' President Franklin Delano Roosevelt signed and ratified the Philippine Constitution.[9] Further, mirroring the United States' legislature, the Philippine government adopted a bicameral legislative model with a Senate and House of Representatives.

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[3] *Id.*
[4] *Id.* at 166.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 159-60.
[8] *Id.* at 167.
[9] *Philippine Legal Rsch.*, GLOBALEX, https://www.nyulawglobal.org/globalex/Philippines.html#_1._Introduction (last visited Jan. 7, 2023).

Importantly, McKinley and Taft controlled the Philippine judiciary.[10] The United States' goals with the Philippine's judiciary were long-term and encouraged Philippine dependence on the United States. Taft wrote about his plans to "change the official language of legal proceedings to English in 'three or four years.'"[11] Further, Taft affirmed his commitments to "appoint for a term at least U.S. lawyers who will afford an example to these people of what Anglo Saxon justice is."[12] Taft's quotes also reveal the veiled racism behind their "democracy" mission. Terming Filipinos as "these people" and claiming "US lawyers" will bring "Anglo Saxon justice" echoes colonial ideologies—such as the "white man's burden" and "civilizing missions."

Taft succeeded in making the Philippine judiciary dependent on the United States. Most notably, the Supreme Court of the Philippines exemplified the United States' colonial control. To start, the Philippine Supreme Court was not the final authority. Rather, Philippine Supreme Court decisions were appealable to the U.S. Supreme Court. Those decisions were also reported in the U.S. Supreme Court Reports. Further, most Philippine Supreme Court justices were Americans.[13] Four of the seven justices were American. The other three were Filipino. Notably, Taft appointed Cayetano Arellano as the Chief Judge of the Supreme Court of the Philippines. Arellano, a Filipino lawyer and judge, was well respected by Filipinos, Spanish, and Americans alike.[14] Rather than an effort to empower Filipinos, Taft's appointment may have been strategic. One scholar wrote that,

> While colonial leaders like Taft favored stocking the Filipino bench with US transplants, the appointment of a Filipino as the first Chief Justice likely bolstered the facade that the people of the islands would be 'taught' to govern themselves without compromising colonial control due to Arellano's favorable views toward the colonial project.[15]

[10] Foley, *supra* note 1, at 159.
[11] *Id.* at 168.
[12] *Id.*
[13] *Philippine Legal Rsch.*, *supra* note 9.
[14] Foley, *supra* note 1, at 169.
[15] *Id.*

Thus, the United States effectively balanced controlling the judiciary directly with American judges and indirectly through pro-American Filipino judges.

In effect, the Philippine judicial system reinforced American power in the Islands. Judicial control over the Philippines also deepened the impact of Spain's colonization of the Philippines. For example, American occupation in the Philippines divided the country along "Hispanicized and non-Hispanicized people."[16] In general, Hispanicized Filipinos were Christian and elites.[17] The Philippine judicial system excluded peasants—poor, non-Hispanicized, non-Christian workers. Only Filipino elites could participate in the judicial process. Essentially, Filipinos who complied with the previous colonizer, Spain, were rewarded with power in the following colonial regime.

III. BREAKING DEMOCRACY: THE UNITED STATES' SUPPORT FOR PHILIPPINE MARTIAL LAW

Throughout the United States' control over the islands, the United States continued to claim that the Philippines benefitted from their democratic mission. But the United States received significant security and economic benefits from the colony. Also, the period of Martial Law—wherein the United States supported the dictator Ferdinand Marcos—revealed that American leaders prioritized benefitting from the colony rather than spreading democracy. American benefits in the Philippines include that the United States operated two important strategic bases: the Clark Air Force Base and Subic Bay Naval Station, both on Luzon Island in the Philippines. In addition, the United States benefited from the Philippines' resources and economic partnerships. The United States also leveraged Philippine laborers, including for naval, agricultural, and medical jobs.

The United States continued to support the Philippine government as Ferdinand Marcos declared Martial Law on September 21, 1972. Marcos' proclamation of Martial Law was based on upholding democratic principles. Specifically, he claimed that the "New People's Army" was

[16] *Id.* at 168.
[17] *Id.*

"pursuing relentless and ruthless armed struggle against our duly constituted government … in Cagayan Valley, in Central Luzon, in the Southern Tagalog Region, in the Bicol Area, in the Visayas and in Mindanao."[18] Marcos asserted that Martial Law was necessary "to sustain and defend our government and our democratic way of life."[19]

PHILIPPINES Sunday Express
THE NATIONAL DAILY NEWSMAGAZINE
VOLUME 1, NO. 141 SUNDAY, SEPTEMBER 24, 1972 16 PAGES
10 CENTAVOS

FM DECLARES MARTIAL LAW

The nat'l situation in brief

• This is not a military takeover. Civilian government still functions. The officials and employes of the national and local governments continue to discharge their duties as before within the limits of the situation.

• All executive departments, bureaus, offices, agencies and instrumentalities of the government, as well as government-owned or controlled corporations, governments of provinces, cities, municipalities and barrios continue to function under the present officers and employes in accordance with existing laws.

• The judiciary shall continue to function under the present organization and personnel and try and decide all criminal and civil cases with certain exceptions.

• All schools will be closed for one week beginning this Monday for all levels.

• Carrying of firearms outside the residence even if covered by license but without permission of the armed forces is prohibited.

• Curfew will be imposed from 12 midnight to 4 o'clock in the morning.

• Departure of Filipinos for abroad is temporarily suspended except for official missions.

(Please turn to Page 3)

PRESIDENT MARCOS addresses nation on television broadcast.

But civilian gov't still functions; no military takeover

President Marcos announced last night that he had placed the entire country under martial law to prevent violent overthrow of the government by a foreign-backed Communist insurgency.

The Chief Executive said he signed the martial law order (Proclamation No. 1081) last Sept. 21, 1972, and authorized its implementation by the military at 9 p.m. Friday.

"I am utilizing the proclamation of martial law," he said, "for one purpose alone: to save the Republic and reform society."

To save the Republic and form a new society

In imposing martial law, Mr. Marcos said he would likewise wield this emergency power to establish for the country a "new society" cleansed of the evils of corruption and ineptitude in government.

He President stressed the imposition of martial law does not mean a military takeover. The government of the Republic continues, he declared, adding that the officials and employes of the government will continue to discharge their functions as before within the limits of the situation.

(Please turn to Page 2)

Nation is calm; business, life go on normally

The nation has taken President Marcos' declaration of martial law calmly.

There was some amount of apprehension early in the day, caused by the absence of the usual morning papers in the streets; the silence of most radio and television; and the reports of domestic travellers who had gone to the airport and discovered that all flights had been suspended indefinitely.

As the day wore on, however, this apprehension seemed to have dissolved into the day's chores. And the principal reason must have been the conspicuous scarcity of soldiers in the city's main thoroughfares, where traffic continued to be directed by a handful of Manila policemen. During the day, traffic was, as usual, intolerable. It would peak later in the afternoon, as people hurried home to listen to the presidential proclamation, and subside early in the evening, when shopping centers which saw normal business during the day started to close up.

There was heavy buying in some supermarkets, but that is usual on Saturdays. Banco Filipino, one of the few savings banks which open on Saturdays, posted notice at ten o'clock in the morning that it was suspending operations on account of the "uncertain situation." By and large, however, the people seem to have adapted themselves readily to the situation. This much the *Express* gathered after a day-long survey of the Greater Manila area.

In front of ABS-CBN on Bohol Avenue, Quezon City, a few girls swarmed in front of the gate, shyly asking the marines in command what seemed to be the matter, for Saturdays in ABS-CBN are usually alive beyond belief. They were politely informed that the studios had been closed.

Nearby, a few executives of the network huddled, analyzing the situation. They said that the gate was sealed at two o'clock the previous evening. Their faces expressed regret, but Choy Arnaldo, the anchorman of the award-winning television series *Sandigan*,

(Please turn to Page 3)

Newspaper headline when Marcos declared Martial Law.[20]

Despite Marcos' claims to further democracy, Martial Law consolidated power in Marcos and established a dictatorship. The proclamation merged the Prime Minister's powers into the President's.[21] In addition, military tribunals were established. Beyond consolidating legal power in

[18] Proclaiming a State of Martial Law in the Philippines, Proclamation No. 1081, s. 1972, O.G. (Sept. 21, 1972), https://www.officialgazette.gov.ph/1972/09/21/proclamation-no-1081/.
[19] *Id.*
[20] O.G., *supra* note 18.
[21] *Philippine Legal Rsch.*, *supra* note 9.

Marcos and the military, Martial Law facilitated extreme human rights violations. Marcos instituted widespread arrests and detentions and allowed disappearances, killings, and torture of people who were critical of the government. In fact, Marcos had admitted that 50,000 people—specifically "church workers, human rights defenders, legal aid lawyers, labour leaders, and journalists"—were arrested and detained under Martial Law from 1972 to 1975.[22] Martial Law also significantly impoverished Filipinos—by the end of Martial Law, 60 percent of Filipino families were considered poor.[23]

Despite these concerns, the United States supported Marcos' regime. In 1973, during President Richard Nixon's meeting with John Scali, the U.S. Ambassador to the United Nations, Nixon candidly spoke about his support for Marcos. The conversation took place during Martial Law in the Philippines. Nixon said,

> Take Marcos - - I won't lecture him on his internal structure, either the Philippines or the Communists. Our concern is foreign policy except for something like genocide, etc. We will aid dictators if it is in our interest. We have objectives to give aid to Yugoslavia, Romania, Poland. Our concern with Cuba, China, and the USSR is their external policy of external aggression and subversion.[24]

Nixon's willingness to "aid dictators if it is in [the United States'] interest" overtly demonstrates the United States' goals for its colonial legacy.

Indeed, the United States received security and economic benefits for supporting Marcos. In the late 1970s, during the end of the Vietnam War, the United States' security and economic reliance on the Philippines increased. During the Vietnam War, Philippine bases were highly active and important sources of control, especially given their proximity to the former French Indochina.[25] Then, President Nixon began a policy of "Vietnamization," which reduced the American military's presence

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[22] *Five things to know about Martial Law in the Philippines*, AMNESTY INT'L (Apr. 25, 2022), https://www.amnesty.org/en/latest/news/2022/04/five-things-to-know-about-martial-law-in-the-philippines/.
[23] Martial Law Museum, *supra* note 18.
[24] MEMORANDUM OF CONVERSATION, THE WHITE HOUSE (Feb. 13, 1973, 11:30 AM), https://www.fordlibrarymuseum.gov/library/document/0314/1552556.pdf.
[25] WILLIAM J. POMEROY, AN AM. MADE TRAGEDY: NEO-COLONIALISM AND DICTATORSHIP IN THE PHILIPPINES 93 (New York: International Publishers, 1974).

in Asia. Given the decrease in troops in Asia, President Nixon's policies led to greater emphasis on the United States' naval presence. Marcos pledged to ensure American presence on the Islands and would continue the United States' bases. In addition to Marcos' commitment to the United States' naval presence in the Philippines, Marcos also supported American business interests. Specifically, Marcos would ease restrictions on foreign property ownership.[26]

The United States' policies toward Marcos evolved over the years, but the United States' ability to pressure Marcos to change was limited. Near the later years of Martial Law, the United States began to change its policies toward Marcos. President Jimmy Carter began prioritizing human rights as a foreign policy agenda—distinct from "previous Republican presidents before and after his term."[27] Prior to Carter, "US-supported dictators … ruled with impunity and reckless abandon as they enjoyed full American support so long as they promote or preserve America's interests."[28] Instead, Carter began restricting "economic assistance and military aid … only if recipient countries subscribed to a modicum of civil liberties and political reforms."[29] In response to Carter's policies, in January 1978, Marcos initiated the Philippines' first election under his rule.

Although the United States' policies toward Marcos evolved, the United States' intervention against Marcos was limited. Termed the "American dilemma," "the importance of the U.S. military bases in the Philippines, the intrusion of the superpower conflict into Southeast Asia, and the fear of a growing communist movement in the Philippines all place[d] limits on how far American foreign policy [could] change."[30] Essentially, the United States' support for Marcos led to "breaking" democracy, countering American prior ambitions to further the democratic mission in the Philippines.

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[26] DANIEL J. SARGENT, A SUPERPOWER TRANSFORMED: THE REMAKING OF AM. FOREIGN POL'Y 53 (New York: Oxford University Press, 2015).
[27] Martial Law Museum, *supra* note 18.
[28] Martial Law Museum, *supra* note 18.
[29] Martial Law Museum, *supra* note 18.
[30] Gary Hawes, *U.S. Support for the Marcos Administration and the Pressures that Made for Change*, 8 YUSOF ISHAK INSTITUTE 18, 19 (1986).

IV. RE-BUILDING DEMOCRACY: ADJUDICATING MARTIAL LAW CRIMES IN THE UNITED STATES

Despite the United States' support for the dictator, American courts became the venue for adjudicating Marcos' crimes during Martial Law. After Marcos lost control of the presidency in February 1986, six civil lawsuits were filed against him in the United States.[31] In general, there were "two types of lawsuits" against Marcos.[32] The first type was on behalf of around ten thousand people—the "victims of torture, disappearance, and summary execution from Marcos' declaration of martial law in September 1972 until his departure from the Philippines."[33] The second type of lawsuits were actions on behalf of around thirty named individuals.[34]

The Marcos trials were the "first lawsuit[s] for human rights abuses in another country that was tried on its merits in a U.S. court."[35] The Philippines' court systems were unavailable—Philippine law required a defendant to be physically within the jurisdiction when they were served.[36] Notably, Marcos asserted that he was willing to return to the Philippines to defend himself.[37] President Corazon Aquino, however, refused to allow Marcos' return.[38] Further, international tribunals were limited at the time—there was no universal jurisdiction to prosecute torture claims.[39] Thus, the United States became an important forum for adjudicating Marcos' human rights abuses.

The United States had jurisdiction to hear the cases based on the Alien Tort Claims Act, which states that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[40] Thus, because the

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[31] Ellen L. Lutz, *The Marcos Hum. Rts. Litig.: Can Just. Be Achieved in U.S. Courts for Abuses that Occurred Abroad?*, 14 BOSTON COLL.THIRD WORLD L. J. 43, 43 (1994).
[32] *Id.*
[33] *Id.* at 44.
[34] *Id.* at 43.
[35] *Id.* at 45.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] Notably, the Convention Against Torture now requires that states make torture a punishable offense when committed within their territory by or against nationals.
[40] Lutz, *supra* note 31, at 43.

Alien Tort Claims Act only establishes jurisdiction for civil claims, Marcos did not receive criminal penalties for his acts during Martial Law.[41] Additionally, the United States' Foreign Sovereign Immunity law barred the plaintiffs from naming the Republic of the Philippines as the defendant.[42] Consequently, the plaintiffs sued Marcos as an individual for civil claims. Notably, jurisdiction was still an issue in certain cases such as *Guinto v. Marcos*,[43] because the Act of State doctrine barred the court from ruling on "acts of a foreign head of State acting in his official capacity."

Indeed, Filipino claimants encountered challenges adjudicating claims against Marcos in the United States. To start, the Philippine government "acted neither quickly nor diligently to establish the truth."[44] The government had not investigated the human rights abuses. In addition, government records and information from government officials, which would likely contain evidence of human rights abuses, were not accessible.[45] Evidence against Marcos was often in the Philippines and inaccessible from the United States. Filipino litigants also faced other challenges, such as "cultural and linguistic barriers" and "difficulties obtaining visas."[46] Contributing to these barriers, the United States' courts were a foreign forum with foreign substantive, procedural, and evidentiary rules.[47] Claimants, therefore, had to learn American systems while also adjudicating their cases. Nonetheless, the Philippine government expressed its support for the human rights litigation against Marcos in the United States.[48]

Despite these challenges, some lawsuits successfully brought a form of justice to plaintiffs. For example, in *Trajano v. Marcos*, 978 F.2d 493 (9th Cir. 1992), there was a default judgment of $4,161,000 against Marcos' daughter. The decision upheld the "law of nations" to adjudicate claims

[41] *Id.* at 48.
[42] 28 U.S.C. § 1605 (1993).
[43] 654 F. Supp. 276, 280 (S.D. Cal. 1986).
[44] Lutz, *supra* note 31, at 47.
[45] *Id.* at 47-48.
[46] *Id.* at 47.
[47] *Id.*
[48] *Id.* at 50.

of "wrongful death" and "torture in violation of a *jus* cogens norm of international law."[49] However, Marcos did not face criminal penalties. While "the result [of the trials] was a compromise, it was a welcome one."[50]

Although the United States provided a jurisdiction to try civil claims against Marcos, court orders were limited. According to Amnesty International in 2022, "[j]ustice remains elusive" for the Philippines.[51] Today, several families continue to lack proper documentation to prove violations committed during Martial Law. As a possible remedy, the Philippine government created the Human Rights Victims' Claims Board (HRVCB). The HRVCB was intended to "receive, evaluate, process, and investigate repatriation applications" of violations committed during Martial Law.[52] The HRVCB defined categories of human rights violations: killing and enforced disappearance; torture; cruel, inhumane, and degrading treatment; arbitrary detention; and involuntary exile.[53] The HRVCB found 11,103 victims of human rights violations during Martial Law, but there were over 75,000 claimants.[54] Despite the several thousand claimants who have not yet received justice, the HRVCB ceased operations in 2018.[55]

V. CONCLUSIONS

The United States' colonial regime impacted the long-term stability of the Philippine government. Since the United States colonized the Islands in 1902, they built the Philippine's legal body to depend on American law. In return, the United States extracted resources, labor, and secured important military bases in the Pacific. Although the Philippines was no longer a U.S. colony after World War II, the American colonial regime continued to impact the Philippines. In 1972, the United

[49] Trajano v. Marcos, 978 F.2d 493, 503 (9th Cir. 1992).
[50] Lutz, *supra* note 31 at 51.
[51] *Five things to know about Martial Law in the Philippines*, *supra* note 22.
[52] *Roll of Victims*, HUMAN RIGHTS VIOLATIONS VICTIMS' MEMORIAL COMMISSION, https://hrvvmemcom.gov.ph/roll-of-victims/ (last visited Jan. 7, 2023).
[53] *Id.*
[54] *Id.*
[55] *Five things to know about Martial Law in the Philippines*, *supra* note 22.

States supported Marcos' dictatorship, and in the years after Marcos' fall from power, the United States adjudicated civil claims against Marcos. The tension between supporting Marcos' dictatorship but also adjudicating claims against Marcos is a colonial residue—an effect of the United States' strong and continued interest in the Philippines.

As a recommendation, the United States should commit to supporting HRVCB and other efforts to bring justice to those impacted by Martial Law. In doing so, the United States must acknowledge its own role in enabling Marcos. In addition, public memory of the United States' colonial role in the Philippines is limited. History textbooks, museums, and public discourse often do not acknowledge the United States' colonial presence in the Islands. These sources, instead, must recognize the United States' contributions to building the Philippine democracy to be dependent on the United States. Building public memory around history will encourage more dialogue about colonial histories and empower action to remedy injustices caused by colonial residues.

Essay 2

Colonial Influences in Suriname's Constitution-Making Process: A Cautionary Tale

I. INTRODUCTION: DUTCH INFLUENCE IN SURINAME'S CONSTITUTION

A society's constitution forms the basis of all other laws of the country and binds the people it governs to comply with its provisions. The idea of compliance with the constitution is largely based on liberal social contract theory, where consent of the people to give up certain freedoms forms the basis of a government's validity.[1] Modern constitutions are meant to reflect the values and principles of the people in addition to establishing the structure of the political regime.[2] For constitutions to be binding on a group of people, and to be obeyed and respected without threat of force, there must be some indication that it was adopted with the consent of the people and reflects the values of the people it governs.[3] The people must perceive the constitution as legitimate to ensure free and voluntary compliance.[4] Participation of the people in the constitution-making process contributes to a constitution's legitimacy.[5] When a constitution does not align with the publicly held values of the people, it creates a disjuncture between the people and the law and is unable "to penetrate its society,

[1] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971).
[2] *See* F.T. Abioye, *Constitution-Making, Legitimacy and Rule of Law; A Comparative Analysis*, 44 COMPAR. & INT'L L. J. S. AFR. 59, 61 (2011).
[3] *Id.*; *See* Claude Klein & András Sajó, *Constitution-Making: Process and Substance*, *in* OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 419, 424 (Michel Rosenfeld & András Sajó eds., 2012).
[4] Abioye, *supra* note 2, at 61.
[5] *Id.*; Klein & Sajó, *supra* note 3, at 419.

to effectively regulate social relationships within its territory, to extract needed resources from its citizens and to manage those resources in rational ways."[6]

A discrepancy between the values of the people and the values codified in the constitution can contribute to a weak rule of law.[7] This Paper will analyze public participation in the constitution-making process in Suriname in the 1980s that led to its current constitution. The initiation of the constitution-making process was heavily influenced by external factors, in particular the withdrawal of development aid from the Netherlands after political murders in 1982. The Dutch government made resumption of aid conditional upon Suriname becoming a democracy, and, due to Suriname's dire economic situation, this influenced the political leaders to initiate the drafting of a new constitution. Representatives appointed by a military regime that was not democratically elected drafted the new constitution. Because the Dutch required particular democratic values to be embedded in Suriname's governance structure, the constitution was drafted with the Dutch conditions in mind, rather than the values of the people of Suriname. This causes a discrepancy between the values embedded in the constitution and those held by the people of Suriname. Although the new constitution was adopted through a referendum, the external factors influencing the initiation of a constitution-making process and the lack of public participation in the drafting process decreased the legitimacy of the constitution. The lack of legitimacy of the constitution likely contributes to the weak rule of law in Suriname today.

II. HISTORICAL BACKGROUND

[6] Abioye, *supra* note 2, at 60 (quoting P. Ocheje, *Exploring the Legal Dimensions of Political Legitimacy: A Rights Approach to Governance in Africa*, *in* LEGITIMATE GOVERNANCE IN AFRICA: INTERNATIONAL AND DOMESTIC LEGAL PERSPECTIVES 165, 168 (E.K. Quashigah & O.C. Okafor eds., 1999)).
[7] *See id.* at 61.

Suriname gained independence from the Netherlands in 1975, after over 300 years of colonial rule, although Suriname had been largely "self-governing" since 1945.[8] The Dutch government began granting Suriname limited amounts of independence after World War II, when the Dutch governor who had previously held exclusive control relinquished some power to the elected College van Algemeen Bestuur (CAB) in 1949.[9] The CAB had the official duty of assisting the governor in ruling Suriname, but increasingly expanded its responsibilities.[10]

In 1975, negotiations between the Dutch and Surinamese governments concluded, and Suriname became independent with the promise of 3.5 billion Dutch gulden in development aid over the next ten to fifteen years.[11] A new constitution was passed, which essentially mirrored the Charter implemented in 1945 that made Suriname self-governing.[12] In 1980, a military coup led by Dési Bouterse was the response to declining public trust in the government after scandals surrounding corruption and excessive spending came to light.[13] The coup suspended the 1975 constitution and replaced it with a system of authoritarian military rule, bringing an end to democratic Suriname.[14]

The military regime destabilized the country's diplomatic relations with the Netherlands. Following the brutal murder of fifteen prominent politicians in 1982 by military leader Dési Bouterse, the Dutch ambassador to Suriname sent the Dutch government a list of the people who had been murdered.[15] In retaliation to the perceived betrayal of trust, Suriname's foreign minister declared the

[8] Ruben Gowricharn, *Suriname's Constitutional Limits*, *in* THE OXFORD HANDBOOK OF CARIBBEAN CONSTITUTIONS 242, 251 (Richard Albert, Derek O'Brien & Se-shauna Wheatle eds., 2020).
[9] H. Fernandes Mendes, *Staatkundige Ontwikkeling en Politieke Cultuur in Suriname*, 6 LEIDSCHRIFT: SURINAME 27, 27–29 (1990).
[10] *Id.* at 30.
[11] Gowricharn, *supra* note 8, at 251.
[12] *Id.* at 256.
[13] *Id.* at 257.
[14] Fernandes Mendez, *supra* note 9, at 34.
[15] *See* Roger Janssen, *Chapter II: Independent in Name Only*, *in* IN SEARCH OF A PATH: AN ANALYSIS OF THE FOREIGN POLICY OF SURINAME FROM 1975 TO 1991 25, 25 (2011). Bouterse, the military coup leader and in 2010 democratically elected president of Suriname, was convicted of murdering the fifteen opponents and sentenced to 20 years in prison in 2019. *Id.*

ambassador *persona non grata*.[16] The Netherlands responded by severing diplomatic ties and terminating the development aid it had provided since Suriname's independence.[17] The Netherlands made continuance of the payments conditional upon re-democratization of Suriname.[18]

Suriname's economy was dwindling rapidly, and the military failed to acquire sufficient support from the general public, barely maintaining its grasp on the country in the face of guerrilla conflict in the inlands.[19] In 1985, Bouterse, the military leader, issued a political accord that assigned a National Assembly (Nationaal Assemblée) with 31 seats, made of 14 military leaders, 11 representatives of the four major labor unions, and 6 representatives of the business community.[20] The Nationaal Assemblée was tasked with drafting a new constitution, and was to do so within 27 months.[21]

The Dutch government explicitly made unfreezing of development aid conditional upon a return to democracy, a free press and freedom of speech.[22] In September 1987, the new constitution was adopted by the Nationaal Assemblée and ratified by a referendum in 1987.[23] The new constitution stated that legislative power is derived from the will of the people, as opposed to the military, and incorporated all the demands from the Dutch.[24] Yet, the military maintained a strong political presence and started its own political party, the Nationale Democratisch Partij (NDP).[25] Furthermore, the first post-military president clashed with Bouterse so significantly that in 1990, another coup took place.[26] Elections the subsequent year showed that the military had not gained any popularity, and the new

[16] EDWARD M. DEW, THE TROUBLE IN SURINAME, 1975–1993 140–46 (1st ed. 1994).
[17] *Id.*
[18] *Id.* at 111; Gary Brana-Shute, *Back to the Barracks? Five Years 'Revo' in Suriname*, 28 J. INTERAMERICAN STUD. & WORLD AFFS. 93, 98 (1986).
[19] Brana-Shute, *supra* note 18, at 96; DEW, *supra* note 16, at 111.
[20] Brana-Shute, *supra* note 18, at 96.
[21] *Id.*
[22] DEW, *supra* note 16, at 95.
[23] Gowricharn, *supra* note 8, at 261.
[24] Constitution of the Republic of Suriname, Mar. 30, 1987, art. 1.
[25] Gowricharn, *supra* note 8, at 261.
[26] *Id.* at 262.

government ultimately aligned itself with the Netherlands, receiving both development aid and aid in the form of weapons.[27] Present-day Suriname struggles to maintain a strong rule of law.

III. WHY ADOPT A NEW CONSTITUTION?

The factors leading to a military leader initiating a process of constitution-making can be broadly divided into three categories. First, Suriname was in economic ruin in 1985, after five years of revolutionary military leadership and revenue from exports dropping dramatically. Second, the military had failed to gain general public support due to corruption and intimidation. Third, Dutch aid had become crucial to Suriname's economy before independence and in the few years immediately preceding the coup, and the Dutch had made continuance of aid conditional upon re-democratization of Suriname. These factors leading up to the drafting of a new constitution each undermined the legitimacy of the initiation of the constitution-making process because the motivations for drafting a new constitution were external, rather than driven by internal sentiments.

A. Economic factors

Suriname's leader during the coup, Dési Bouterse, was highly concerned with repairing diplomatic relations with the Netherlands for economic reasons.[28] Suriname's economy relied largely on exports to the European market of aluminum, bauxite, and rice.[29] Bauxite prices had been decreasing globally, leading to a lower revenue from one of the main sources of government income.[30] Additionally, bauxite was available and cheaper elsewhere, and the biggest bauxite producer showed signs of plans to leave the country.[31] More so than the decreased revenue of bauxite exports, the International Monetary Fund (IMF) estimated that discontinuance of Dutch aid was responsible for a

[27] *Id.* at 263.
[28] DEW, *supra* note 16, at 142.
[29] *See* IMF Minutes of Exec. Bd. Meeting 84/17, *Suriname – 1983 Article IV Consultation*, EBM/84/17/-4, at 46, 50 (Jan. 27, 1984).
[30] *See id.* ("[B]auxite and foreign aid . . . together accounted for [sixty] "percent of Suriname's income from abroad in 1982," before the Dutch ceased their aid).
[31] Brana-Shute, *supra* note 18, at 98.

two-thirds increase in the country's account deficits and the cause of Suriname's overall balance of payments not being in equilibrium.[32] The economy suffered, leading to shortages of essential goods such as toilet paper and flour.[33]

The military regime understood the extent of economic despair that was soon to come upon Suriname, and actively searched for solutions.[34] Suriname's military leaders engaged in conversation with the IMF and reached a loan agreement for $100 million on the condition that government expenditures would be significantly reduced.[35] The cabinet's approach was to increase taxation of bauxite workers' incomes, which immediately led to strikes across the bauxite industry, causing power outages nation-wide and a significant loss in government revenue.[36] The IMF assessed that Suriname's foreign exchange reserves might be depleted by the middle of 1984 unless drastic action was taken.[37] The failure to implement the necessary policy changes due to a lack of public support caused the government to be discharged by Bouterse.[38] An arrangement with the IMF was never reached, presumably due to Suriname's failure to implement the prior actions requested by the IMF.[39]

Since other avenues failed to fund Suriname's current account deficit, the military leaders again realized the necessity of securing Dutch development aid, so much so that resumption of Dutch aid was a part of the economic policies presented to the IMF.[40] The dire economic situation in Suriname made securing the resumption of Dutch aid critical in the country's economic policy.

B. Loss of public support

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[32] IMF Minutes of Exec. Bd. Meeting 84/17, *supra* note 29, at 46 ("While the bauxite market is expected to improve in 1984, the major uncertainty affecting the outlook in Suriname is the indefinite suspension of the disbursement of the Dutch grant. If disbursements were resumed, Suriname's reserve position and balance of payments situation would improve dramatically; the availability of the grant would have reduced the 1983 current account deficit by almost two thirds, while the overall payments balance would have been close to equilibrium.").
[33] DEW, *supra* note 16, at 110.
[34] Brana-Shute, *supra* note 18, at 98.
[35] DEW, *supra* note 16, at 95–96.
[36] *Id.* at 96.
[37] IMF, *Suriname - Staff Report for the 1983 Article IV Consultation,* at 7 (Jan. 5, 1984).
[38] DEW, *supra* note 16, at 96.
[39] *Id.* These prior actions were the cutting of government expenditures, *id.*
[40] IMF, *supra* note 37, at 7.

While the military coup initially enjoyed public support, the military regime quickly became unpopular after citizens were randomly arrested and publicly humiliated, the press was censored, and radical left-wing groups increased their grasp on the military.[41] The Dutch canceled development aid at the end of 1982, after the Decembermoorden,[42] during which fifteen opponents of the military regime were murdered by the government.[43] The United States joined the Netherlands in its disapproval of the military regime and called for an increase in political pressure on Suriname after the Decembermoorden, which led to Suriname's military becoming increasingly politically isolated.[44] In addition to the international unpopularity of Suriname's military, there was a lack of public support domestically. Widespread corruption within the military government caused distrust[45] and was perhaps only tolerated due to the regime of intimidation and violence the military ran.[46]

The loss of public support became troublesome when Suriname failed to secure an IMF loan after implementation of the IMF's requested prior actions led to nationwide strikes.[47] The prior actions required included reduction of government spending and a 12.5% cut of the government payroll, leading to a loss of potentially 5,000 government jobs.[48] However, the policies that were implemented affected only the bauxite workers.[49] Despite the firing of the cabinet that cherry-picked economic

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[41] Gowricharn, *supra* note 8, at 259.
[42] *Desi Bouterse: Suriname President Gets 20 Years in Jail for Murder*, BBC NEWS (Nov. 30, 2019), https://www.bbc.com/news/world-latin-america-50611555. Dési Bouterse, the military coup leader and democratically elected president of Suriname in 2010, was convicted of murdering the fifteen opponents and sentenced to twenty years in prison in 2019, *id.*
[43] Janssen, *supra* note 15, at 25.
[44] Gowricharn, *supra* note 8, at 259.
[45] DEW, *supra* note 16, at 112–13. Dew gives the following anecdotes: The Minister of Finance refused a local factory an import license for the material to produce toilet paper, instead giving his own company a license to import finished toilet paper, which he then placed on the black market. Additionally, there were reports of the chief lieutenants acquiring Brazilian motorboats, noting that it is inconceivable they acquired these out of their own pockets since none of them officially earned more than Sf 60,000, *id.*
[46] Brana-Shute, *supra* note 18, at 103 ("The fact that Surinamers have been unwilling to rise up against the military does not make them indifferent. They are outgunned and no one goes up against an APC with a shotgun. [. . .] There is an elite army within the army [. . .]. They are heavily armed with Uzi machine guns and FALS rifles and are supported by troop transport trucks, armored personnel carriers and armored reconnaissance vehicles with 90mm cannons.").
[47] DEW, *supra* note 16, at 96.
[48] *Id.*
[49] *Id.*

policies to save the government workers,[50] the military government undoubtedly realized its loathsome reputation among the people and was made to feel the economic impact of this through the strikes.

C. Dutch Conditions to Continue Aid

The Dutch canceled development aid at the end of 1982, after the Decembermoorden,[51] in which fifteen opponents of the military regime were murdered by the government.[52] The Dutch government explicitly made unfreezing of development aid conditional upon three criteria being met: "there must be (a) a return to democracy, including the restoration of an independent judiciary; (b) a free press; and (c) freedom of speech."[53] The Netherlands severed diplomatic ties with Suriname after the Decembermoorden in 1982, and the Dutch appeared unlikely to budge on their conditions.[54]

Given the dire situation of the economy, the inability to secure IMF financing, and the heavy dependence of Suriname on the Netherlands to finance its current account deficits, the military government was aware of the importance of Dutch aid resuming and told the IMF they expected the aid to resume.[55] Publicizing that there was an expectation of the aid to resume indicates that there was a plan to meet the Dutch demands. This is supported by the installment of the Nationaal Assemblée in 1984, which was tasked with drafting a new constitution.[56]

IV. LEGITIMACY OF THE CONSTITUTION-MAKING PROCESS

For constitutions to be binding on a group of people and to be obeyed and respected without threat of force, there must be some indication that it was adopted with the consent of the people and reflects the values of the people it governs. The people must perceive the constitution as legitimate to

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[50] *Id.* at 97.
[51] *Desi Bouterse: Suriname President Gets 20 Years in Jail for Murder*, *supra* note 42. Dési Bouterse, the military coup leader and in 2010 democratically elected president of Suriname, was convicted of murdering the fifteen opponents and sentenced to twenty years in prison in 2019. *Id.*
[52] Janssen, *supra* note 15, at 25.
[53] DEW, *supra* note 16, at 95.
[54] *Id.*
[55] *See* IMF, *supra* note 37, at 7 ("The authorities' approach to the immediate needs of economic stabilization and adjustment has been influenced by their expectations that disbursements of Dutch aid would soon be resumed . . . .").
[56] Gowricharn, *supra* note 8, at 260.

ensure free and voluntary compliance. The entity that drafts the new constitution must represent the body of the people the constitution will govern.[57] Public participation is thus required to establish the legitimacy of the new constitution since this is the only way to ensure the constitution is a reflection of the people's values.[58] The more participatory the constitution-making process is, the higher its legitimacy and acceptance.[59] Legitimacy in this Paper will be measured by both the participation of the people and by the influence of external factors (i.e., factors other than the values of the people of Suriname) on the initiation of a constitution-drafting process and the drafting of the constitution. Although a referendum confirmed the adoption of the new constitution, neither the drafting nor initiation process were backed by any kind of public support, leading to a lack of legitimacy for the constitution when it was enacted.

A. Legitimacy of Initiation

Suriname's constitution was initiated after the factors detailed above made a continuing military regime untenable. The Dutch conditions placed on resumption of aid are particularly likely to have contributed to the initiation of a new constitution-drafting process. The Dutch government explicitly required Suriname to become democratic, ensure free speech, and develop a free press.[60] These substantive demands required the end of the military government and the implementation of a new, democratic government structure. The subsequent initiation of drafting a new constitution that contained the mandate for a parliamentary democracy was undoubtedly influenced by the Dutch mandates. In effect, the Dutch, knowingly or not, put tremendous pressure on Suriname's government to implement a democratic constitution as quickly as possible. The threat of economic ruin held Suriname's leaders hostage as negotiations with the IMF failed and their revenues from exports

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[57] *Id.*
[58] Margaret A. Burnham, *Caribbean Constitutions and the Death Penalty*, *in* THE OXFORD HANDBOOK OF CARIBBEAN CONSTITUTIONS, 421, 424 (Richard Albert, Derek O'Brien & Se-shauna Wheatle eds., 2020).
[59] *Id.*
[60] DEW, *supra* note 16, at 95.

continued to decline. Dutch aid was the one guaranteed form of income that waited on the other side of a democratic constitution. Rather than inspired by the values of the people, the initiation of drafting a new constitution was inspired by a desperate attempt to save the economy. Indirectly, the values of the Dutch people were imposed on Suriname through this imposition of ideological conditions in return for development aid, rather than the values of Suriname's people.

B. Legitimacy of Drafting

Military governments are inherently anti-democratic since they take power through force rather than through consent from the people. Acts taken by a military government are then lacking in legitimacy due to a lack of public participation. In Suriname, the constitution was drafted by the Nationaal Assemblée, consisting of prominent military leaders, labor union representatives, and members of the business community appointed by military leader Bouterse. Although there was an attempt at diverse representation by including labor union representatives and representatives from the business community, 14 out of 31 seats were held by military leaders. Since appointment of the body drafting the new constitution was done by a military leader who came to power through a coup, the Nationaal Assemblée was not representative of the people of Suriname, but an extension of the military regime that had come to power illegitimately. The body that drafted the constitution thus did not adequately represent the interests of the people, nor was there public participation in the drafting process. Since there was no opportunity for input by the people, the drafting process lacked legitimacy.

C. Legitimacy of Adoption

The new constitution was adopted through a referendum in 1987 with a 62% turnout and a 95% affirmative vote to adopt the constitution.[61] This is a significant amount of public acquiescence to the constitution and provides some legitimacy to the document. To qualify the overwhelming support, it is helpful to think about the counterfactual, however. In lieu of adopting a new constitution,

[61] *Id.* at 146.

the military regime and terror would have continued to wreck the country and economic despair would have worsened. Given these circumstances, it is likely that many felt relieved at the thought of elections and the resumption of Dutch aid. Even with the acceptance of the constitution through a referendum, the initiation of the constitution-drafting process and the drafting itself lacked public participation entirely, thereby leaving the people to choose between an imposed constitution and a terrorizing military reign. Due to the coercive conditions under which the people of Suriname adopted the referendum, the constitution's ostensible legitimacy is lacking in fact.

V. SUCCESS OF CONSTITUTION

The lack of legitimacy of the constitution has contributed to a weak rule of law in Suriname. A constitution that is devoid of legitimacy, as Suriname's constitution is, creates a disjunction between the people and the law and thereby is unable to effectively regulate society.[62] As early as 1987, right before the first elections were held, it became clear that the new constitution was more symbolic than functional. In October 1987, Boutserse told the New York Times that the military may not accept the results of the election if his party did not gain a majority.[63] In 1990, Bouterse followed through on his rhetoric and announced a coup to the elected government over the phone.[64] Elections were held later that year, but the incident indicates how fragile the newly established democracy was.

A fragile trust in government continues to this day, and is evidenced in Suriname by structural corruption, causing distrust in the government and inefficient use of funds.[65] Suriname is 79th out of 140 countries in the global rule of law ranking, scoring particularly low on the constraints on the government, open government, due process of the law and rights of the accused.[66] The UNDP report

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[62] Abioye, *supra* note 2, at 60.
[63] Joseph B. Treaster, *Suriname Leader Wary of Elections*, N.Y. Times, Oct. 6, 1987.
[64] Gowricharn, *supra* note 8, at 262.
[65] UN Dev. Program, *Corruption Risk Assessment for Suriname: Final Report*, at 7 (Feb. 2017). ("In Suriname, corruption is a systemic problem that is embedded in almost all structures, institutions, sectors, and transactions conducted among business organizations both domestic and foreign, as well as among citizens and the government.").
[66] WJP Rule of Law Index, *Suriname*, World Justice Project, https://worldjusticeproject.org/rule-of-law-index/country/2022/Suriname/Open%20Government/ (last visited Jan. 10, 2023). The ranking for open government is

on corruption in Suriname cites civil society having a limited role in promoting principles like the rule of law, integrity, transparency, and accountability as a significant weakness.[67] This clearly comports with the theory that an illegitimate constitution causes a discrepancy between the foundation of government and the people. Suriname's people do not identify with the values embedded in the constitution because they were not participants in the constitution-making process, which has caused long-lasting effects on effective governance.

VI. CONCLUSION

A constitution becomes legitimate when it is adopted with the consent of the people and reflects the people's values. Suriname's current constitution was drafted after the Dutch discontinued their development aid and military reign ruined the economy. The Dutch made the resumption of aid conditional upon Suriname becoming a democracy again and introducing other civil liberties. These substantive conditions on what Suriname's government should look like caused the constitution that was drafted to be heavily influenced by Dutch values, rather than the values of Suriname's people, as can only be established through public participation in the drafting process. The consequences of this illegitimate formation of the constitution are evident in Suriname today, as the country struggles with corruption and a weak rule of law.

particularly bad, with Suriname scoring 34% on publicized laws and government data, 31% on right to information, 20% lower than the regional average, 37% on complaint mechanisms, 21% below the regional average. *Id.*

[67] UN Dev. Program, *supra* note 65, at 8.

Essay 3

Hong Kong Colonial Residues

I. INTRODUCTION: LEGAL CULTURES AND LEGAL LANGUAGES FROM HISTORY

Modern China, having adopted civil law in large quantities, has historically become a civil law country. One important reason for this is that China was not a British colony. However, after the return of Hong Kong in 1997, the English law that was originally transplanted in Hong Kong was retained and continues to have legal effect, as long as it does not conflict with the "Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China" (Basic Law) and has not been amended by the legislature of the Hong Kong Special Administrative Region. The Basic Law serves as the national law of China and acts as the organic law for the Hong Kong Special Administrative Region (HKSAR).

Part I of this Paper establishes a conceptual framework for the textual analysis of Basic Law provisions in Part II. It introduces the fundamentally distinctive and conflicting characteristics of Hong Kong's and China's legal systems and legal languages. The Basic Law, enacted in 1990, expressly stipulates: "the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." The English law of Hong Kong is still in force, and Hong Kong is the only

region in China that still uses the laws of the common law system. These colonial remnants continue to influence the legal system in Hong Kong.

II. PART 1: TWO LEGAL CULTURES

A. Hong Kong's British Common Law Culture

The law of the Hong Kong Special Administrative Region has its foundation in the English common law system, inherited from being a former British colony and dependent territory. The modern British common law legal system derives from a Western epistemology based upon notions of rationality, scientific thinking, and truth. Its methodology applies reason and rational thinking to facts and law. The scientific tools of investigation separate legally material facts of the case from irrelevant or background facts. The system is coherently structured and organized and has its own internal logic. The application of reason and scientific analysis is commonly believed to result in a clear understanding of the truth of the case, which, when applied to the law, means justice is served.[1] The scientific method, which is highly valued in Western societies, elevates law and the legal process above other forms of knowledge and other methods for securing justice.

The common law legal system requires procedural justice as well as substantive justice—without the former, the latter cannot be guaranteed. The system sets out objective legal procedures that, under a rule of law system, are applied equally to everyone, including rulers. The rule of law system has been accepted by most Hong Kong people, who respect the power of the law and common law legal intimations.

> [T]he common law heritage has given Hong Kong not just a neat set of rules but an attitude of mind, not mere rules *of* action but also *ways* of acting, not just "Rule *by* Law" but "the Rule of Law." It is these attitudes and forms of conduct as well as the spirit of the Rule of Law that are particularly difficult to translate into legal norms, especially

[1] For a critical analysis of the scientific method, *see* Sandra Harding, *Whose Science? Whose knowledge? Thinking From Women's Lives* (1991).

> in a context where radically different principles and attitudes are espoused by the incoming sovereign authority.[2]

Above all, Hong Kong people expect the law to protect them from abuses of political power. However, these attitudes and values are incompatible with the Chinese legal system.

B. China's Socialist Civil Law Culture

China does not have a legal *culture* in the Western sense of cultural beliefs in law as an instrument of social control and legal institutions as the appropriate forum for enforcing correct social behavior. Rather, "[t]he foundation of Chinese culture is the concept of 'rule of etiquettes' and the concept of 'no litigation.'"[3] The traditional Chinese means of social control is based on Confucianism, which is given expression through a complicated set of rituals, practices, and class and gender codes of conduct (*li*). The nearest approximation in Confucian culture to law in the Western sense is a set of criminal punishments (*fa*) that are found in the pre-socialist Qing Code.[4]

After the Communist Revolution, China adopted a civil law system. So far, however, the new legal system has been unsuccessful in replacing traditional cultural beliefs that law is morally inferior to *li*. Since the start of the modernization drive in 1979, China has made numerous unsuccessful attempts to create a rule of law culture. Despite the existence of hundreds of new laws, China remains a rule *by* law system rather than a rule *of* law system. As one scholar notes, "Marxist-Leninist ideology converges with Confucianism in a sense: they share a common distrust of, or lack of respect for, the rule of law."[5] According to orthodox Marxist-Leninist theory, bourgeois law is a tool of the ruling

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[2] Dennis Chang, *Towards a Jurisprudence of a Third Kind – "One Country, Two Systems,"* 20 CASE W. RES. J. INT'L L. 99, 110 (1988).
[3] Yang Kaixiang, *A Comparative Study of Judges' Status*, 137 SHANGHAI FAXUE [JURISPRUDENCE] 45 (Apr. 10, 1993), translated in JPRS-CAR-93-041, at 28 (F.B.I.S. June 21, 1993).
[4] *See* SYBILLE VAN DER SPRENKEI, LEGAL INSTITUTIONS IN MANCHU CHINA: A SOCIOLOGICAL ANALYSIS (1977).
[5] Albert H.Y. Chen, *Justice After 1997*, *in* CRIME AND JUSTICE IN HONG KONG 172, 182 (Harold Traver & Jon Vagg eds, 1991).

classes used against the people.[6] Socialist law, however, is an instrument of the people because the party represents and protects the interests of the masses. Some notable aspects of the Chinese socialist system are its legal flexibility, lack of procedural regularity, and the supremacy of Chinese Communist Party (CCP) policy. Some notable characteristics of Chinese modern culture include a high degree of distrust, if not disdain, for law and a preference, even by victims of criminal acts, for settling conflicts privately.[7]

The Chinese distrust for the law and political preoccupation with controlling the legal system stands in stark contrast with Hong Kong's common law rule of law philosophy. This difference is discernible in the often confusing and imprecise language of the Basic Law.

C. Two Legal Languages

Law is a living language: it has a history, a vocabulary, and a point of view. China's and Hong Kong's legal languages are no exceptions. Their legal histories and jurisprudences, although once the same, have developed along different paths since Britain's colonization of Hong Kong and China's transformation to socialism. The two jurisdictions have developed distinct legal cultures and mutually unintelligible legal languages. After more than one hundred years of colonial rule and the common law, the meanings Hong Kong people attach to legal terms in the Chinese language are imbued with common law assumptions and referents. Likewise, more than fifty years of socialism have altered the meaning of legal terms in China. As a result, although Chinese people on both sides of the border utter the same legal words, they do not speak the same legal language.

Certainly, Chinese analogues for common law terms exist, but translation is more than merely finding equivalent terms. Properly executed, translation captures the essence of the language so that

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[6] Angelo Codevilla, *America's Ruling Class — And the Perils of Revolution*, THE AMERICAN SPECTATOR 2 (July 2010).
[7] Wang, Xiangwei, China's Legal System Has a Long Way to Go Before It Can Be Trusted, S. CHINA MORNING POST (Jul. 13, 2019), https://www.scmp.com/week-asia/opinion/article/3018421/chinas-legal-system-has-long-way-go-it-can-be-trusted.

the message embedded in those terms is transmitted by the messenger—i.e., by the words. Successful translation exposes, rather than submerges, cultural differences. It creates dialogue rather than lulls the recipient into complacency. It does not permit the recipient to assume she understands the speaker's meaning. Hit-or-miss translation may suffice, for example, in the mass media, but it is not adequate when the life or death of an entire legal system is at stake. Nowhere is the need for a precise translation more obvious than in the Basic Law. Unfortunately, however, the English-language version of the Basic Law simply does not carry the essence of the official Chinese-language version. For example, one cannot translate even the most basic, most important concept, that of law itself, from Chinese into English, although the Chinese term *falv* is commonly used to denote the law.[8] These differences are never discussed, and so the Basic Law has, the author fears, lulled many people into a false sense of security about the survivability of the present legal system.

Thus, the entire process of analyzing and interpreting the Basic Law is problematic and fraught with danger. The meaning of "independence" in China differs radically from the meaning in Hong Kong and so use of this word hides the differences. The deception of current discourse lies in the failure of official pronouncements from both sides of the border to address the fragility of this assumption. As long as Chinese and Hong Kong government officials assume that the words they use, such as "law" and "constitution," have the same content or references in both legal languages, they perpetuate the myth that Hong Kong's legal system will remain basically unchanged after 1997. For example, when the two sides declare in their own culture-specific languages that Hong Kong's judiciary will be "independent," they appear to be in agreement. Hong Kong's six million people need and deserve leaders who will engage in open and frank discussions about the two systems' cultural, philosophical, political, and legal differences. Without such a dialogue, the resolution of the dilemmas

[8] Liang Zhiping, Explicating "Law": A Comparative Perspective of Chinese and Western Legal Culture, 3 J. CHINESE L. 55, 89 (1989).

posed by the unique challenges to Hong Kong's legal system will be a slow and painful process. The two governments will likely not abandon their fundamental philosophies, but realpolitik requires each side to acknowledge and resolve the issues raised in this Paper.

III. PART II: DEMISE OF JUDICIAL POWERS

Part II of this Paper addresses the central issue of judicial power in the Basic Law. It compares essential elements of judicial authority, such as judicial independence, in the common law and Chinese civil law systems and then attempts to resolve, to the extent possible, the inevitable conflicting meanings within the context of the Basic Law and the HKSAR. In most instances, the conflicts cannot be resolved, and the only outcome is a call for clarification or amendment to the Basic Law. The following section describes judicial independence in Hong Kong and China and then sets out the possible implications for the HKSAR of the broad expanse separating the concept in Hong Kong and China. The following section then asks the basic, and yet unanswered, question of the legal effect of the Basic Law. Is Basic Law a common law constitution, a Chinese civil law "constitution" or an unwieldy amalgam of the two? The following section then proceeds with a review of several complicated, interlinking, and potentially poorly drafted Basic Law provisions in an attempt to assess the central question of this Paper. The questions are: which specific powers of judicial review will be retained by the HKSAR judiciary after the handover to Chinese sovereignty, and which powers will be transferred out of the common law system and into the hands of the standing Committee? The analysis reveals the impossibility of a definitive answer to the question but makes it abundantly clear that a significant transfer of judicial power will occur unless the Basic Law is amended.

A. Judicial Independence

This section highlights significant differences between the Hong Kong and Chinese judiciaries and the implications of those differences for the HKSAR judiciary, the Hong Kong legal system, and the people of Hong Kong. As demonstrated below, terms such as *constitution, independence, judiciary, judge*,

and judicial review are not translatable into Chinese even though "equivalent" Chinese terms exist. The meanings of the commonly used Chinese and English "equivalents" are so dissimilar that using them is, at best, uninformative and, at worst, misleading.

i. Hong Kong's Independent Judiciary

The term "independence of the judiciary" is fraught with potential for misunderstanding and conflict because the very notion of a *judiciary* in China diverges significantly from the meaning attached in Hong Kong. The common law definition of independence is straightforward. Judges are not beholden to the executive or the legislative branch, may not become enmeshed in partisan politics, and do not take directions from any person or institution when adjudicating cases. Judges of the highest courts cannot be removed except for cause, and all judicial salaries are fixed by law at a rate high enough to reduce the risk of corruption. Judges may not adjudicate cases in which there may be, or could be perceived to be, any conflict of interest. They must endeavor to remain engaged, yet uninvolved, with the cases they adjudicate and must appear to act, and indeed act, fairly and impartially in the exercise of their discretion. They may neither meet with parties nor their attorneys unless both sides are present nor comment publicly on a case in progress. Trials are open to the public, and jury verdicts and judicial decisions are available for public scrutiny. Judges must render decisions in non-jury and appellate cases in writing and apply proper legal reasoning for the outcome. Judges have no power to decide matters that are not before them in their official capacity or to apply the law in an arbitrary or irrational manner. If a judge erroneously, arbitrarily or irrationally decides a case, the system provides an appeal mechanism for reviewing and correcting improper decisions. The institutional practices protecting the judiciary, combined with these restraints on judicial behavior, ensure, to the greatest extent possible, independence of the judiciary.

ii. China's Judicial Organs and Non-Interference

The Chinese judiciary, although superficially similar to Hong Kong's, is entirely different in form and function. The Chinese judiciary also considers its judges to be "independent." The Chinese term for independence is *duli*. However, a yawning cultural gap separates China's "duli" judiciary from Hong Kong's "independent" one.

First, China does not have courts in the Western sense. Instead, judicial organs within the civil service are responsible for administering the law.[9] Until recently, judges had civil service titles and were indistinguishable from bureaucrats in other administrative organs of the state. In 1995, the National People's Congress (NPC) adopted the Legal Official (Faguan) Law, which separates the judiciary from the bureaucracy and establishes a system for hiring, firing, classifying, evaluating, and training judges.[10] However, while judges are no longer classified as bureaucrats, they remain subordinate officials. Under the old system, judges were called *shenpanyunn* (adjudication personnel) or *fayuan ganbu* (court cad- res/officials),[11] both of which accurately rejected the bureaucratic role of the judiciary. They are now simply called *Faguan* (legal officials), which still reflects their subordinate civil servant status. Therefore, in order to express the bureaucratic nature of China's judiciary, the more accurate terms are "adjudicatory organ" instead of court and legal *official* instead of judge.

Second, legal officials, even those on the Supreme People's Adjudicatory Organ, the highest adjudicatory organ, have no job security.[12] Even though the Legal Official Law establishes fixed salaries, lower-level legal officials are paid from local revenues, making them especially vulnerable to pressure from local bureaucracies. Except for the Supreme People's Adjudicatory Organ, most legal officials have no, or minimal, legal training and only very few possess law degrees. Before 1995,

> [L]aw school graduates, demobilized soldiers seeking a new profession, and cadres of other state organs [made] up the bulk of potential judges. There [was] no special training or test [to qualify for such a position] . . . . Their salary is low; they have little

[9] *See* Susan Finder, The Supreme People's Court of the People's Republic of China, 7 J. CHINESE L. 145, 148 (1993).
[10] Zhonghua Renmin Gongheguo Faguanfa [Legal Official Law of the People's Republic of China] (Feb 2, 1995).
[11] Finder, *supra* note 9, at 175.
[12] XIANFA [Constitution], art. 67, §§ 11, 124 (1982) (P.R.C.).

> social status, and in society as a whole, and even within the legal profession, they do not play a "remarkable" role.[13]

The quality of Legal Officials should improve over time as the Legal Official Law introduces an examination and evaluation system and intensive short-term legal training for existing non-law trained legal officials.[14] However, many years will pass before educated and legally trained personnel can fulfill the country's need for qualified staff: very few law graduates are willing to join the judiciary unless forced to do so, and training of the existing legal officials will take time.

Third, the judicial organ is not the sole state organ charged with exercising adjudicatory power. The Public Security Bureau can arrest, convict, fine, and/or sentence persons to a period of detention for various crimes that, in the common law system, would be handled by the courts.[15]

Fourth, although the *Xianfa* states that adjudicatory organs are independent and "not subject to any interference by administrative organs, public organizations or individuals,"[16] adjudicatory organs are not free from the influence of the CCP, the NPC, or the Standing Committee.[17] Despite recent legal reforms intended to bring about a rule of law system, the CCP still maintains its control over the work of the adjudicatory organs. As described by Qiao Shi, secretary of the Central Political and Legal Commission of the CCP, "[b]asic court functions are to independently hear various cases within the legal framework and under the party's leadership."[18] Any attempt by a legal official to claim independence from the CCP would be tantamount to a counterrevolutionary act.

The CCP exercises supervision through a hierarchical structure, with the CCP at the top dictating overall policy. The NPC and Standing Committee supervise the Supreme People's

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[13] Yang, *supra* note 3, at 28.
[14] Legal Official Law, *supra* note 8, arts. 4(6), 9.
[15] *See e.g.*, Regulations of the PRC on Security Administration and Punishment (1990).
[16] XIANFA, art. 126.
[17] Legal Official Law, *supra* note 8, art. 8 (2).
[18] Liu Zhenying & Sun Benyao, Xinhua (Beijing), Jan 10, 1992.

Adjudicatory Organ,[19] which, in turn, supervises lower adjudicatory organs, which supervise adjudicatory organs below them.[20] The Supreme People's Adjudicatory Organ is directly responsible to the NPC and the Standing Committee, and the lower adjudicatory organs are responsible to the organs of state power that created them. The lack of judicial independence is further evident in the fact that adjudicatory organs must submit annual work reports to the supervisory organs. These reports describe the year's adjudicatory work and plans for the next year. Therefore, from the Chinese point of view, the CCP, the NPC, the Standing Committee and the lower people's congresses do not *interfere* with the judicial process; they direct or guide the adjudicatory organs, just as the Supreme People's Adjudicatory Organ directs and guides the lower-level adjudicatory organs.

Nonetheless, even some Chinese scholars recognize that supervision constitutes an interference with adjudicatory independence. As one Chinese commentator describes it, "[administrative] interference comes mainly from two sources: One, the judicial committee and the leaders within the court system . . . Two, leaders of certain administrative departments put pressure on judges" in certain cases.[21] The author frankly concludes, "it is very difficult for [legal officials] to exercise independent judicial power and even more difficult for them to have judicial freedom."[22] Although the Legal Official Law now forbids administrative organs from exercising influence over legal officials,[23] enforcement will be difficult given the low status of the adjudicatory organs and the tremendous power wielded by bureaucracies in China.

Judicial committees will continue to interfere with the work of adjudicatory organs through their exercise of adjudicatory powers.[24] Judicial committees decide important or difficult cases

[19] XIANFA, art. 67, § 6.
[20] *Id.* art. 127.
[21] Yang, *supra* note 3, at 28-29.
[22] *Id.* at 29.
[23] Legal Official Law, *supra* note 8, art 8(2).
[24] Adjudicatory Organ Organization Law, *supra* note 14, art 8(2).

collectively before trial, and the subordinate adjudicatory organs are bound to enforce the committee's decisions.[25] Two legal officials of the Supreme People's Adjudicatory Organ describe the committee's job thusly:

> These committees, instead of trying cases directly, first discuss and then make decisions on the most important or difficult cases handled by collegiate benches of judges. The collegiate benches are obliged to carry out the decisions by the judicial committee. The judicial committee exercises collective leadership over the judicial activity within each people's court. Members of the judicial committee are appointed or dismissed by the standing committee of the people's congress at the request of the president of the court.[26]

In ordinary cases that do not require direct decision-making by a judicial committee, "the court president or the chief judge of the relevant division of the court" and, in certain situations the judicial committee, must, nonetheless, pre-approve the decision.[27] Adjudicatory organs at the lower levels, where almost all cases are heard, have very little judicial-type power. They are limited to administering law as received and are not empowered to interpret the law or question its appropriateness. Thus, China's civil law courts neither have the institutional independence of European civil law courts nor the individual independence of judges in common law courts.

Fifth, legal officials are not expected to, and do not, remain independent from the pre-trial process or from the parties or lawyers involved in cases before them. In criminal and civil cases, legal officials are authorized to conduct their own investigations and to discuss cases with parties, witnesses and/or counsel for one side without the presence of representatives from the other side.[28] According to the more constrained Chinese definitions of independent and impartial, the legal officials are engaging in mutual assistance that does not interfere with their ability to render impartial decisions.

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[25] *Id.*
[26] Zhang Min & Shan Changzong, *Inside China's Court System*, BEIJING REV. 15, 17 (1990).
[27] ALBERT HUNG-YEE CHEN, AN INTRODUCTION TO THE LEGAL SYSTEM OF THE PEOPLE'S REPUBLIC OF CHINA 120 (1992).
[28] Criminal Procedure Law, supra note 17.

Not surprisingly, legal officials' ability to meet with parties can easily lead to corrupt practices. To offset their low salaries and increase their prestige, many legal officials long ago abandoned any attempt to act impartially. Instead, they often require parties to hold lavish banquets for them before the trial begins. The problem is so serious that the Legal Official Law specifically outlaws accepting gifts or attending banquets.[29]

Duli, therefore, does not mean independence from the executive or legislative branches or from the CCP; neither does it mean impartiality, in the common law sense. It simply means the ability to adjudicate within the parameters set by the supervisory organs. It amounts to little more than investigating, hearing testimony, and mechanically applying (but rarely questioning) a predetermined outcome.

IV. CONCLUSION

The transition period during which Hong Kong's common law legal system would undergo a metamorphosis from a common law system into a common/socialist/civil law system will involve numerous uncertainties and continual smuggling between two political and social ideologies and two jurisprudences. The period of change will force members of the common law judiciary to undergo an uncomfortable adjustment as they try to accommodate themselves to new constraints on judicial powers and to a new jurisprudence. At the same time, members of the Standing Committee will have no choice but to learn and respect a new legal language and to understand an alien legal philosophy.

The process will not be pleasant nor the tasks easy for officials in Hong Kong or in China. Retention of the viable and internationally respected pre-handover legal system depends upon the mutual respect and cooperation of all parties. Both sides must endeavor to understand each other's legal systems and legal philosophies and be willing to work together to arrive at mutually acceptable

[29] Legal Official Law, *supra* note 8, art. 30(12).

definitions of legal terms and issues in the Basic Law. They must find unique solutions to meet the unique challenges posed by the "one country-two legal systems" model.

Essay 4

Colonial Veins in the American Adversary Defense and French Inquisitor Advocate

I. STATEMENT OF PURPOSE

Colonialism has impacted modern legal systems on a global scale. With few exceptions, every legal system in the world is a variation of either the English common law adversarial system or the Continental European civil law inquisitorial system.[1] The rule of law has been used over centuries as a means of control, particularly during colonial times.[2] Legal procedures were used as a means of enforcing the culture of a dominant group upon the colonized people.[3] Trials were used to replace cultural traditions by making authoritative judgments and condescending interpretations of people's lives, behaviors, and actions through what was deemed "fact-finding."[4] These judgments not only introduced new meanings to those being colonized but effectively wiped out the local cultures and laws. This use of the rule of law to wipe out a culture was an extremely effective way to communicate that the colonizer's ideas and culture were "correct" rather than that of the colonized.[5] Trials and subsequent punishments served as critical devices for asserting control over the colonized and as

[1] Daniel Klerman et al., *Legal Origin or Colonial History?*, 3 J. LEGAL ANALYSIS 379, 380 (2011).
[2] Sally Merry, *Law and Colonialism*, 25 LAW & SOC'Y REV. 889, 891-96 (1991) (book review).
[3] *Id.* at 896.
[4] *Id.*
[5] *Id.*

reinforcement of the colonizer's new defined society, which included everyday activities, events, and relationships viewed in new ways.[6]

While it may be easy to see how the "rule of law" was used to usurp the power of those being colonized during the age of imperialism and before, without equivocation, the misuse of the "rule of law" as a means of control has severely impacted current legal systems. Indeed, it has impacted what citizens view as the role and responsibilities of courts, arbiters, advocates, law enforcement, and every aspect of the legal system. As a result, the "rule of law" has effectively pitted varied interest groups of the colonial State against each other, as well as pitting colonized people against each other.[7] It is easy to contemplate an argument that instituting and enforcing the "rule of law" on native peoples, was the most effective way to show the natives how little value they actually had.

Still, this dichotomy is as old as time. Luckily, there have been factions within the dichotomy that have allowed and empowered people on both sides of colonialism to fight to preserve their culture and values. The outcome of these power struggles over control of local courts determined the shape of the procedures in court and, consequently, the transformations forced on the culture of colonized peoples.[8] There is extreme complexity and variation in the legal systems that exist within former colonies, where legal systems were shaped by the interests of colonizers, colonized people, and internal conflicts within colonized societies. However, it is important to study the role of law in colonialism to gain insights into the nature of European colonial law and its methods of domination over other societies, both in the past and the present.

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[6] Merry, *supra* note 2, at 922 ("[T]he indentured labor system in Papua New Guinea in the early twentieth century which converted civil wrongs such as desertion or failure to work into criminal wrongs susceptible to punishment").
[7] Merry, *supra* note 2, at 891-96.
[8] *See, e.g.*, *id.* at 893 ("In the British colonies in Africa, for example, colonized people's cases were typically handled in "native courts" enforcing "customary law." However, as the works under review demonstrate, this "customary law" was itself a product of the colonial period, shaped by the efforts of "native" modernizing elites to create law attuned to the new market economy and the efforts of European officials to preserve traditional culture and the power of tribal political leaders. Similarly, subordinate groups in modern states often develop distinctive legal systems only partially acknowledged and accepted by the dominant society").

II. INTRODUCTION

While many focus primarily on the historical context of colonial law and its impact on colonized peoples, understanding the role of law in colonialism can also provide insight into how legal systems continue to shape and be shaped by power dynamics within modern societies. The use of trials during colonialism to force ethnic minorities to incorporate cultural norms from the dominant nation State may draw parallels to current legal issues in the United States.[9] For example, there are many marginalized communities that are subjected to laws and legal systems that do not fully reflect their culture or interests. In addition, legal systems, which are shaped by the interests of those in power, rather than being impartial and fair for all, parallel ongoing discussions about the impact of systemic bias and power imbalances in the modern American legal system. The United States is in a constant state of turmoil because of the persistent perceived injustices (many of which can validly be argued as real) within the criminal justice system. This has resulted in numerous calls for changes to the adversarial legal system from both legal scholars and the public over time. This Paper aims to explore residual colonial themes in modern-day criminal trials and the ways in which law continues to be shaped by power dynamics by examining the role of legal ethics and its impact on modern legal procedures. Through a comparative analysis of the procedures in criminal trials within America and France, this Paper will argue that modern-day legal systems continue to reflect and reinforce power imbalances within societies, despite the "end" of colonialism.

[9] *Id.* at 890-91 ("The courts and police established by colonial powers … enforced compliance to a new political order and at the same time sought to impose a new culture. Colonial governments often promulgated regulations concerning land and labor, regulations that frequently extended to specifying conditions of marriage and divorce and patterns of dancing, drinking, and entertainment. Thus, law, along with other institutions of the colonial state, transformed conceptions of time, space, property, work, marriage, and the state. The role law played in the colonizing process is an instance of its capacity to reshape culture and consciousness.").

III. ADVERSARIAL AMERICANS & INQUISITORIAL FRENCH

Overall, the inquisitorial and adversarial systems differ in the values they reflect and the goals they pursue. The inquisitorial system places a strong emphasis on the search for truth and the role of an impartial investigator in discovering the facts of a case, while the adversarial system values the opportunity for both sides to present their case and for a thorough examination of the evidence.[10] These varying values can be explained, in part, by the historical foundations these systems were built upon.

> If we are to try and discern a difference in originating conceptions between the two legal traditions, it would be that civil law systems begin with the idea of the state as supreme and the role of individual in obedience to it. English common law, on the other hand, developed to protect the property of individuals and limit the power of the state to expropriate resources. From the time of the Magna Charta in 1215 the common law was supported by the aristocracy as a hedge against encroachment on land and liberty by the state. Civil law, in the French and Roman tradition, on the other hand, developed as an instrument for expanding and administering the empire. It was, in effect, a tool used by the state to regulate its citizens rather than to protect them from the encroachment of the state.[11]

These differences are reflected in the structures and foundations of the systems, as well as the rules of procedure and the ethical standards expected of lawyers. Understanding these differences can provide insight into the different approaches taken by different legal systems and the cultures of justice from which they arise.

A. Adversarial American System

The U.S. legal system is adversarial because of the argumentative nature of its proceedings.[12] In this system, the parties are represented by lawyers who act as advocates for their clients and present their cases in opposition to each other.[13] Born of the British common law system, the U.S. legal system

[10] Ellen Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 INDIANA L. J. 301, 301-13 (1989).
[11] *See* Sandra Joireman, *Colonization and the Rule of Law: Comparing the Effectiveness of Common Law and Civil Law Countries*, 64 POL. SCI. FAC. PUBL'N. 2, 6 (2004).
[12] Ralph Grunewald, *Comparing Injustices: Truth Justice, and the System*, 77 ALB. L. REV. 1139, 1155-61 (2014).
[13] *Id.*

is said to be one in which the individual and the individual's rights are valued above anything else.[14] The adversarial system trusts the parties involved in a case to present their arguments honestly and expects that the truth will emerge through the presentation of both sides of the case.[15] The theory behind the adversarial process is the idea that the truth will be most accurately revealed through the presentation and examination of evidence and arguments by both sides.[16] However, not all evidence is allowed to be presented to decision-makers because of the implementation of rules designed to protect the defendant's rights. Even without all evidence being presented, "truth" is determined by a neutral third party, such as a judge or a jury, based on the evidence presented, at times in addition to that which is not presented.

The way in which the presentation of evidence is strictly controlled has led many to believe that the adversarial system is ineffective as a means of truth-finding. Critics of the adversarial system point out that prioritizing individual rights over finding the truth is harmful to society as a whole.[17]

> The "pragmatic truth" sought by the adversarial system does not denote apathy towards what really occurred in a transaction. It maintains full accounting of what happened as a goal, but it will subordinate this in favor of other social values. The system seeks out the best truth it can get under the circumstances, which include practical concerns such as the reliability of evidence and the priority of any values in the contest. Specifically, in the criminal fact-finding context, proponents of the American adversarial system will accept that clear evidence of the defendant's guilt should be suppressed if illegally obtained. In the United States, a premium is placed on individual rights and deterring the police from interfering with them. In the adversarial system, as it is today, society must accept that the truth of some matters will be obscured in the name of other competing values.[18]

Proponents of the adversarial system emphasize the element of "deterrence" and the importance of a legal system, which protects the individual against the untrustworthy State.

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[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 134-35 (1987-1988).
[18] Mathew King, *Security, Scale, Form, and Function: The Search for Truth and the Exclusion of Evidence in Adversarial and Inquisitorial Justice Systems*, 12 INT'L LEGAL PERSP. 185, 189 (2002).

> Any attempt to determine why society tolerates a system that it knows is in some sense defective as a truth-finding device leads to . . . the purpose of adversary criminal trial. The criminal law is one of the government's greatest weapons. Obviously, it can be used to control populations by harsh means. Compared to the average citizen, the government has overwhelming resources and tremendous credibility advantages. Furthermore, judges are government officials, and, in the long run, they are not likely to oppose the government. Even if judges develop a culture of independence from the government, all professional judging would still tend toward bureaucratic justice. Judging seems inherently to tend toward rigorous administration of calculable rules, a dehumanized justice little concerned with individual differences. A defendant's trial rights, therefore, intervene to handicap the government's use of criminal prosecution and its ability to influence outcomes. The adversary criminal trial can be understood as a check on a significant risk of persecution or an otherwise too enthusiastic prosecution policy.[19]

This explanation for the structure of the system paints a picture of protection for the individual from a big bad government. However, we must consider *which* individuals are being protected by these rules by looking at the historical context in which the American system was structured. The American adversarial system was created by settlers who were distrusting of their former government. It is important to remember that to the already present natives in the Americas, these untrusting settlers also could not be trusted by the Indigenous peoples. While the adversarial system claims to protect individuals from the government, it was also created to serve the goals of the settlers, which was ultimately to suppress and dominate the native ethnic population so that the settlers could thrive in a newly created "homeland" free of the tyranny they could no longer tolerate, a not-so-funny irony.

B. Inquisitorial French System

To some, the inquisitorial legal system can be seen as valuable because of its emphasis on the common good rather than the individual. Based on the European civil law system, the inquisitorial system focuses on the state guiding its citizens through the rule of the law.[20] The inquisitorial system places a strong emphasis on the search for truth and the role of an impartial investigator in discovering

[19] Goodpaster, *supra* note 17, at 134-35.
[20] King, *supra* note 18, at 194-195.

the facts of a case.[21] In this system, the investigator, who may be a judge, a magistrate, or a police officer, is responsible for gathering and examining evidence, questioning suspects and witnesses, and determining the truth of the matter.[22] The goal of the inquisitorial process is to arrive at the truth as accurately and objectively as possible, and the investigator is expected to be neutral and unbiased in pursuit of this goal. [23]

> Inquisitorial systems of adjudication are more communitarian than individualistic in nature. The goal is to seek the socially correct solution to the litigants' dispute by demanding cooperation among the court and litigants in the development of evidence and argument. In theory, less importance is given to individual self-interest, though fair adjudication requires that inquisitorial systems allow individuals to argue their self-interests. Nevertheless, the judge, with a broader, disinterested perspective, has a relatively free hand in pursuing investigations and is not confined to considering only the parties' interests and arguments.[24]

While the idea of a legal system is rooted in finding the truth to administer justice, the colonial perspectives behind such a system can provide further insight into how that society measures justice.[25] The French were historically a colonizing power. The goal of a colonizing power would be to rule over society as a whole rather than individuals. Though the French were not previously colonized, they had no less of an incentive to protect the individual and the individual's rights.[26] While the creators of the American adversarial system tried to protect the individual from tyranny, after the revolution, the French did it to protect the common man from elitism. The French system developed as a result of the French attempt to equalize all men and separate their status in society from their status as a human being. The French system seeks to find truth in a way that prevents status from being the

[21] Sward, *supra* note 10, at 310-13.
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] Klerman, *supra* note 1, at 379-388.

dominant force.[27] Interestingly, in either system, the incentive for "truth" remains to maintain control and order over people, which ironically is opposed to the idea of individual freedom in the first place.

The values and goals of both systems are reflected in the rules of procedure that govern the judicial process. In the inquisitorial system, there is a greater willingness to admit all evidence, including that which is improperly obtained or normally excluded as prejudicial in adversarial systems. This reflects the priority placed on the search for truth and the belief that the judge or investigator is capable of properly weighing the probative value of the evidence. In contrast, the adversarial system places a greater emphasis on protecting the rights and liberties of the accused and the fairness of the process. This is reflected in rules such as the exclusion of improperly or illegally obtained evidence and the protection of the accused from prejudicial evidence.

IV. AMERICAN LAWYERS & FRENCH *AVOCATS*

Despite differences in the structures of the two legal systems, both use legal representatives as conduits to "truth." By considering the standards and duties imposed on legal representatives, we can consider how the roles of representatives in criminal trials are used to serve the state's interests and society's values.

In America, the duty of a lawyer is primarily to zealously advocate for the best interests of their client. Legal ethics professional standards require American lawyers to defend their clients by whatever legal means necessary.[28] This means that lawyers are expected to prioritize their clients above all.

> The traditional conception of criminal defense advocacy in England and America was captured in the . . . statement of Lord Brougham in 1820: '[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not

[27] Felicity Nagorcka et al, *Stranded Between Partisanship and The Truth? A Comparative Analysis of Legal Ethics in The Adversarial and Inquisitorial Systems of Justice*, 29 MELBOURNE U. L.R. 448, 473 (2005).
[28] American Bar Association, *ABA Standards for Criminal Justice: Prosecution and Defense Function* §§ 4-7.6(b) (1993).

> regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.' The notion that an advocate owes no allegiance to any principles other than those imposed by the law—and must subordinate all other considerations to that of advancing the interests of the client—is perhaps the dominant understanding of criminal defense representation in adversarial systems.[29]

Zealous advocacy can present a moral dilemma for the American lawyer because it requires them to seek every legal advantage on behalf of their clients, regardless of whether they morally disagree with what the client desires.[30] To a certain extent, American social values mitigate this dilemma with the strict belief that it is better that ten guilty men go free than one innocent shall suffer. [31]

In contrast, in French *avocats* have a duty to assist the court in determining the truth and to provide a full and fair defense.[32] In the French system, *avocats* are expected to adhere to ethical standards such as delicacy, humanity, and disinterestedness, which require them to avoid conflicts of interest and maintain proper standards of behavior as outlined in the *Code Penal*, which is the French code of conduct for *avocat*.[33] The French social value of humanity is reflected in the role of the French *avocat* which is not to represent, but rather assist their client, by supporting a cause in which the *avocat* believes.[34] Unlike the role of the American lawyer, the role of the *avocat* allows for more independence from the client's individual wishes. *Avocat*s are in control of how to handle their client's case. They are not required to consider their client's wishes or even consult or inform their clients of the strategy.[35] This level of control reflects the inquisitorial belief that the *avocat* is better equipped in deciding the

[29] Jenia Turner, *Legal Ethics in International Criminal Defense*, 10 CHI. J. INT'L L. 685, 687-703 (2010).
[30] *Id.* at 701.
[31] *Id.* at 700.
[32] Nagorcka, *supra* note 27, at 473.
[33] *Id.* at 464-466.
[34] *Id.* at 465.
[35] *Id.* at 465.

client's best interests.[36] The inquisitorial system allows judges to intervene on behalf of the client as a means of protection, if necessary.[37]

This comparison illustrates how different legal systems, ethical rules, and procedures can shape how power dynamics play out within the legal system, and ultimately impact the access to justice and outcome of trials for defendants. In the American system, the emphasis on zealous advocacy can lead to an uneven playing field where individuals with fewer resources and less representation may have less of an ability to effectively defend themselves. On the other hand, the French system with its focus on determining the truth, could be seen as a system that does not protect individuals from the all-powerful government. Similar to colonial times, the modern French criminal trial procedure benefits the States' interests. A system focused on the State's interests reflects society's trust in the court to responsibly administer justice. Additionally, this comparison also highlights how legal systems may reflect the cultural, historical, and political context in which they operate. Both the zealous advocacy and accusatorial system are designed to serve justice but the emphasis of either can lead to different results for defendants and the overall societal perception of justice. This illustrates the complex relationship between legal systems and the societies they operate in and how legal ethics play a major role in this relationship.

[36] Turner, *supra* note 29, at 703.
[37] *Id.*

Essay 5

Effectuating Indigenous Rights in the Amazon: A Regional Solution

While international law maintains esteem for the principle of State sovereignty, recent trends demonstrate an increasing recognition that State sovereignty often comes at the expense of Indigenous rights. This essay first discusses the pervasive influence of European legal ideas—including State sovereignty—on post-independence Latin American legal systems and demonstrates the incompatibility of these ideas with Indigenous notions of land ownership in the Amazon. Next, this essay explores international law in the wake of the Indigenous peoples' movement, arguing that this marks a crucial but vague step towards recognizing Indigenous rights in the Amazon. Before suggesting a solution, this paper highlights the difficulty of effectuating international Indigenous norms in the Amazon when South American governments jealously guard their right to State sovereignty. This paper concludes that regional institutions are best situated to guard and enforce Indigenous rights in the Amazon.

I. THE INTERNATIONAL LEGAL SYSTEM: BALKANIZATION AT THE EXPENSE OF INDIGENOUS RIGHTS

A. A Clash of Cultures: The Legal Needs of Modern Indigenous Groups

The colonial and post-colonial eras in Latin America have instilled into the region a legal and political ethos that prioritizes State sovereignty over the legitimacy of Indigenous rights, particularly

those relating to land ownership and forestry practices.[1] Since at least the seventeenth century, the international status quo has largely remained a Euro-centric, post-Westphalian[2] system in which "[a]ll [S]tates vehemently protect their individual sovereignty and the right to legislate and regulate activities within their own areas of jurisdiction."[3] This system traveled with the Colombian exchange and pervaded the political and legal ideology in Latin America. The post-Westphalian approach fostered a legal breed of social Darwinism, akin to a legal neo-colonialism. Indeed, its vocal proponents suggested it was "Europe's duty to aid in the development of the most backward quarters of the globe, and to exercise police authority over barbarous races."[4] This mentality infantilized Indigenous groups and dismantled their long-established conceptions of land and forestry rights. In the name of protection and progress, colonizers and their post-independence successors in governance propagated the notion that "America was terra nullius and that [Indigenous] peoples did not have the capacity to manage their natural resources."[5] Thus, the colonial era presaged that sovereign interests would supplant Indigenous land and forestry rights.[6]

The critical first years of post-independence Latin American legal systems were tainted by the continued prioritization of State sovereignty. Indigenous communities, exploited by the European colonizers, experienced "the beginning of internal colonialism, in which the power over land [by the

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[1] *E.g.*, U.N. Econ. Comm'n for Latin America and the Caribbean, *Guaranteeing Indigenous People's Rights in Latin America: Progress in the Past Decade and Remaining Challenges*, 11–12, U.N. Doc. LC/L.3893 (Nov. 2014) (A process "began with the arrival of Europeans more than five centuries ago, stripping them not only of the territories they lived in and their spaces for social and cultural reproduction but also of their culture, their worldviews and their ways of interacting with nature.") [hereinafter ECLAC Report].

[2] In international relations theory, the "Westphalian System" is the idea that nations' "dominions reached the limits of their borders—and there they stopped, absolutely." Jeremy Adelman, *Empires, Nations, and Revolutions*, 79 J. OF THE HIST. OF IDEAS 73, 75 (2018).

[3] Krista Singleton-Cambage, *International Legal Sources and Global Environmental Crises: The Inadequacy of Principles, Treaties, and Custom*, 2 ILSA J. OF INT'L & COMP. L. 171, 174 (1995).

[4] Walter Rech, *International Law, Empire, and the Relative Indeterminacy of Narrative*, *in* INTERNATIONAL LAW AND EMPIRE: HISTORICAL EXPLORATIONS 57, 58 (2017).

[5] Siu Lang Carrillo Yap, *Introduction: Conflicts Because of Lands and Forests – the Challenging Relation Between Amazonian Indigenous Peoples and Their Nation States*, *in* LAND AND FOREST RIGHTS OF AMAZONIAN INDIGENOUS PEOPLES FROM A NATIONAL AND INTERNATIONAL PERSPECTIVE: A LEGAL COMPARISON OF THE NATIONAL NORMS OF BOLIVIA, BRAZIL, ECUADOR, AND PERU 1, 1 (Alfredsson and Henrard eds., 2022).

[6] *See, e.g.*, *id.*

newly created sovereign State] not only allowed resettlement and exploitation but also [laid] the foundation of the settler society."[7] As the colonizers left the region and new nation States formed, Indigenous dispossession increased "via the adoption of legal frameworks that favoured private ownership and established the primacy of individual rights over collective ones."[8] The clash between State interests and Indigenous land rights meant that Indigenous management of traditional forests ceded to a State's extractive economic incentives.[9] In the modern day, the effect of grafting a State-centric system onto the historically Indigenous Amazon region was that "[a]ll across Amazonia, Indians suffer infringements on their land and expect to lose their territory because of superior national interests."[10] A dangerous residue of colonialism in the Amazon was thus the delegitimization of spiritual and cultural interactions with nature and the derivative robbery and exploitation of Indigenous lands.

Particularly important for Indigenous groups in the Amazon is the connection between land rights and spiritual ties to the land. This is largely absent from any Amazonian nation State's property law. Individual property rights were alien to Indigenous communities pre-colonization, and, while adaptation to the colonizers' norms was necessary, Indigenous communities also maintained their values and traditions at the local level.[11] Chief among these was their conception of the inseparability of spirituality and the land.[12] A first step towards legal recognition of spiritual ties to the land involves solidifying into the law communal ownership rights of Indigenous peoples over their lands.[13] However, this inherently conflicts with the colonial notion of State sovereignty. Countries that refuse

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[7] Roger Merino, *Reimagining the Nation-State: Indigenous Peoples and the Making of Plurinationalism in Latin America*, 31 LEIDEN J. OF INT'L L. 773, 775 (2018).
[8] ECLAC Report, *supra* note 1.
[9] *See* Carrillo Yap, *supra* note 5, at 2.
[10] Mona Suhrbier, *The Present Situation of Indigenous Peoples in the Amazon Region*, *in* AMAZONIA AND SIBERIA: LEGAL ASPECTS OF THE PRESERVATION OF THE ENVIRONMENT AND DEVELOPMENT IN THE LAST OPEN SPACES (1993).
[11] *See* Linda Etchart, *Indigenous Peoples and International Law in the Ecuadorian Amazon*, 11 LAWS 55, 57 (2022).
[12] *Id.*
[13] Carrillo Yap, *supra* note 5, at 3.

to recognize Indigenous communal ownership rights over lands argue that Indigenous communities are the subjects of State sovereignty and that the possession rights of those lands belong to the State.[14] This justification is often coupled with a similarly denigrating argument that a nation State's ownership of lands protects Indigenous groups from fraud, land encroachment, poachers, or extractive corporations.[15]

B. A Glimmer of Hope: Indigenous Rights in International Institutional Law

The international Indigenous peoples' movement, which gained momentum in the twentieth century and has since maintained a steady position in international law and policy, has focused on regional and international institutions as vehicles for codifying the desired rights of Indigenous groups.[16] The success of the Indigenous peoples' movement at the level of transnational institutions is demonstrated by the emergence of several U.N. conferences, derivative groups, and treaties devoted to or addressing Indigenous rights, including—but not limited to—the Working Group on Indigenous Populations (1982), the International Non-Governmental Organisation Conference on Discrimination Against Indigenous Populations in the Americas (1977), and the International Non-Governmental Organisation Conference on Indigenous Peoples and the Land (1981).[17] The drafters of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) highlighted the critical importance of political participation of Indigenous peoples in the Concluding Observations of those treaties, both adopted in 1966.[18] These were the precursors to two milestones in international law: the United Nations Declaration of the Rights of Indigenous People (UNDRIP), adopted by a 144-country

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[14] *Id.*
[15] *Id.*
[16] *E.g.*, Paul Oldham & Miriam Anne Frank, *We the Peoples: The United Nations Declaration on the Rights of Indigenous Peoples*, 24 ANTHROPOLOGY TODAY 5, 5 (2008).
[17] *See* Sabine Kradolfer, *The Transnationalisation of Indigenous Peoples' Movements and the Emergence of New Indigenous Elites*, 61 INT'L SOC. SCIENCE J. 377, 378-79 (2010).
[18] *See* Alexandra Tomaselli, *Political Participation, the International Labour Organization, and Indigenous Peoples: Convention 169 'Participatory' Rights*, 24 INT'L J. HUM. RTS. 127, 127 (2019).

majority of States in the U.N. General Assembly in 2007, and the International Labour Organization (ILO) Convention No. 169.

The ICCPR and the ICESCR crucially established the right to self-determination as binding treaty law for the signatory parties, which include Bolivia, Brazil, Ecuador, Peru, and other States home to the Amazon rainforest.[19] Article 27 of the ICCPR addresses the cultural rights of minorities and attempts to elevate them to the stature of an international human right.[20] In tandem with Article 1, assuring the right of self-determination,[21] Article 27 verges on enshrining the right of Indigenous groups to enjoy a system of collective property.[22] This right is at the heart of ensuring the sustainability of the Amazon via a return to Indigenous notions of the environment. The ICCPR and ICESCR are first steps towards making room for communal land ownership in international law, but they have not proven sufficient to override individual States' sovereignty and capital driven post-colonial resource management regimes in the region.

UNDRIP and ILO Convention No. 169 were meant to address Indigenous rights issues at the international level. These treaties are undeniable steps forward—a few steps further than the ICCPR and ICESCR—but they are unequipped to handle the nuances and specific needs of Indigenous groups in the Amazon, a region with a robust and diverse kaleidoscope of Indigenous cultures.[23] ILO Convention No. 169 broke ground by recognizing "the full realization of the social, economic and cultural rights of Indigenous peoples."[24] UNDRIP went further to recognize and define—albeit vaguely—the right to self-determination. Articles 3 and 4 confirm that the right includes "the right to

[19] *See generally* G.A. Res. 2200(A) (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966) [hereinafter ICCPR].
[20] *Id.* art. 27; Carrillo Yap, *supra* note 5, at 23.
[21] ICCPR, *supra* note 19, at art. 1.
[22] *See* Carrillo Yap, *supra* note 5, at 23-24.
[23] *See, e.g.*, Etchart, *supra* note 11, at 55-56.
[24] International Labour Organisation [ILO] General Conference, Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries Art. 2(b), Sept. 5, 1991; Carrillo Yap, *supra* note 5, at 25.

autonomy or self-government in matters relating to their internal and local affairs."[25] Perhaps most important for Amazonian peoples are Articles 25 and 26, which set forth the right to maintain and strengthen spiritual relationships with traditional lands and the right to have State recognition and legal protection of traditional lands in light of the community's particularized "customs, traditions, and land tenure systems."[26] Neither agreement specifically broaches a version of the right to communal ownership of traditional lands, however, and UNDRIP Article 46 stresses that the contours of the rights contained in the agreement are limited by the principle of State sovereignty.[27] The overarching State sovereignty caveat effectively nullifies the right to self-determination for Indigenous groups in the Amazon, whose identity is linked closely to communal rights to traditional lands.[28] Thus, despite these developments in international law, States in the Amazon can continue to use a State sovereignty justification to deny land and forestry rights to Indigenous groups in the rainforest.

II. THE FRICTION BETWEEN INDIGENOUS PRACTICES AND DOMINANT LEGAL REGIMES IN THE AMAZON

The Peruvian Constitution's Native Communities regime highlights the struggle that Indigenous groups face to have their rights take effect at the national level. The 1993 Constitution of Peru guarantees "Peasant and Native Communities" private, communal, or other special ownership rights over the land that are imprescriptible except in the instance of abandonment, in which case they revert to the domain of the State.[29] There are several problems with this cursory attempt to codify Indigenous land rights. Particularly, the provision that the lands will revert to the State in the case of abandonment is a failure to recognize that Indigenous groups in Peru are often semi-nomadic, moving

[25] G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Oct. 2, 2007) [hereinafter UNDRIP].
[26] *Id.* arts. 25-26.
[27] *Id.* art. 46; Carrillo Yap, *supra* note 5, at 33.
[28] *See* Carrillo Yap, *supra* note 5, at 35 ("UNDRIP does not define the content of the right to internal self-determination, nor the rights to autonomy and self-government. These are rights to be fulfilled, and the content of these rights must be negotiated between indigenous peoples and the State.").
[29] *Id.* at 156 (citing Constitución Política del Perú 31 December 1993 (Congreso Constituyente Democrático)).

from one traditional land to another to avoid overuse of the soil.[30] The constitutional guarantee of the free disposal and use of Indigenous lands clashes with the Indigenous notion of communal land ownership,[31] as it would be anathema for an individual to dispense of traditional lands for monetary gain—something permissible under the 1993 Constitution. Additionally, legislation shifts some authority back to the State in a way that sterilizes the economic autonomy of Indigenous groups. Decree Law 22175 dictates that Indigenous groups "do not have ownership rights over lands suitable for forestry" and because most lands of Amazonian Indigenous groups in Peru are suitable for forestry, "they have ownership rights over only a small part of their original territory."[32] The method for attaining ownership rights over traditional lands is a cumbersome titling process that depends on the efficiency and dedication of the multiple government officials that drive the bureaucratic titling process and on the whims of the government, which often changes the State institution responsible for the titling process.[33] Finally, the Peruvian government gives clear preference to industrial and infrastructure projects, "which can establish their projects in the lands of communities without land rights titles."[34] Despite clear progress towards the legal recognition of Indigenous land rights in Peru, the implementation and real effect of these rights are subject to State sovereignty in a way that individual property rights are not.

In the Ecuadorian Amazon, a similar story began with the oil exploration of the 1970s and continues today. The Ecuadorian government—in contravention of ILO Convention No. 107[35]—failed to consult the Indigenous groups to be affected by future extractive behaviors on their lands

[30] *Id.* at 158.
[31] *Id.* at 159.
[32] *Id.* at 160 n.238 (citing Sociedad Ecuatoriana de Derecho Forestal 79).
[33] *Id.* at 162 (citing Defensoría del Pueblo, 'Informe No. 220-2014-DP/AMASPPI-PPI: … ..).
[34] *Id.* at 163.
[35] ILO Convention No. 107 of 1957, Article 4 requires States to consult in good faith with Indigenous groups in order to obtain their free and informed consent prior to authorizing extractive behaviors affecting their lands. ILO, Convention No. 107, art. 4 (1957).

before giving oil companies the green light to explore and extract oil.[36] Although the effects on the environment that stemmed from the government's failure to protect Indigenous rights in the face of threat from foreign oil companies were deleterious and irreparable, the crucial concept of free, prior, and informed consent embodied by ILO Convention No. 107 has been rejected since 2017 by the government administrations of Correa, Parra, and Lasso. The lessons have not been learned, and State sovereignty continues to hamper the restoration of Indigenous autonomy and land rights.

III. REGIONAL FRAMEWORKS AS AN AVENUE TO LEGITIMIZE AND INCORPORATE INDIGENOUS APPROACHES TO LAND AND FORESTRY RIGHTS

While international institutions and agreements have proven more effective than the balkanized State system for providing legal legitimacy to Indigenous rights, regional institutions promise a path to recognizing the regional specificity of Indigenous legal needs. Although there is not yet a binding regional agreement on the matter of Indigenous people's rights in the Americas, actions within regional institutions suggest there might soon be.[37] The OAS, recognizing the need to codify and make actionable unique Indigenous rights that were lost during the centuries of dominance of post-Westphalian legal norms in the region, adopted the American Declaration on the Rights of Indigenous Peoples (ADRIP) in 2016. ADRIP went further than UNDRIP: it stated that Indigenous peoples have a right to live in harmony with nature and established the right of Indigenous peoples to live in voluntary isolation and to be protected in that isolation.[38] ADRIP's scope is broad, protecting the right to maintain spiritual sites,[39] the right to protect their environment,[40] the right to promote and develop distinct legal structures,[41] and more.

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[36] Etchart, *supra* note 11, at 57.
[37] *See* BEATRIZ GARCIA, THE AMAZON FROM AN INTERNATIONAL LAW PERSPECTIVE 176 (Cambridge Univ. Press, 2011).
[38] *See generally* AG Res 2888, Organization of American States, American Declaration on the Rights of Indigenous Peoples (June 15, 2016) [hereinafter ADRIP].
[39] *Id.* art. XVI.
[40] *Id.* art. XIX.
[41] *Id.* art. XXIII.

ADRIP is promising because Indigenous groups have had success enforcing similar rights at the Inter-American Court of Human Rights (IACtHR), the judicial organ of the American Convention on Human Rights (ACHR), a treaty ratified by OAS member States. Particularly groundbreaking were two decisions concerning Paraguay: *Yakye Axa v. Paraguay* and *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*.[42] Both cases concerned land disputes between Indigenous groups and the Paraguayan government. The Indigenous groups alleged that Paraguay's actions violated Article 21 of the ACHR and several provisions of ILO No. 169.[43] Most notable were the Court's holdings, in both cases, that "the rights of Indigenous peoples over lands occupied in the past are enforceable as long as their spiritual relationship with the lands is maintained."[44] The Court's rhetoric was seminal for Indigenous property rights in the Amazon. It emphasized the connection between traditional lands, natural resources, the Indigenous worldview, and cultural identity.[45] The IACtHR has authority to interpret and enforce the ADRIP, and the Paraguayan cases suggest that it will not shy away from curbing State sovereignty to protect the rights enshrined therein.

These cases demonstrate that a regional institution is best positioned to effectuate developing international human rights norms in a way that accounts for the nuances of Indigenous people's needs in the Amazon. The ACHR and similar regional conventions are well suited to break from individualistic conceptions of property and recognize fundamental Indigenous rights. The judicial bodies of these Conventions provide hope that States cannot ignore Indigenous rights in the name of

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[42] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 142 (Feb. 6, 2006); *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 146 (Mar. 29, 2006).
[43] *Yakye Axa*, at 71 (¶ 116-17).
[44] *See* Carrillo Yap, *supra* note 5, at 44 (citing *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 146, ¶ 131-32 (Mar. 29, 2006); *Case of the Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 125, ¶ 149 (June 17, 2005)).
[45] *Id.* (citing *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C.) No. 146, ¶ 131-32 (Mar. 29, 2006), at ¶ 118).

State sovereignty. These cases demonstrate the practical power of regional cooperation and suggest that Indigenous rights in the Amazon are best protected by regional institutions.

Chapter 4:

Colonial Residues on the Rule of Law, Migration, & Human Rights

Refugees and migrants protesting outside an overcrowded refugee camp on the Greek island of Samos. Credit: Associated Press (2019)

Essay 1

Precursors of Migration & Displacement: Post-Colonial Violence, Insecurity, and the Threatened Rule of Law by Illicit Non-State Actors in the Northern Triangle

I. INTRODUCTION

Illicit non-State actors play an increasingly influential role in present conditions of State fragility and insecurity throughout Central America, which has led to mass migration and displacement from the region. Illicit non-State actors and their excessive use of violence threaten the public order and undermine the livelihood and political authority of the nation-State. Northern Triangle governments have failed to address regional security conditions, in part, because of their recent histories of autocratic rule. After the colonizer's departure, regional civil wars broke out from the 1970s to the 1990s. Since then, widespread public corruption, an absence of political will, and low tax collection rates have destabilized State institutions and governance, creating a power vacuum ripe with opportunities for non-actors to seize control. This Paper focuses on how weak internal configurations of the State and an overall lack of State presence have created conditions vulnerable to criminal violence and illicit activity.

Part I of this Paper analyzes Central America's colonial legacy of violence. Part II establishes the principal drivers of violence and insecurity caused by criminal non-State actors and their connection to under-developed domestic legal and political institutions. Part III develops a case study

of transnational organized crime and criminal gang activity in the Northern Triangle and explores how the phenomenon of organized crime originates from the weak State. Finally, this Paper concludes with recommendations for a comprehensive approach to reform while taking into account the region's history of colonial residues.

II. THE CENTRAL AMERICAN COLONIAL LEGACY OF VIOLENCE

Physical violence played an eminent role in the Central American colonial legacy. Spanish and Portuguese colonizers relied on massive violence, which was evidenced by the population decimation of Indigenous societies.[1] In 1625, after the conquest, Indigenous populations decreased from approximately 25 million to 1.25 million in Central America and Mexico.[2] Colonial violence and coercion were accomplished vis-à-vis enslavement, forced labor, and warfare. For example, 200,000 Indigenous Nicaraguans were enslaved and sold off to other neighboring countries in the early sixteenth century.[3] Widespread military campaigns sought to consolidate colonial rule by carrying out massacres and mass atrocity acts against Indigenous groups across the region.[4]

Institutionalized colonial violence and subjugation undermined the economic, political, and cultural foundations of early Indigenous Central American societies, including the Chorotega, Miskito, Guaymí, and Kuna tribes, which has led to long-term consequences visible in present-day conditions. Colonial violence gutted early societies of their governance structures and paved the way for armed conflicts that later emerged in Guatemala, El Salvador, and Honduras in the late twentieth century. Today, States with shrinking resources and "hollowed-out" structures are declining rapidly, which has opened the gateway for criminal organizations to seize control over political processes and entire

[1] Wolfgang Gabbert, *The Longue Durée of Colonial Violence in Latin America*, 37 CONTROVERSIES AROUND THE DIGITAL HUMANITIES 254, 255 (2012).
[2] *Id.*
[3] *Id.* at 258.
[4] *Id.* at 259.

territories.[5] It is estimated that criminal organizations now own 25% to 50% of land in Guatemala, Honduras, and El Salvador.[6] Thus, these organizations have debilitated governments and launched a "crisis of authority" and legitimacy.[7]

III. KEY DRIVERS OF VIOLENCE AND INSECURITY BY CRIMINAL NON-STATE ACTORS

This section addresses the key drivers of violence and insecurity in the Northern Triangle, including weak State capacity and a lack of legitimacy and control over national territory. Crime and security are most likely to occur in spaces where there is no prevailing authority, including where there is weak governance and limited transparency.

A. Asserting Control Over National Territory

In Central America, areas where neither the State nor rival gangs have assumed dominance have become hot spots for conflict. Uncontrolled public spaces—such as bus routes—are frequently exploited by gangs seeking opportunities to assert control and have become sites of high levels of violence.[8] Obtaining control over urban local spaces provides an entry point for gangs to enter larger-scale illicit political economies, such as transnational routes, which are regulated by advanced organized criminal networks.[9] Gangs that are able to expand their territorial reach gain a strategically competitive advantage over other criminal organizations. Subsequently, gangs that gain a monopoly over national territory then often exercise significant authority over local political and judicial systems in their respective jurisdictions. Thus, local territorial and political control are closely intertwined, and, where there is dominance over territory lacking State presence, high rates of crime and violence follow.

IV. CASE STUDY: TRANSNATIONAL ORGANIZED CRIME IN THE NORTHERN TRIANGLE

[5] *See* Douglas Farrah, *Central America's Northern Triangle: A Time for Turmoil and Transitions*, 4 INSTITUTE FOR NATIONAL STRATEGIC SECURITY, NATIONAL DEFENSE UNIV. 88, 89 (2013).
[6] *Id.* at 99.
[7] *Id.* at 90.
[8] *See* DEBORAH J. YASHAR, HOMICIDAL ECOLOGIES: ILLICIT ECONOMIES AND COMPLICIT STATES IN LATIN AMERICA 96 (2018).
[9] *Id.* at 68.

Transnational organized crime and criminal gang activity in the Northern Triangle is the principal cause of violence, conflict, and State fragility in the region. Domestic non-State actors, including the Mara Salvatrucha (MS-13) and the "18th Street" Gang (Barrio 18), form powerful local and transnational networks across Central America and have contributed to some of the highest homicide rates globally.[10]

This section provides background on the current state of insecurity in the Northern Triangle, including an assessment of the tools and *modus operandi* behind the illicit groups' deployment of violence.

A. Current State of Insecurity and Violence

Gang membership and violence is rampant in and around urban areas of Honduras, Guatemala, and El Salvador. According to Human Rights Watch, estimates of the number of active gang members in Honduras, alone, range up to 40,000.[11] It is predicted that 5% of the male population of Honduras between the ages of 15 and 24 belongs to a criminal gang.[12] Membership coincides with high rates of violence, as gangs not only forcibly recruit local populations but also murder, disappear, and displace those who refuse to join their enclave. Countries such as Honduras have one of the world's highest murder rates, with 44.8 murders per 100,000 population in 2019.[13] Violent organized crime has a disruptive impact on civil society. According to surveys from the Latin American Public Opinion Project, a quarter of residents in the Northern Triangle reported that they had been victims

[10] Clare Ribando Seelke, *Gangs in Central America*, CONGRESSIONAL RESEARCH SERVICE (Aug. 29, 2016), https://sgp.fas.org/crs/row/RL34112.pdf.
[11] *See Honduras: Events of 2021*, HUMAN RIGHTS WATCH (2021), ttps://www.hrw.org/world-report/2022/country-chapters/Honduras.
[12] *Transnational Organized Crime in Central America and the Caribbean: A Threat Assessment*, United Nations Office on Drugs and Crime 60 (Sept. 2012) [hereinafter *Transnational Organized Crime*].
[13] *See Honduras: Events of 2021*, *supra* note 11.

of crime.[14] In turn, outbound migration from the region has reached its peak, resulting in the flight of over two million people since 2014.[15]

B. Modus Operandi

The emergence of organized crime in Central America is influenced by historical, societal, and cultural influences. Organized crime in the region has political roots traceable to colonial histories when many Indigenous groups were disenfranchised during foreign colonial occupation. Consequently, underrepresented groups deployed criminal tactics to advance their objectives. As a result, modern organized criminal organizations have used similar strategies to advance their agenda, relying on trafficking, smuggling, money laundering, kidnapping, and extortion.[16] In addition, they have also taken over government functions belonging to the weak States they reside in, stepping in to provide public goods, patronage, and economic status to marginalized individuals.[17] The following discussion of criminal groups' *modus operandi* analyzes the extent to which these groups have deployed tactics reliant upon weak post-colonial infrastructure.

Regional criminal gangs have raised funds and expanded their economic prowess through lucrative illicit activities, including extortion, money laundering, and drug and arms smuggling. In 2016, the Honduran government seized over $1 million in MS-13 assets, including local properties and businesses controlled by the gang.[18] However, government seizures of gang-controlled assets and finances have done little to disrupt the flow of illicit economic transactions and well-established criminal economies across the Northern Triangle.

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[14] Maureen Taft-Morales & Peter J. Meyer, *Central American Migration: Root Causes and U.S. Policy*, CONGRESSIONAL RESEARCH SERVICE (Mar. 27, 2019), https://crsreports.congress.gov/product/pdf/IF/IF11151/1.
[15] Amelia Cheatham & Diana Roy, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 22, 2022), https://www.cfr.org/backgrounder/central-americas-turbulent-northern-triangle?gclid=Cj0KCQjwk5ibBhDqARIsACzmgLREhOqcAhWkJQvl_vBCkIw6Be4UhdJWu4wD-AoAQKT5DnIl1w47Gw0aAsAiEALw_wcB.
[16] DIEGO GAMBETTA, THE SICILIAN MAFIA (1993).
[17] *See* DIETER HALLER & CRIS SHORE, *The Sack of Two Cities: Organized Crime and Political Corruption in Youngstown and Palermo*, *in* CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES (2005).
[18] Ribando Seelke, *supra* note 10, at 7.

Gangs, in part, have succeeded in growing their political infrastructure and capital by centralizing control on local levels. Surveys by investigative think tanks predict that local bus and taxi collectives pay over $2.5 million in extortion fees per year.[19] By centralizing control on local levels through informal systems of taxation, these domestic non-State actors seek to secure territorial hegemony and power over other competing rival groups.

External political motives and material realities are not the only motivating forces behind gangs' use of threats and violence. Violence also provides a normative framework that establishes internal order and cohesion within the gang. Both MS-13 and Barrio 18 rely on violence as a recruitment tool, whereby prospective members must carry out violent missions considered demonstrative of their loyalty and "commitment" to be considered for membership.[20] Upon entry, initiates are then forced to undergo brutal beatings. Once admitted to the gang, members face a series of strict codes, rules, and disciplinary procedures that are designed to foster obedience and limit chances of defection. Gang norms and social identities determine the degree of authority that criminal organizations take on which, subsequently, contributes to continued life cycles of violence.

Similarly, while there are officially established norms governing the use of violence within gangs, including *calentadas* (beatings) that are carried out if a member commits a *chequeo* (failure to complete an assignment or to comply with internal rules), there is also an informal code of conduct that relies on violence to command respect and allegiance. Groups such as Barrio 18 adhere to the principle of "respect the *barrio*," which relies on "superseding codes" of loyalty as justification for the commission of violence.[21] For example, if a remark made about another gang member's romantic

[19] Steven Dudley & Héctor Silva Ávalos, *MS13 in the Americas: How the World's Most Notorious Gang Defies Logic, Resists Destruction*, INSIGHT CRIME & CTR. FOR LATIN AMERICAN & LATINO STUD. 40 (Feb. 16, 2018).
[20] Elyssa Pachico, Juan José Martínez, & Steven Dudley, *Gangs in Honduras*, INSIGHT CRIME & CTR. FOR LATIN AMERICAN & LATINO STUD. 26 (Dec. 9, 2015).
[21] *Id.*

partner is perceived to be offensive, a violent reaction may be triggered in response and is considered justified.[22]

One interpretation of gangs' formal and informal codes of conduct suggests that norms prizing integrity and loyalty to the criminal organization effectively mitigate members' behavior. These norms not only create a sense of order but also contribute to the longevity of the gang by instilling core values such as "unity," "courage," and "self-sacrifice" in members.[23] Gang discourse that holds loyalty as paramount causes members to develop a strong emotional attachment to the "brotherhood." In turn, members become martyrs for their respective criminal organizations while, all the while, maintaining a conscious awareness of the brutal consequences of betrayal and defection. This set of socially constructed representations, practices, and understandings contribute to the structure and legitimacy of criminal organizations.

By developing their own set of conventions, including initiation rules, ranking systems, rites of passage, and rules of conduct, gangs create a framework aimed at encouraging discipline and obedience among members.[24] In turn, a set of socially constructed norms grounded in violence and intimidation tactics creates order within the criminal organization.

V. RECOMMENDATIONS: POST-COLONIAL REFORM EFFORTS

The complex set of factors surrounding violence and organized crime in the Northern Triangle necessitates a comprehensive approach to reform. Structural reforms should be implemented across three core political, legal, economic, and social arenas to reduce violence and insecurity perpetrated by transnational criminal organizations. First, domestic public security sector corruption should be reduced, and weak government institutions should be strengthened through

[22] *Id.*
[23] *Crime and Development in Central America: Caught in the Crossfire*, UNITED NATIONS OFFICE ON DRUGS AND CRIME (May 2007), https://www.unodc.org/pdf/research/Central_America_Study_2007.pdf.
[24] *Id.* at 58.

rule of law and accountability mechanisms. Second, national peace accords and regional security instruments should be revised. Lastly, illicit criminal economies should be dismantled by pursuing sustainable economic growth and development initiatives. Likewise, social policies that seek to "rebuild" domestic civil society by disrupting cycles of violence should be implemented.

A. Strengthen the Rule of Law and Institutions

Curbing Central American migration and displacement depends on affecting systemic change, which can only be achieved by creating a safer, more transparent, and democratic region. Central American governance can be improved through capacity building and coordination among key players in the judicial sector—including prosecutors, judges, and investigators—to strengthen institutions and the rule of law. Reducing domestic public corruption will also lead to greater accountability.

International support for judicial sector reform from key regional allies, including the United States, may be provided through capacity-building programs such as the Office of Overseas Prosecutorial Development Assistance and Training (OPDAT). These programs will send resident legal advisors from the United States to assist Northern Triangle judiciaries and public ministries in prosecuting corruption and transnational criminal operations, including illicit political finance and migrant and human smuggling cases.[25] Likewise, in July 2021, the Biden Administration announced its Root Causes of Migration Strategy, which launched a regional anti-corruption initiative designed to improve governance and the rule of law by helping Central American governments implement reforms promoting transparent and participatory electoral processes, broad government oversight, and civic engagement.[26] By arming Central American governments with the tools to investigate and prosecute their own crimes, the United States can play a supportive role in encouraging stronger accountability and the rule of law.

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[25] John Negroponte et al., *Building a Better Future*, ATLANTIC COUNCIL (May 5, 2017), https://www.atlanticcouncil.org/in-depth-research-reports/report/building-a-better-future/.
[26] Taft-Morales & Meyer, *supra* note 14, at 10.

Likewise, international organizations may play a supportive role in constructing democratic institutions and strengthening the independence of the justice sector. There is room for collaboration between functional and regional international organizations, such as Transparency International and the Organization of American States (OAS), to promote transparency in electoral systems and government processes. Further, these groups should work together to promote a merit-based, independent process for the nomination and selection of judicial officials.

B. Revise National Peace Accords and Regional Security Instruments

One major downfall of peace processes in Central American countries including El Salvador, Guatemala, and Nicaragua was the failure to account for the depth of clandestine networks that provided weapons, intelligence, and international support networks to all parties of the armed conflicts.[27] After the implementation of the peace accords, these clandestine groups not only remained intact but also evolved into heavily armed and resourced criminal organizations. For example, two years after the signature of El Salvador's Chapultepec Peace Accords between the government and left-wing guerrillas, which established a cease-fire and the demobilization of guerrilla forces, the disbanded forces morphed into sophisticated criminal entities that commanded strong economic and political control.[28] These forces wielded additional power by recruiting skilled ex-military personnel that had been pushed out after the administration drastically downsized its defense capabilities after the civil war.[29]

To properly carry out the vision of the Central American peace accords, the domestic agreements should be revised according to the regional OAS Treaty on Democratic Security in Central America,[30] signed on December 15, 1995, in San Pedro Sula, Honduras by Costa Rica, Honduras, El

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[27] Farrah, *supra* note 5, at 97.
[28] *Transnational Organized Crime*, *supra* note 12, at 11-13.
[29] Farrah, *supra* note 5, at 101.
[30] *See* Organization of American States, Inter-American Conventions and Treaties Related to Hemispheric Security, Feb. 27, 1967, O.A.S.T.S.

Salvador, Guatemala, Nicaragua, and Panama. The treaty seeks to strengthen regional security cooperation.

C. Break Cycles of Violence through Economic & Social Development

Further, educational and employment opportunities in the public sector should be expanded for purposes of both prevention and social reintegration. This starts with a redirection of public spending toward anti-gang initiatives. Governments should implement targeted prevention programs for marginalized youth in high-risk neighborhoods aimed at discouraging youth from joining gangs.[31] Post-colonial environments are particularly susceptible to public corruption and vacuum-filling organized criminal organizations, leading to poverty, weak institutions, lack of trust in law enforcement, weak judiciaries, and marginalized minority groups. Often, youth will look to criminal networks in times of economic need. Thus, the provision of public goods and services directed at deterring youth gang membership is an effective mitigation strategy designed to prevent the recruitment and growth of criminal networks.

Consequently, Honduras only allotted 6% of the $318 million collected through its security tax toward prevention programs between 2012 and 2016.[32] On the other hand, El Salvador has demonstrated more commitment towards anti-gang initiatives by investing in rehabilitation and job training programs. In recent years, the Salvadoran government allocated $72 million towards employment and entrepreneurship projects designed to help ex-gang members secure work in the licit economy.[33] These types of initiatives are particularly fundamental for ex-gang members who not only face stigma among employers and in their communities but who also struggle with developing new social identities. Northern Triangle governments should work to grow these types of projects through increased coordination with NGOs and the private sector.

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[31] Negroponte, *supra* note 25, at 31.
[32] *Id.* at 35.
[33] TOM WAINWRIGHT, NARCONOMICS: HOW TO RUN A DRUG CARTEL 47 (1st ed. 2016).

VI. CONCLUSION

Central American criminal gangs pose a major threat to safety, security, and domestic civil society, serving as one of the principal sources of migration and displacement from the region. An assessment of the *modus operandi* shows that competition over profit, political authority, and territorial control is a main driver of conflict and fragility.

Addressing the source of post-colonial instability, violence, and transnational crime in the Northern Triangle must start at the local level with domestic political actors and institutions. Specifically, post-colonial reform efforts must correct for weaknesses in the State's legal and regulatory frameworks, where the State has historically underprovided public goods, including security and economic freedom. Until apparatuses of the State, including the political and judicial institutions, are strengthened, criminal organizations will continue to exercise power and political authority by holding a "monopoly on violence."[34] By strengthening institutions to improve governance and the rule of law, stability, and development in the Northern Triangle will likely soon follow.

[34] Dudley & Ávalos, *supra* note 19, at 48.

Essay 2

Indigenous Coverage Gaps: The Lack of Protection for Indigenous Migrants

Colonialism touches every aspect of modern society, and the law is no exception: colonialist legacies have permeated the domestic, regional, and international legal structures which govern many societies. Analyzing international law from a rights-centered, Indigenous focus peels back the layers of colonialism as much as possible. The United Nations Declaration of Indigenous Peoples (UNDRIP) and the International Labour Organization's (ILO) Convention No. 169 "Indigenous and Tribal Peoples Convention" are two international legal documents taking important steps to incorporate non-assimilationist, Indigenous-rights-centered approaches to international law. Taking this approach works to wash away colonial residues governing Indigenous populations, prioritizes respect for their sovereignty and can lead to Indigenous rights' incorporation into customary international law.

The first section of this Paper will give a brief overview of international law's interaction with Indigenous peoples. The second section provides a short overview of Colombia's Indigenous populations and of the internal Colombian conflict which prompted mass migration. The third section of this article summarizes the migration of Indigenous populations as a result of the conflict. The fourth section addresses the areas in which international law fails to protect Indigenous migrant's rights in the context of Colombia's Indigenous migration to Ecuador. Finally, the argument is summarized, and further areas of research are proposed.

I. INDIGENOUS PEOPLES AND INTERNATIONAL LAW

The modern international legal system was created in the aftermath of World War II to ensure security, peace, and social and economic advancement for all people in the world.[1] The U.N. has been one of the leading international legal organizations since its creation in 1945, but it has consistently failed throughout history to hold open an invitation for significant marginalized voices in the international community. Among the 7.76 billion people the U.N. purports to serve,[2] approximately 6.2 percent of that population is Indigenous.[3] Until recently, Indigenous peoples have been systematically excluded from the international legal arena, yet still subjected to the rules created in those spaces.[4]

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[1] The U.N. General Charter Preamble, which solidified the foundation of the current international system of law, states: "We the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small, and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and to promote social progress and better standards of life in larger freedom, and for these ends to practice tolerance and live together in peace with one another as good neighbours, and to unite our strength to maintain international peace and security, and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, and to employ international machinery for the promotion of the economic and social advancement of all peoples, have resolved to combine our efforts to accomplish these aims. Accordingly, our respective Governments, through representatives assembled in the city of San Francisco, who have exhibited their full powers found to be in good and due form, have agreed to the present Charter of the United Nations and do hereby establish an international organization to be known as the United Nations." U.N. Charter Preamble, https://www.un.org/en/about-us/un-charter/full-text.

[2] The World Bank, Data: Population, Total (2021), https://data.worldbank.org/indicator/SP.POP.TOTL.

[3] Rishabh Kumar Dhir et al., *Implementing the ILO Indigenous and Tribal Peoples Convention No. 169: Towards an Inclusive, Sustainable and Just Future*, INTERNATIONAL LABOUR ORGANIZATION [ILO] 13 (Feb. 3, 2020).

[4] In 1923, Haudenosaunee Chief Deskaheh traveled to speak to the U.N.'s predecessor, the League of Nations, regarding his people's right to self-govern. He was not allowed to speak and returned home in 1925. Maori religious leader T.W. Ratana experienced a similarly dismissive attitude and denial of access to the League of Nations in 1925. The next U.N. action relating to Indigenous peoples did not take place until 1981 through publication of a "Study on the Problem of Discrimination against Indigenous Populations." During this span of almost 40 years of U.N. inaction, the International Labour Organization (ILO) proposed ILO Conv. No. 107 "Indigenous and Tribal Populations Convention" in 1957. Beyond these actions, Indigenous peoples were largely left out of international law, and certainly not invited to international fora. In fact, there was no formal channel for Indigenous peoples to share their experiences with the United Nations until the creation of the Working Group on Indigenous Populations in 1982—59 years after Chief Deskaheh attempted to make his voice heard. *See* INDIGENOUS PEOPLES AT THE UNITED NATIONS, https://www.un.org/development/desa/indigenouspeoples/about-us.html (last visited April 2, 2023).

International law does not clearly define "Indigenous peoples." UNDRIP itself does not offer a definition for "Indigenous peoples," but rather addresses certain principles pertaining to their rights which will be discussed later in this Paper.[5] The ILO Convention No. 169 "Indigenous and Tribal Peoples Convention" sets out the guiding principles of self-identification: relationship with ancestral lands; a common pre-colonial ancestry; distinct social, economic, and political systems; distinct language, beliefs, and law; the identification of a minority group in society; and the desire for community preservation.[6]

The ILO passed the "Indigenous and Tribal Peoples Convention" (The Convention) on June 27, 1989, recognizing various economic, cultural, and social rights of Indigenous communities.[7] The Convention was the ILO's first effort to apply a non-assimilationist approach to Indigenous rights[8]

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[5] The closest the United Nations has come to defining "Indigenous peoples" is through the 1981 "Study on the Problem of Discrimination against Indigenous Populations" authored by Jose R. Martinez Cobo, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. His definition is as follows: "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant." Chapter II, para. 34. This definition has not been formally adopted by the U.N.

[6] *See* INTER-PARLIAMENTARY UNION, IMPLEMENTING THE UN DECLARATION OF RIGHTS OF INDIGENOUS PEOPLES: HANDBOOK FOR PARLIAMENTARIANS NO. 23, 11-12 (23rd ed. 2014) [hereinafter IMPLEMENTING UNDRIP]; ILO Conv. No. 169, art. 1(a) ("Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.").

[7] ILO Conv. No. 169 (1989).

[8] ILO Conv. No .107 (1957). ILO Conv. No. 107, the "Indigenous and Tribal Populations Convention" (1957), was ILO Conv. No. 169's predecessor and is now closed for ratification. ILO Conv. No. 107, implemented in 1957, addressed Indigenous rights but focused on Indigenous "integrat[ion] into the national community" rather than Indigenous rights to self-determination and preservation of their own identity, language, and culture. *See* Preamble, ILO Conv. No. 107. ILO Conv. No. 169, however, is open for ratification and is considered the only international treaty that directly addresses the issues of Indigenous peoples. 24 countries have ratified ILO Conv. No. 169: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Germany, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, and Venezuela. The

and addresses equal rights for women, lands and national resources, equality of work opportunity and treatment, and access to justice, education, health and social security.[9] The Convention is still open for ratification, however, there has only been small, sporadic ratification since the latest surge of ratifying States in the late 1990s.[10]

The U.N. General Assembly took almost two decades to follow up on the ILO's work, passing UNDRIP on September 13, 2007.[11] UNDRIP addresses Indigenous peoples' rights to self-determination in the contexts of culture, religion, education, language, property, healthcare, and social security, among other topics.[12] While this declaration is a strong public step toward giving Indigenous peoples the space to advocate for and govern themselves, some States do not fully adhere to it. For example, the United States has reiterated on several occasions that,

> [t]he Declaration is an aspirational document of moral and political force and is not legally binding or a statement of current international law. The Declaration expresses aspirations that the United States seeks to achieve within

Convention came into force on September 5, 1991. *Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, INTERNATIONAL LABOUR ORGANIZATION [ILO] (March 23, 2023), https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314.

[9] Dhir, *supra* note 3, at 32-33.

[10] *Id.*

[11] *See generally* G.A. Res. 61/295, UN Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007) [hereinafter UNDRIP].

[12] *See generally id.* Article 3 of the Declaration affirms "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 4 extends self-determination to governance in internal or local affairs. In choosing to self-govern their internal affairs, Indigenous peoples are not barred from participating fully in the "political, economic, social and cultural life of the State." *See* UNDRIP, art. 5. Article 11 grants Indigenous peoples the right to practice their cultural traditions and customs, while Article 12 addresses religious customs and traditions. Article 14 addresses the rights of Indigenous peoples to "establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning." Additionally, Article 21 states "Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security." Article 24 further addresses Indigenous rights to practice their own healthcare and participate in the State's healthcare system. Articles 25-30 and 32 address Indigenous rights and interactions with land and territorial sovereignty. Additional articles further address other aspects of Indigenous rights, ultimately attempting to act "in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith." *See* UNDRIP, art. 46.

> the structure of the U.S. Constitution, laws, and international obligations, while also seeking, where appropriate, to improve our laws and policies.[13]

Other States, such as Bolivia, the Republic of the Congo, and the Philippines have taken direct steps to incorporate UNDRIP into their national legislations to provide legitimate state backing of this international instrument.[14] The varying degrees of reception to this anti-colonialist, self-determinative assertion of Indigenous rights creates uneven expectations for Indigenous communities around the globe.

While some States have adopted frameworks for Indigenous populations to assert their rights pursuant to the ILO Convention No. 169 and the U.N. Declaration, there still exists a coverage gap when Indigenous peoples are forced to migrate to States which do not adequately protect their rights as Indigenous peoples under international agreements. For example, such a gap existed, and still exists, for Indigenous peoples forced to migrate from Colombia to Ecuador during the Colombian internal conflict. Both States are parties to UNDRIP and ILO Conv. No. 169, and therefore are subject to their terms, despite neither agreement providing an enforcement mechanism to ensure adequate compliance with the agreements. The Colombian internal conflict has forced Indigenous communities across the Colombian-Ecuador border into Ecuador;[15] yet, Ecuador has failed to fully recognize Indigenous rights in their domestic asylum system and greater immigration system. In failing to fulfill their agreements to ILO Convo. 169 and UNDRIP, Ecuador reinforces colonialist legal structures

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[13] Explanation of Position on "Rights of Indigenous Peoples," UNITED STATES MISSION TO THE UNITED NATIONS (Nov. 7, 2019), https://usun.usmission.gov/united-states-explanation-of-position-on-rights-of-indigenous-peoples/.

[14] Bolivia adopted Law 3760 in 2007, which incorporated all of UNDRIP into Bolivian domestic law. In 2010, Bolivia passed another five new laws to change the structure of their plurinational State but included provisions in each about the rights of Indigenous peoples. The Republic of the Congo passed Law no. 5-2011 in 2011 to protect the Indigenous rights of the Babongo, Baaka, and other peoples. Finally, the Philippines adopted the Indigenous Peoples Rights Act in 1997 recognizing Indigenous' peoples' collective land rights. *See* IMPLEMENTING UNDRIP, *supra* note 6, at 38-40.

[15] Around 10,000 Indigenous Colombians were forcibly displaced into Ecuador in 2022. *See* Luis Jaime Acosta, *Colombia, Ecuador Working to Prevent Indigenous Abuse by Armed Groups*, REUTERS (Mar. 7, 2023 at 1:34PM), https://www.reuters.com/world/americas/colombia-ecuador-working-prevent-indigenous-abuse-by-armed-groups-2023-03-07/.

which suppress Indigenous identity and threaten the survival of these communities. The larger international community has yet to learn from this lesson and must fill these gaps which fail to protect Indigenous peoples and their right to fully maintain their identities under international law.

II. THE COLOMBIAN CONFLICT: A BRIEF OVERVIEW

Colombia is one of the most ethnically diverse countries in the world, housing approximately 102 different Indigenous groups within its borders.[16] Colombia experienced a bloody internal conflict known as *La Violencia* first inspired by regional guerilla movements[17] starting around 1948 and lasting approximately a decade.[18] Guerilla bands emerged during *La Violencia*, and government forces fought against competing bands all around the country.[19] The violence was so horrific that more than 200,000 people were killed over the course of a decade.[20] The expansion of armed groups, like the Revolutionary Armed Forces of Colombia (FARC), into kidnapping and extortion enabled them to gain power and influence in the 1980s and 1990s as the conflict continued between the Colombian government and guerilla groups.[21] The FARC are opposed by the Colombian government and other political groups. In 2016, the Colombian government and FARC leaders successfully reached an agreement to end the 50-year civil war.[22]

Violence in Colombia, growing rapidly from *La Violencia* and continuing to the present day, is a significant catalyst for the forced migration of individuals unable to protect themselves. Although estimates vary widely, over the past fifty years of conflict, tens of thousands of Colombians have died,

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[16] Michelle Begue, *Driven from Their Lands, Colombia's Awá Struggle to Survive*, UN HIGH COMMISSIONER FOR REFUGEES [UNHCR] (Dec. 26, 2017), https://www.unhcr.org/en-us/news/stories/2017/12/5a3a6ed84/driven-lands-colombias-awa-struggle-survive.html.

[17] *Colombia's Peace Process Through 2016*, CONGRESSIONAL RESEARCH SERVICE 2 (Dec. 31, 2016), https://crsreports.congress.gov/product/pdf/R/R42982/16 [hereinafter CRS Report].

[18] Norman A. Bailey, *La Violencia in Colombia*, 9 J. INTER-AM. STUD. 561, 566 (1967).

[19] *Id.* at 567.

[20] Steven Boraz, *Case Study: The Colombia-Venezuela Border, in* UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS 243, 244 (RAND Corporation 2007).

[21] *Id.*

[22] CRS Report, *supra* note 17, at 1.

more than 10 percent of Colombia's population has become forcibly displaced, and more than 25,000 people have been estimated missing or disappeared.[23] This ongoing humanitarian emergency still calls for strong state action to protect innocent individuals and for the international community to take steps to ensure stability and peace within the region.

III. THE FORCED MIGRATION OF INDIGENOUS COMMUNITIES

Colombia continues to struggle with the effects of the bloody conflict it has survived over the past fifty years. According to the U.N. High Commissioner for Refugees (UNHCR) 2021 Global Report, more than 130,000 newly displaced people were officially recorded this year and an additional 21,000 were confined by illegal armed groups.[24] Approximately 41 percent of those displaced and 99 percent of those confined are Afro-Colombian or Indigenous peoples.[25] Furthermore, 483,260 internally displaced Indigenous peoples were registered by the Colombian government between January to June 2021.[26] However, both "international organizations and NGOs remained concerned regarding the slow and insufficient institutional response to displacement."[27]

Communities such as the Awá people living in southwest Colombia and northeast Ecuador[28] struggle to survive on their original ancestral land due to the conflict; some have been relocated to other places within Colombia.[29] They fight to maintain their shared culture, despite losing their ancestral homelands and facing discrimination in more urban settings.[30] Approximately 29,000

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[23] *Id.* at 2.
[24] *Colombia Situation,* UNHCR (last visited Dec. 20, 2022), https://reporting.unhcr.org/colombiasituation [hereinafter *Colombia Situation*].
[25] *Id.*
[26] Colombia 2021 Human Rights Report, U.S. Department of State, https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/colombia/.
[27] *Id.*
[28] UNHCR, *Research Paper No. 263: Displaced Indigenous Peoples in the Colombian Border Regions*, 4 (Oct. 2013), ISSN 1020-7473, https://www.refworld.org/docid/528367f04.html [accessed 20 December 2022] [hereinafter UNHCR *Research Paper No. 263*].
[29] Begue, *supra* note 16.
[30] *Id.*

Indigenous Awá members live in the border region and are subject to violence, forced displacement, land mines, and recruitment of minors by armed groups.[31] Both Colombia and Ecuador have recognized "gaps in state presence" along the border where the Awá community lives and are subject to these human rights violations.[32]

In general, Colombia's Indigenous peoples frequently live on resource-rich lands located in "strategic areas" fought over by armed groups.[33] Although the 2016 peace agreement brought the promise of progress, violence against Indigenous communities persists.[34] Systematic attacks on community leaders strip Indigenous groups of the capacity to assert their legal rights within the proper channels provided to them by the Colombian government.[35] Indigenous communities also face barriers to participation in the legal processes created for Indigenous land stewardship and restitution.[36] The communities are also subject to higher incidences of poverty and child mortality.[37] Furthermore, generalized violence, as well as limited access to justice and security disproportionately affect Indigenous communities and continue to threaten their survival.[38]

Colombians and Indigenous peoples are not just internally relocating; they are also fleeing to border States. Approximately 54,000 Colombian refugees were reported in Ecuador by the end of 2021.[39] Many Indigenous communities live in the border regions between Colombia and Ecuador and Colombia and Venezuela, but their presence is often under-reported in the asylum process.[40] These communities may seek to maintain their "invisibility" to government officials for fear of

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[31] Acosta, *supra* note 15.
[32] *Id.*
[33] *Colombia: Country Focus*, European Union Agency for Asylum, 118 (Dec. 2022), https://www.ecoi.net/en/file/local/2083878/2022_12_EUAA_COI_Report_Colombia_Country_focus.pdf.
[34] *Id.*
[35] *Id.*
[36] *Id.* at 120.
[37] *Id.*
[38] *Id.* at 118.
[39] *Colombia Situation, supra* note 24.
[40] UNHCR *Research Paper No. 263, supra* note 28, at 1.

discrimination.[41] Like the Awá people, their ancestral lands may not be neatly encompassed by the overlaying State's political borders, presenting challenges for intra-community, yet bi-national, travel.[42] Indigenous people may also face obstacles in the form of language and cultural barriers, general lack of legal resources, and poverty, illness, and lack of education.

IV. INTERNATIONAL LAW: PROTECTION GAPS

A. UNDRIP and ILO Convention No. 169

Indigenous communities have fought since colonization to assert their independence from the cultural, political, and legal structures which were forced upon them. Their continuous fight for independence and recognized legal rights has garnered them some victories in the form of UNDRIP and ILO Convention No. 169. These victories are a significant first step to respecting the sovereignty of these communities, however, there is much work to be done in the international and domestic legal spheres to further protect Indigenous rights, especially in the context of Indigenous cross-border migration.

Just as colonialism infringed on the sovereignty of Indigenous populations, colonialist residues in modern society continue to stifle Indigenous communities' growth. International law's recognition of self-determination and free and informed consent can help wash away these residues and allow Indigenous communities to flourish on their own. UNDRIP acknowledges the colonialism Indigenous communities survived and the "historic injustices" they have suffered, including "dispossession of their lands, territories and resources" which stunted their right to develop "in accordance with their own needs and interests."[43] ILO Conv. No. 169 also acknowledges the colonial residues permeating international law, but adopts a new goal of "removing the assimilationist orientation of the earlier

[41] *Id.* at 3.
[42] *The Awa: Colombia's Tribal People*, BBC NEWS: AMERICAS (Aug. 27, 2009, at 8:48PM), http://news.bbc.co.uk/2/hi/americas/8224593.stm.
[43] UNDRIP, Preamble.

standards" set out in ILO Conv. No. 107. It aims to "recognize the aspirations of [Indigenous] peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages, and religions, within the framework of the States in which they live."[44] Without recognizing that colonialism has negatively impacted Indigenous development and has forced western approaches on Indigenous communities, the principles of self-determination and prior, free, and informed consent could not be introduced.

Indigenous peoples regain agency under international law through the principle of self-determination: Indigenous peoples should be their own decision-makers. Article 3 of UNDRIP enshrines the principle of self-determination, granting Indigenous peoples the right to "freely determine their political status and freely pursue their economic, social and cultural development."[45] Stemming from this broader right is a right "to autonomy or self-government in matters relating to their internal and local affairs" and their finance.[46] Putting this principle into practice, however, is difficult because Article 46(1) prevents the interpretation of Articles 3 or 4 to be construed in a way that "engage[s] in any activity or to perform[s] any act contrary to the Charter of the United Nations or [is] construed as authorizing or encouraging any action which would dismember or impair totally or in part, the territorial integrity or political unity of sovereign and independent States." In the same declaration, a right and a coverage gap of that right is created: Article 46(1) gives States an opportunity to circumvent the implementation and enforcement of Articles 3 and 4, therefore keeping in place the colonialist structures if supporting Indigenous autonomy would threaten the complete sovereignty of the traditional, colonialist State. UNDRIP creates a basis for States to honor Indigenous identity but does not create a solid foundation off of which Indigenous peoples can assert their rights. In practice,

[44] ILO Conv. No. 169, Preamble.
[45] UNDRIP, art. 3.
[46] UNDRIP, art. 4.

self-determination can manifest in local self-government or participation in negotiations between Indigenous peoples and governments, among other means.[47]

Flowing from self-determination is the principle of free, prior, and informed consent. Free, prior, and informed consent is so integral to the principle of self-determination that the U.N. Expert Mechanism on the Rights of Indigenous Peoples stressed that it "is required in matters of fundamental importance for the rights, survival, dignity, and well-being of Indigenous peoples."[48] Although the principle is not clearly defined in UNDRIP, the *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent* provides a definition mainly following the plain meaning definition of each word, contextualized specifically for land-use projects on Indigenous territory.[49] The proper implementation of this principle is achieved through thorough and genuine consultation with Indigenous peoples when States are considering projects which will directly affect specific populations; however, States have a duty of general consultation to all their populations for greater changes that affect peoples who are not Indigenous and will also be affected.[50] Genuine consultation and respect for the consent of Indigenous peoples give back to Indigenous peoples the agency that was stripped from them through colonialism. There are concrete steps States can take to involve Indigenous peoples in decision-making processes that directly affect them, therefore honoring their rights and respecting their sovereignty.

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[47] *See* IMPLEMENTING UNDRIP, *supra* note 6, at 16.

[48] *Id.* at 29 (citing Expert Mechanism advice no. 2, found in *Final report of the study on indigenous peoples and the right to participate in decision-making*, 17 August 2001 (A/HRC/18/42, annex)).

[49] "Free, should imply that there is no coercion, intimidation or manipulation, and Prior should imply consent being sought sufficiently in advance of any authorization or commencement of activities and respective requirements of Indigenous consultation/consensus processes. Informed should imply that information is provided that covers a range of aspects, [including, inter alia]… the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project and its duration; locality or areas affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks; personnel likely to be involved in the execution of the project; and procedures the project may entail." *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, U.N. Doc. E/C.19/2005/3 (Jan. 17-19, 2005).

[50] IMPLEMENTING UNDRIP, *supra* note 6, at 28.

International law also sets out more specific Indigenous rights. Article 16 of ILO Conv No. 169 and Article 10 of UNDRIP set out provisions advocating against the forcible removal of Indigenous communities from their lands or territories.[51] Furthermore, UNDRIP states that "Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders."[52] The ILO more clearly places the responsibility of ensuring this right of bi-national movement and maintenance of community relations on State governments.[53] Both documents advocate for the State to make changes to its own laws to further the advancement of these rights in the State's territory for the betterment of Indigenous communities everywhere. The Declaration and Convention cannot bind States to each other when Indigenous communities must move across political borders and into another State's territory.[54] Therefore, Indigenous refugees face the danger of losing their cultural, political, economic, and legal rights upon their arrival to another country, especially due to the obstacles they may face in properly communicating with others, interacting with a new domestic legal system, and receiving adequate support while they relocate and seek safety.

B. Application of International Agreements to Colombia and Ecuador

Signatories to UNDRIP are not legally bound by its contents, but in signing the Declaration they make a strong commitment to the principles for which it advocates. Likewise, ILO Conv. No. 169 sets forth a promising framework but does not have an attached enforcement mechanism to

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[51] ILO Conv. No. 169, art. 16; UNDRIP, art. 10.

[52] UNDRIP, art. 36(1).

[53] ILO Conv. No. 169, art. 32. Stating "Governments shall take appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between Indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields."

[54] ILO Conv. No. 169 advocates for free and informed consent before displacing Indigenous populations. If they need to be displaced, the Convention states the peoples shall have a right to return when able to do so, or they shall be granted "lands of quality and legal status at least equal to that of the lands previously occupied by them." ILO Conv. No. 169, art. 32.

ensure Indigenous rights are properly respected by the Convention's parties. By signing both agreements, both Ecuador and Colombia committed their efforts to the international community to uphold these values.[55] Voicing their commitment to Indigenous rights helps to incorporate Indigenous voices into international law, therefore peeling back the layers of colonialism that have shut them out, and also introduces Indigenous human rights into customary international law. However, failing to wholly uphold these commitments highlights the shortcomings of UNDRIP and ILO Conv. No. 169 and slows the development of legal structures in international law.

Colombia, like Ecuador, is also a party to the Organization of American States (OAS) 2016 American Declaration on the Rights of Indigenous Peoples.[56] The OAS Declaration emphasizes self-determination and informed, free, and prior consent like UNDRIP and ILO Conv. No. 169 as well.[57] Colombia broke with OAS consensus on the OAS definition of free, prior, and informed consent in favor of the ILO Conv. No. 169 definition, which the State believed does not "imply the right to veto state decisions, but is rather a suitable mechanism for Indigenous and tribal peoples to enjoy the right of expression and of influencing the decision-making process."[58] This reservation highlights the tension between State sovereignty and Indigenous self-determination, where colonial legacies will likely win out over Indigenous rights to self-determination.

However, Colombia has domestic laws in place that mirror its commitments to Indigenous peoples under ILO Conv. No. 169 and UNDRIP. The Colombian National Constitution recognizes Indigenous peoples' right to self-governance, providing that the rights "are not contrary to the Constitution and the laws of the Republic."[59] Although the official language of Colombia is Spanish,

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[55] UNHCR *Research Paper No. 263, supra* note 28, at 7.

[56] *See generally* American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16), Organization of American States [OAS] (June 15, 2016).

[57] *See* Art. III for self-determination, and Arts. XXIII(2) and XXIX(4) for references to free, prior, and informed consent in the OAS Declaration. American Declaration on the Rights of Indigenous Peoples, arts. XXIII(2), XXIX(4).

[58] *Id.* art. XXIII(2), note 3.

[59] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COLOMBIA [CP] Jul. 20, 1991, art. 246.

"the languages and dialects of ethnic groups are also official in their territories."[60] Indigenous peoples are granted Colombian citizenship under the Constitution "straddling border areas, in application of the principle of reciprocity according to public international treaties."[61] The application of these Constitutional principles in practice, however, has been called into question.[62] While Colombia has enforced some of these constitutional provisions,[63] it still struggles to fulfill its promises to protect displaced Indigenous communities moving across borders under UNDRIP and ILO Conv. No. 169. Colombia has acknowledged its violation of Indigenous rights leading to mass internal displacement of Indigenous peoples and has set up frameworks to address these violations.[64] The ILO still urges the Colombian State to provide more information on how Indigenous peoples participate in the implementation of ILO Conv. No. 169, to act to restore peace within the country and to provide reparations to Indigenous communities affected by violence.[65]

Ecuador has also attempted to fulfill its international obligations by passing several domestic laws, however, it falls short of fully respecting the human rights of Indigenous refugees under UNDRIP and ILO Conv. No. 169. The Ecuadorian National Constitution guarantees full and equal citizenship for Indigenous peoples and recognizes certain Indigenous rights.[66] Firstly, Ecuador recognizes Kichwa and Shuar, two Indigenous languages, as "official languages for intercultural ties."[67]

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[60] *Id.* art. 10.
[61] *Id.* art. 96(2)(c).
[62] UNHCR *Research Paper No. 263, supra* note 28, at 10.
[63] Dimitri Selibas, *Indigenous Communities in Colombia's Amazon Move Closer to Self-Governance*, MONGABAY (June 29, 2022), https://news.mongabay.com/2022/06/indigenous-communities-in-colombias-amazon-move-closer-to-self-governance/. In 2021, Colombia's Supreme Court required the Colombian government to implement Decree 632, making 14 Indigenous territories entities in the eastern Amazon.
[64] UNHCR *Research Paper No. 263, supra* note 28, at 10-11.
[65] ILO, Comm. of Experts on the Application of Conventions, Observation on Indigenous and Tribal Peoples Convention for Colombia (2019), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4023016.
[66] CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR, Oct. 20, 2008, art 6, arts 56, 57.
[67] *Id.* art. 2.

The Constitution explicitly prohibits discrimination on the basis of "ethnic belonging."[68] People have a right to their own culture:

> "Persons have the right to build and uphold their own cultural identity, to decide their belonging to one or various cultural communities, and to express these choices; the right to aesthetic freedom; the right to learn about the historical past of their cultures and to gain access to their cultural heritage; to disseminate their own cultural expressions and to have access to diverse cultural expressions."[69]

The Constitution further enumerates specific Indigenous rights centered around developing identity;[70] judicial independence;[71] freedom from discrimination;[72] a right to receive compensation from damages resulting from discrimination;[73] property rights;[74] representation in government;[75] free, prior, and informed consent;[76] communication across borders;[77] and collective action and ownership.[78]

These rights, thoroughly articulated in the Constitution, are difficult to implement in practice. The situation of Indigenous migrants articulates this point: Article 40 of the Ecuadorian Constitution states that "the right to migrate of persons is recognized. No human being shall be identified or considered as illegal because of his/her migratory status."[79] Indigenous groups who flee from Colombia to join their same people living in Ecuador should be afforded autonomous adjudication of shared territory under the Ecuadorian Constitution.[80] In practice, however, Indigenous communities

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[68] *Id.* art. 11(2).
[69] *Id.* art. 21.
[70] *Id.* art. 57(1).
[71] *Id.* art. 171.
[72] *Id.* art. 57(2).
[73] *Id.* art. 57(3).
[74] *Id.* arts. 57(4)-(8), (11).
[75] *Id.* arts. 57(15), (16).
[76] *Id.* art. 57(17).
[77] *Id.* art. 57(18).
[78] *Id.* arts. 57(59), (60).
[79] *Id.* art. 40.
[80] *Id.* art. 257 ("Within the framework of political-administrative organization, indigenous or Afro-Ecuadorian territorial districts may be formed. These shall have jurisdiction over the respective autonomous territorial government and shall be governed by the principles of interculturalism and plurinationalism, and in accordance with collective rights."); UNHCR *Research Paper No. 263*, *supra* note 28, at 13.

are afforded little autonomy, and Indigenous communities have to face many obstacles to gain recognition by the government to obtain communal land titles.[81] Additionally, Ecuador has a recognized asylum process through which refugees may apply within 90 days of arriving in the country.[82] However, Indigenous communities still face obstacles to obtaining asylum. Colombians in Ecuador report high levels of discrimination, barriers to accessing education and crime.[83] Many Colombian refugees resort to invisibility in Ecuador as a survival mechanism.[84] Therefore, Indigenous refugees are unable to obtain the very status they seek, and then are unable to obtain full access to the rights they are afforded through the law.

The UNHCR made several recommendations to improve conditions for Indigenous refugees on the Colombia-Ecuador border. More thorough documentation by State agencies on the status of Indigenous populations living in the State and seeking asylum or other forms of relief "grants access to benefits to refugees, confers legal status and can help guard against abuse and indefinite detention through protection measures that accompany such status."[85] The UNHCR advocates for alternative measures for access to asylum for Indigenous refugees, including dual nationality where applicable and the issuance of bilateral identification documents.[86] Overall, the UNHCR advocates for supporting collective Indigenous rights, protecting Indigenous leaders, and promoting protection through raising awareness of Indigenous identities and values.[87]

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[81] UNHCR *Research Paper No. 263, supra* note 28, at 13.

[82] *See, e.g.*, How Can I Apply for Refugee Status?, UNHCR, https://help.unhcr.org/ecuador/en/bienvenido-a/acceso-a-la-condicion-de-personas-refugiada-asilo-y-tramites-migratorios/solicitud-refugiado/. In May 2012, Ecuador violated international law through passing Decree 1182, which only gave asylum seekers a mere 15 days to apply for asylum; UNHCR *Research Paper No. 263*, *supra* note 28, at 14. The Decree has since been repealed and asylum seekers are given 90 days to apply.

[83] Jeffrey D. Pugh et al., *Welcome Wears Thin for Colombians in Ecuador*, MIGRATION POLICY (Jan. 09, 2020), https://www.migrationpolicy.org/article/welcome-wears-thin-for-colombians-ecuador.

[84] *Id.*

[85] UNHCR *Research Paper No. 263, supra* note 28, at 17.

[86] *Id.* at 18-19.

[87] *Id.* at 18, 20.

V. CONCLUSION

Indigenous peoples living in Colombia have fought to stay on their ancestral homelands and survive the violence which rocked Colombia for over fifty years. The Colombian State has passed domestic laws and made efforts to fulfill its intentions to comply with UNDRIP and ILO Conv. No. 169. Despite its shortcomings, Colombia and Ecuador have made more recent advances to fulfill their international obligations.[88] Still, some Indigenous peoples have been forced to migrate across Colombian borders into Ecuador. In Ecuador, they have faced obstacles to obtaining asylee status and further obstacles in the recognition of their Indigenous identity and rights.

In becoming a party to these international agreements, both Colombia and Ecuador have furthered the incorporation of Indigenous rights into customary international law. ILO Conv. No. 169 and UNDRIP make strong assertions of collective Indigenous rights and the principle of self-determination, rebuking colonialist legacies set forth in previous agreements which forced western ideologies onto Indigenous communities. States joining these agreements took a stand against this colonialist legacy, and any action they take in accordance with its provisions chips away at it and creates a space for Indigenous voices to be heard. Although Colombia and Ecuador may have some way to go in fully fulfilling the promises they made through joining ILO Conv. No. 169 and UNDRIP, each step they make in advocating for Indigenous rights scrubs at colonial residues and ensures the international legal system fights for justice and peace for all people.

[88] In March 2023, Colombia and Ecuador announced a binational alert system for the Awá Indigenous community living on the shared border to better protect the community from armed groups targeting the Indigenous population there. *See* Acosta, *supra* note 15.

Essay 3

Colonial Residues: Conflicts Over Nationality in the Modern Era

From the 1940s onwards, colonial exit by imperial nations was widespread. The process left challenges for both the colonizers and former colonies, like citizenship and nationality legislation. The measures taken related to nationality and citizenship created new challenges in migration legislation and policy and left a potential way to intervene in other States in the future. This Paper will first introduce the general legal principles of nationality laws applied internationally, then talk about specific policies of different States and colonies, and finally will discuss a case involving the United Kingdom and Hong Kong SAR in recent years.

I. INTRODUCTION—GENERAL NATIONALITY LAW

There are several types of ways to acquire a nationality in international law. At birth, one may acquire nationality by *jus soli* (by birthright) and *jus sanguinis* (by parentage). At marriage, one may acquire citizenship of another country through one's spouse. Most countries offer naturalization for foreigners who wish to acquire a nationality, with common requirements on skills, education level, and a period of years of residence. Among the pathways to citizenship, the two most commonly mentioned are *jus soli* and *jus sanguinis*, which will be introduced below.

A. Jus soli

Under *jus soli* or the right of territory, nationality or citizenship is acquired when one is born in the territory of a State. People born outside the territory are foreigners even if their parents are citizens of the State, and they may only become a citizen by naturalization later.[1]

There are multiple variants of *jus soli.* Under unconditional *jus soli*, nationality is conferred to all who are born on the territory without exception automatically.[2] Over centuries, many States have revised rules and created conditional *jus soli*—for example, that a child shall not have a parent holding a specific residence right (e.g., ambassador of another State).[3] A common type of conditional *jus soli* is double *jus soli*, under which whoever is born on the territory of a State acquires citizenship only when one of the parents is also born there or principally resides there, like in the Netherlands and France.[4]

B. Jus sanguinis

Under *jus sanguinis* or the right of blood, nationality or citizenship is acquired by virtue of a parent's citizenship. Parentage and heritage play an important role in defining who is a citizen at birth.[5]

In applying *jus sanguinis*, States have some discretion in making exceptions, such as excluding children born abroad or out of wedlock, as well as differentiating between first and second generations born abroad.[6] However, international law has developed to prevent States from making certain discriminative distinctions between cases. For example, the European Convention on Nationality states, "[t]he rules of a State Party on nationality shall not contain distinctions or include any practice which amounts to discrimination on the grounds of sex, religion, race, color or national or ethnic origin."[7]

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[1] *See* Mickaella L. Perina, *Race and the Politics of Citizenship: The Conflict Over Jus Soli and Jus Sanguinis,* INT'L STUD. PHIL. 123, 126 (2006).
[2] *See id*. at 125.
[3] *See* Gerard-René de Groot & Olivier Vonk, *Acquisition of Nationality by Birth on a Particular Territory or Establishment of Parentage: Global Trends Regarding Jus Sanguinis and Jus Soli,* NETH. INT'L L. REV. 319, 322 (2018).
[4] *See id*.
[5] *See* Perina, *supra* note 1, at 125.
[6] *See* de Groot & Vonk, *supra* note 3, at 324.
[7] *See* European Convention on Nationality, art. 5(1).

In some *jus sanguinis* systems, one may not automatically acquire citizenship of a State at birth but may acquire it with greater ease given ethnic ties to the State. To illustrate, under Irish law, a person of Irish descent may apply for Irish citizenship directly even without compliance with ordinary conditions required for naturalization like the number of years of residence required.[8] To limit the acquisition of nationality through *jus sanguinis*, some States have also established that those born abroad and domiciled there cannot acquire it. However, an individual can still build up their ties with the State to avoid this restriction.[9]

C. Modern practice

Through centuries of practice, States have realized that either pure *jus soli* or *jus sanguinis* may lead to ambiguity in certain scenarios; thus, most States have combined both in their legislations. Sometimes States shift from one to another depending on their willingness to accept new immigrants.[10] Now, the historical legal principles applied in acquiring citizenship remain a way to understand a country's culture and how it views nationality.[11] The attitudes toward accepting immigrants are also influenced by colonial residues in the modern era.

When imposing a colonial regime on a new territory, many colonizing States established rules different from what was in place in the original territory. An example is France, which distinguished inhabitants of their territories based on the nature of sovereignty.[12] Inhabitants were either "French Subjects," "French Protected Persons," "French-administered Persons," or possessing their own citizenships.[13]

II. NATIONALITY LAWS ON THE COLONIES WHEN EXITING

[8] *See* Irish Nationality and Citizenship Act, § 16(a).
[9] *See* Gerard-René de Groot et al., *Loss of Citizenship: Trends and Regulations in Europe*, EUDO CITIZENSHIP COMP. CITIZENSHIP ANALYSES 29 (2010).
[10] *See* Perina, *supra* note 1, at 126.
[11] *See id.* at 125.
[12] *See* Władysław Czapliński, *A Note on Decolonization and Nationality*, L. & POL. AFR., ASIA & LATIN AM. 329, 330 (1985).
[13] *See id.*

When exiting the colonies, imperial nations created their own rules for treating past and future residents of the colonies that were largely dependent on Declarations of Independence of the colonies or agreements between the interested States.[14] This section will examine examples to show how the States created and enforced their nationality policies when exiting their colonies.

A. The United Kingdom and Hong Kong

The United Kingdom had a tradition of *jus soli* prior to colonial exit but added *jus sanguinis* provisions to keep links with nationals overseas from the 1950s onwards.[15] Facing decolonization, the United Kingdom further modified its laws to limit granting citizenship in the next decades.

In 1981, the British Nationality Act divided citizenship into three categories: (1) British Citizen, (2) British Dependent Territories Citizen ("BDTC"), which was later called "British Overseas Territories Citizen," and (3) British Overseas Citizen ("BOC").[16] At the time, only British Citizens could live and work freely in the United Kingdom.[17] Hong Kong residents and their offspring fell under BDTC and were deprived of freely entering and working in the United Kingdom. Many scholars criticized the British Nationality Act for implying a prejudice against Hong Kong Chinese and demonstrating a "racialized understanding of nationality."[18]

In 1984, the Sino-British Joint Declaration was signed to handle the Chinese takeover of Hong Kong. The memorandum of the United Kingdom contains a part saying that original BDTCs would cease to be BDTCs, but "will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom."[19] Meanwhile, no person born on

[14] *See id.*
[15] *See* Patrick Weil, *Access to Citizenship: A Comparison of Twenty-five Nationality Laws*, CITIZENSHIP TODAY: GLOBAL PERSP. AND PRAC. 17, 25 (2001).
[16] *See* British Nationality Act 1981.
[17] *See id.*
[18] *See* Chi-kwan Mark, *Decolonising Britishness? The 1981 British Nationality Act and the Identity Crisis of Hong Kong Elites*, J. OF IMPERIAL AND COMMONWEALTH HIST. 565, 567 (2001); *see also* KATHLEEN PAUL, WHITEWASHING BRITAIN: RACE AND CITIZENSHIP IN THE POSTWAR ERA 183-89 (Cornell University Press 1997).
[19] *See* Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong.

or after the handover would be able to acquire the BDTC status via a connection with Hong Kong, but they may still have acquired it by parentage under *jus sanguinis*.[20]

Later, the Hong Kong (British Nationality) Order of 1986 created the British National (Overseas) ("BNO") status, a new category of British nationality specifically for Hong Kong residents.[21] At the time, the rights of BNOs were inherited from BDTCs and the holders were still subject to immigration restrictions on entering and residing in the United Kingdom. The rights of BNOs have changed over the decades, which will be introduced in Part Three below, showing a picture of how colonial residues have created legal and diplomatic problems.

B. Portugal and Macau

Portugal has adopted both *jus soli* with the condition of residence and *jus sanguinis* limited to the first generation.[22] In 1987, the Sino-Portuguese Joint Declaration was signed to tackle the handover of Macau. In the memorandum, the Portuguese government declared:

> In conformity with the Portuguese legislation, the inhabitants in Macao who, having Portuguese citizenship, are holders of a Portuguese passport on 19 December 1999 may continue to use it after this date. No person may acquire Portuguese citizenship as from 20 December 1999 by virtue of his or her connection with Macao.[23]

Similar to Hong Kong, residents of Macau could no longer acquire Portuguese citizenship after December 20, 1999, by *jus soli* but could still acquire it via *jus sanguinis* for the first generation. If the second generation wished to access citizenship, it was conditioned on the length of legal residence of the parents.[24] This is a typical practice in redefining nationality after colonial exits.

C. France and Algeria

France was historically a *jus sanguinis* State since the beginning of the nineteenth century but turned to double *jus soli* in 1889 to cover the third generation of immigrants.[25] In the twentieth

[20] *See id.*
[21] *See* The Hong Kong (British Nationality) Order 1986.
[22] *See* Weil, *supra* note 15, at 20; *see also* Portuguese Nationality Act Law 37/81, of 3 October (Consolidated version, as amended by Organic Law 2/2006, of 17 April), art. 1.
[23] *See* Joint declaration of the Government of the People's Republic of China and the Government of the Portuguese Republic on the Question of Macau.
[24] *See* Weil, *supra* note 15, at 30.
[25] *See id.* at 29.

century, France experienced difficulty revising immigration policies in Africa since there was an unclear legal definition for citizenship.[26] Meanwhile, Africans claimed social and economic equivalence including rights to citizenship with other French people until independence.[27]

When physically exiting former colonies, conflicts relating to citizenship have been partly relieved by a termination of the application of *jus soli*. Instead, *jus soli* remains a consideration in nationality laws afterward. For example, the treatment for Algerians is specifically included in the French Civil Code, showing the considerations for the past and future:

> The French nationality of persons of civil status of general law who were born in Algeria before the 22 July 1962 shall be deemed established, on the terms of Article 30-2, where those persons have enjoyed in a constant way the apparent status of French.[28]

D. Spain

Similar to France, Spain was a traditional *jus sanguinis* State from the early nineteenth century but turned to double *jus soli* when dealing with immigrants: the offspring of immigrants may also get citizenship if one of the parents was also born in Spain, while the children of diplomatic or consular officials are excluded.[29][30]

When exiting colonies, in addition to the ordinary practice of continuing to use *jus sanguinis*, Spain employed a different approach to exclude those who were born in former colonies without Spanish parents and would be pure foreigners to the State:

> Granting of citizenship pursuant to the residence shall require ten years' residence. Five years shall be sufficient for persons who have obtained asylum or refugees, and two years for citizens by birthright of Ibero-American countries, Andorra, the Philippines, …[31]

While the ordinary naturalization process in Spain requires ten years of residence, the requirement was significantly reduced to two years for those who were citizens of former colonies.

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[26] *See* FREDERICK COOPER, CITIZENSHIP BETWEEN EMPIRE AND NATION 125-26 (Princeton University Press 2014).
[27] *See id.* at 434-35.
[28] *See* French Civil Code, art. 32-2.
[29] *See* Weil, *supra* note 15, at 21-9.
[30] *See* The European Convention on Nationality, art. 17.1.
[31] *See* Spanish Civil Code, art. 22.

That may be due to the consideration of attracting more people with similar cultural acceptance who are easier to be assimilated into society. When studying colonial residues on States' nationality laws, this demographic factor is usually an important concern.

E. The Netherlands

Similar to France and Spain, the Netherlands has a tradition of *jus sanguinis* and added double *jus soli* in the twentieth century.[32] Individuals born in the Netherlands with foreign parents may acquire citizenship, provided the requirement on principal place of residence is achieved.[33] After exiting the colonies, the Netherlands imposed a flexible treatment on the colonial residents' citizenships:

> [T]he right to take up residence in the Netherlands as a citizen of the former colonies was not rescinded until the transfer of sovereignty and, indeed, for several years beyond. This meant that all postcolonial migrants retained the right of abode and the same civil rights and duties as any other Dutch citizen.[34]

In the post-colonial era, most migrants from the former colonies of the Netherlands could maintain their Dutch citizenship as "a part of the postcolonial bonus."[35] While the ordinary naturalization process requires permanent or habitual residence for five consecutive years, migrants from the former colonies may enjoy an easier requirement. This illustrates that inhabitants of the former colonies may also benefit from colonial residues left by imperial nations by gaining some relative privileges.

III. NATIONALITY LAW AND COLONIAL EXIT—A WAY TO MAINTAIN POWER? CASE STUDY: THE UNITED KINGDOM, PRC, AND BNO STATUS IN HONG KONG

When exiting colonies, States used various ways to maintain some extent of control over a given country or region to secure benefits including natural resources and economic interests. For example, when exiting Algeria, the French government tried to create a legislative framework

[32] *See* Weil, *supra* note 15, at 21.
[33] *See* Netherlands Nationality Act, art 6.1.
[34] *See* OOSTINDIE GERT, POSTCOLONIAL NETHERLANDS 55 (Cambridge University Press 2011).
[35] *See id*. at 50.

to separate the judicial power from local Algerians to retain some control after the country became independent to secure strategic oil resources.[36]

There were additional other ways to interfere with former colonies after decolonization. Directly, a State could add certain articles in an agreement negotiated with other stakeholders to secure rights over certain issues; indirectly, it could rely on the culture, values, and business infrastructure of the colonial society to retain power. Another controversial way is the manner in which the United Kingdom changed its nationality law regarding the BNO holders in Hong Kong, which happened in recent years.

A. Background

In 2020, the Hong Kong National Security Law ("NSL") was passed in the National People's Congress of the People's Republic of China (PRC). It was widely viewed as a response to a series of social movements dating from 2019 in Hong Kong. Until early 2022, more than 2,000 people were charged under NSL and over 600 were convicted.[37]

Several months after the NSL was passed, the UK revised its nationality law—from January 2021, BNOs could stay in the UK for five years instead of six months, during which they could have unrestricted access to work and study.[38] After five years, they could get "Indefinite Leave to Remain" and permanent residency, then acquire full British citizenship after one additional year.[39]

In 2021, there were around 2.9 million people eligible for BNO passports in Hong Kong under the new rule.[40] Hong Kong citizens' attitude towards the route could be inferred from a survey, in which around 40% of the BNO holders surveyed were either planning or considering

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[36] *See* JEPPESEN CHRIS & ANDREW W.M. SMITH, BRITAIN, FRANCE AND THE DECOLONIZATION OF AFRICA: FUTURE IMPERFECT 71 (UCL Press 2017).
[37] *See* Jennifer Jett & Austin Ramzy, *From Protester to Prisoner: How Hong Kong Is Stifling Dissent*, N.Y. TIMES (May 28, 2021).
[38] *See* HM Government, *Hong Kong British National (Overseas) (BN(O)) Visa* (2020), https://www.gov.uk/guidance/hong-kong-british-national-overseas-visa-applications#what-you-can-and-cannot-do.
[39] *See id.*
[40] *See* HM Government, *Hong Kong British National (Overseas) Visa Policy Statement* (2020) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/902976/CCS207_CCS0720898728-001_HK_BN_Visa_Policy_Statement_A4__4__-_FINAL.pdf.

coming to the United Kingdom via the BNO route in early 2021.[41] When asked about the factors considered in making the decision, the most common answers included quality of the courts, social welfare provision, sense of safety, and offspring's future development.[42] Apart from social welfare, all other factors could be traced somehow to the social movements in Hong Kong in the past decade and the publication of NSL.

B. Rationale Behind the Change and Reaction of PRC

The UK's new legislation was believed to be a reaction to the NSL, which triggered wide controversies. In contrast with past immigration policies which preferred high-skilled labor, the new route did not require skills or certain education levels as before.[43] Although some countries like Australia and Canada also adopted new immigration policies for the people of Hong Kong, they did not limit the coverage to BNO holders only but all people holding either a BNO passport or an HKSAR passport.[44, 45]

Considering traditional motivations to attract immigrants, it seems contradictory for the United Kingdom to simply open a route for BNO holders without other requirements. If it wished to attract more talent to benefit economic development, adding requirements to filter immigrants should have been an existing practice. If politicians wished to improve their own electorate by accepting new immigrants, they should have tried to open the route to other Hong Kong residents without the BNO status altogether to increase the votes.

In attempting to explain the rationale behind this decision, some people raised a salient point—it was the UK's responsibility to do so, either based on the protection of refugees or the

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[41] *See* Ronaldo Au-Yeung, *State Responsibility: International Legal Explanation of the United Kingdom's Citizenship Provision to Hong Kong British National Overseas*, SocArXiv 2 (2002), https://doi.org/10.31235/osf.io/d9bv2.
[42] *See* Man-yee Kan, Lindsay Richards & Peter William Walsh, *The Migration Intentions of British National (Overseas) Status Holders in Hong Kong*, Briefing, The Migration Observatory at the University of Oxford 2, 10 (2021).
[43] *See* Au-Yeung, *supra* note 41, at 12.
[44] *See* Australian Consulate-General Hong Kong, Australia: Migration Pathways for Hong Kong SAR and BNO passport holders (2022), https://hongkong.consulate.gov.au/hkng/VISMG_MigrationPathwaysHK.html.
[45] *See* Government of Canada, Permanent Residence Pathways for Hong Kong Residents (2022), https://www.canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/hong-kong-residents-permanent-residence.html.

interest of their nationals overseas.[46] In contrast, others argued that the whole BNO status is "a remainder of how imperial forms of governance underscore present-day legislation," which has limited impact on reality but is valuable in realizing the crisis in the modern Sino-British relationship in the era of decolonization.[47]

Soon after the BNO route was created, PRC took a counter-measure that it no longer admitted BNO passports as a valid travel document and proof of identity, and the HKSAR government followed the decision.[48] Furthermore, the PRC government tried to undermine the validity of the United Kingdom's decision by claiming that "the Sino-British Joint Declaration, as a historical document, no longer has any practical significance . . . The UK has no sovereignty, no power to rule and no power to supervise Hong Kong after handover."[49] Similarly, the Legislative Council of Hong Kong has reiterated PRC's opinion that "there is no such thing as 'moral obligation'" of the United Kingdom to Hong Kong beforehand.[50]

In contrast, the United Kingdom said that the Declaration was a legally binding treaty that remains valid, and it should monitor the implementation of the agreement.[51] That is also the opinion of many Western countries, as shown in the G7 Foreign Ministers' Statement in 2022, which called on China "to act in accordance with the Sino-British Joint Declaration and its other obligations."[52] The validity and power of the agreement are still under debate now. It is not a purely legal question but involves political and diplomatic concerns and further shows the complexity of problems relating to citizenship brought on by colonial residues.

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[46] *See* Au-Yeung, *supra* note 41, at 15-21.
[47] *See* Benson Michaela, *Hong Kongers and the Coloniality of British Citizenship from Decolonisation to 'Global Britain,'* 1 CURRENT SOCIO. 15 (2021), https://doi.org/10.1177/00113921211048530.
[48] *See* HKSAR Government, *HKSAR Government Follows up on China's Countermeasures against British Government's Handling of Issues Related to British National (Overseas) passport* (2021), https://www.info.gov.hk/gia/general/202101/29/P2021012900763.htm.
[49] *See China Says Sino-British Joint Declaration on Hong Kong No Longer Has Meaning*, REUTERS (2017), https://www.reuters.com/article/us-hongkong-anniversary-china-idUSKBN19L1J1 [hereinafter REUTERS Report].
[50] *See* Legislative Council of the Hong Kong Special Administrative Region, *LCQ5: The Joint Declaration on the Question of Hong Kong* (2014), https://www.info.gov.hk/gia/general/201412/17/P201412170731.htm.
[51] *See* REUTERS Report, *supra* note 49.
[52] *See* G7 Foreign Ministers, *G7 Foreign Ministers' Statement on the Hong Kong Chief Executive Selection* (2022), https://www.state.gov/g7-foreign-ministers-statement-on-the-hong-kong-chief-executive-selection/.

IV. Conclusion

While the decolonization processes for many former colonies have run placidly, conflicts over nationality persist for some of them. The traditional grounds for recognition of nationality including *jus soli* and *jus sanguinis* have encountered ambiguities facing colonization and decolonization.

The conflicts between the PRC and the United Kingdom show that colonial residues are still affecting modern legal and diplomatic processes. The transition of former colonies has not yet been fully completed, and the proper recognition of identity remains an issue to be solved. Countries must have more intense cooperation to tackle this perennial problem and to create a better world.

Essay 4

Impact of French Colonial Legacies on the Ethnic Vietnamese Stateless Population in Cambodia

For much of history, scholarship has viewed statelessness as an issue that could be fixed through legislation, treaties, and international agreements.[1] While these tools play a key role in solving statelessness, they must be viewed in a broader context. Statelessness is irrevocably intertwined with colonialism. From forced displacement, to border creation, and discrimination, European colonialism contributed to the creation of stateless populations both formally and informally.[2] While the United Nations High Commissioner for Refugees, the 1954 Convention Relating to the Status of Stateless Persons ("1954 Convention"), and the 1961 Convention on the Reduction of Statelessness ("1961 Convention") have made considerable progress, the current number of stateless populations worldwide persists.[3] This Paper contends that statelessness cannot solely be viewed through a legal or administrative lens but requires considerations of tensions between nationhood and citizenship, and thus the colonial legacies of the State. First by analyzing the international legal frameworks around statelessness, and second, through applying said frameworks to the case study of ethnic Vietnamese populations in Cambodia, this Paper argues that international frameworks surrounding statelessness must move beyond legalism to account for the impact of colonial legacies on these at-risk populations.

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[1] *See* Malak Benslama, *Decolonising Statelessness: Unpacking Colonial Legacies and Deconstructing Forms of Epistemic Violence*, Melbourne Law School CSS Blog (Jan. 2021).
[2] *See* Christoph Sperfeldt, *Statelessness in Southeast Asia: Causes and Responses, Global Citizenship Observatory* (Mar. 9, 2021).
[3] *See e.g., Statelessness in Numbers: 2020 An Overview and Analysis of Global Statistics*, Institute on Statelessness and Inclusion (2020).

I. LEGAL DEFINITIONS ROOTED IN AMBIGUITY

The ambiguities between de facto and de jure statelessness established through the 1954 and 1961 Conventions leave many people without adequate protection or access to legal recourse.[4] The governing international frameworks, the 1954 and 1961 Conventions, mainly account for de jure stateless populations, leaving a protection gap for those considered de facto stateless.

The 1954 Convention was the primary document establishing a protection framework for stateless persons.[5] It first sets out the legal definition for de jure statelessness, as "a person who is not considered as a national by any State under the operation of its law."[6] Second, it establishes minimum human rights and standards for the treatment of stateless populations, including the right to education, employment, and housing, as well as guarantees stateless people a right to identity, travel documents, and administrative assistance.[7] However, these "guaranteed" rights are often left unfulfilled. Thus, the 1961 Convention was created to move beyond protection. It has the goal of preventing statelessness and reducing it over time by requiring Contracting Parties to abide by rules of "acquisition, renunciation, loss, and deprivation of nationality."[8] The Convention requires States to include safeguards in their domestic laws to prevent the loss of nationality at birth or later in life. For example, children must acquire the nationality of the country where they are born if they do not acquire or have any other nationality. It also includes provisions on situations of renunciation of nationality and State succession.[9] The Convention does not provide a renewed definition of "statelessness," however it does recommend that "persons who are stateless de facto should as far as possible be treated as

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[4] *See* Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 Int'l J. of Refugee L. 156, 173-4 (1998).
[5] *See generally* Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, 360 U.N.T.S. 117.
[6] *See* i*d.* at art. 1(1).
[7] *See generally* Convention Relating to the Status of Stateless Persons.
[8] *See* UNHCR, Interpreting the 1961 Statelessness Convention and Avoiding Statelessness Resulting from Loss and Deprivation of Nationality, Expert meeting convened by the Office of the United Nations High Commissioner for Refugees 2 (Oct. 31-Nov. 1, 2013).
[9] *See* UNHCR, Guidelines on Statelessness No. 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1-4 of the 1961 Convention on the Reduction of Statelessness, HCR/GS/12/04, (Dec. 21, 2012).

stateless de jure to enable them to acquire an effective nationality."[10] Today, this resolution is read to imply that the 1961 Convention is legally binding to de jure statelessness only.

De facto statelessness occurs when a person has a nationality and/or a legal claim to citizenship but is precluded from asserting their claim due to civil disorder, fear of persecution, or practical considerations such as cost.[11] In other words, a person who is de facto stateless has a nationality, but it is "ineffective" given the lack of protection by their State of nationality.[12] However, the term "ineffective nationality" and thus de facto statelessness, does not have a technical legal definition but instead can be understood in categories. There are three generally accepted categories: "(1) Persons who do not enjoy the rights attached to their nationality; (2) Persons who are unable to establish their nationality, or who are of undetermined nationality; (3) Persons who, in the context of State succession, are attributed the nationality of a State other than the State of their habitual residence."[13] This unfortunately leaves much room for ambiguity and confusion, exacerbating the vulnerabilities of stateless persons.

The Conventions sought to provide institutional clarity and formalize international law around statelessness; however, their ambiguities resulted in protection gaps for many.[14] While the definitions established through these documents seem clean-cut on paper, their implementation remains opaque. For example, traditionally de facto statelessness was equated with refugee status. In fact, the 1954 Convention was originally drafted as a Protocol to the 1951 Convention Relating to the Status of Refugees.[15] So, while the 1954 Convention is legally binding regarding de jure statelessness, and the 1951 Refugee Convention protects refugees who are de facto stateless, not all de facto stateless

[10] *See* United Nations Conference on the Elimination or Reduction of Future Statelessness, Resolution I, 989 U.N.T.S. 279.
[11] *See* Hugh Massey, *UNHCR and De Facto Statelessness*, Legal and Protection Policy Research Series, LPPR/2010/01, ii (Apr. 2010).
[12] *See id.* at 26.
[13] *See* Jay Milbrandt, *Adopting the Stateless*, 39 Brooklyn J. Int'l L. (2014).
[14] *See* Batchelor, *supra* note 4, at 173-4.
[15] *See generally* The Equal Rights Trust, Critiquing the Categorization of Statelessness, Chapter 2 (Jul. 2010).

persons are refugees. Therefore, this subgroup has no ability to establish their nationality and no legal protection. There are a plethora of other situations where individuals are unable to prove their nationality. Some people may have never been registered in the civil registration system or the registration system may have been destroyed. Further, countries may be unwilling or unable to identify certain persons as their nationals or their nationality legislation may be unclear or misapplied.[16] There are also situations of failed States or State succession, the lack of consular protection, and even the application of the principle of non-refoulment may lead to de facto statelessness.

For much of history, scholarship has viewed statelessness as an issue that could be fixed through rule of law building.[17] This issue was viewed as a "legal anomaly" that could be solved once the correct laws and guidelines were put in place—for example, the 1954 and 1961 Conventions.[18] However, these Conventions only take a narrow view of the issue, they do not account for colonialism as one of the causes of statelessness. As seen through the following case study of the ethnic Vietnamese minority in Cambodia, the gray zones and ambiguities surrounding de facto statelessness are exacerbated by the legacies of colonialism.

II. CASE STUDY OF ETHNIC VIETNAMESE IN CAMBODIA

Ethnic Vietnamese represent about 5% of Cambodia's population and are the largest minority in the country. However, this population remains stateless. It is understood that almost 90% of ethnic Vietnamese do not have identity cards or birth certificates to prove residency despite living in Cambodia for decades.[19] During Vietnamese expansion, many Vietnamese migrated into today's Cambodia, and specifically resided along the Mekong River and around the Tonle Sap Lake. Today, most ethnic Vietnamese still reside on boats in floating villages around the Tonle Sap Lake.[20] This

[16] *See* Batchelor, *supra* note 4, at 173-4.
[17] *See generally* Benslama, *supra* note 1.
[18] *See* i*d.*
[19] *See generally* Ethnic Vietnamese, Minority Rights Group International.
[20] *See* Rina Chandran, *No Room on Water, No Home on Land for Cambodia's Ethnic Vietnamese*, Reuters (June 27, 2019).

region remained highly contested until it was 'given' to the Vietnamese by the French in 1947, making permanent the presence of the Vietnamese minority in Cambodia.[21] While the French protectorate over Cambodia halted some of the Vietnamese expansion, the French encouraged Vietnamese migration into Cambodia - many to fill the French Administration.[22] Today, some ethnic Vietnamese have integrated into society and acquired formal citizenship documents, but most do not hold the nationality of any state.[23] Without legal status, this population lacks basic rights and is limited in their movement, ability to own land, access education, employment, health care, or legal aid.[24]

A. Weaponizing Nationality Post-Colonialism

The stateless status of ethnic Vietnamese is closely intertwined with the colonial legacies of Cambodia. In fact, post-independence from the French, the State pursued nation-building efforts focused on national identity that played into the myth of Vietnam as a threat to Cambodian existence.[25] The Vietnamese were viewed as having unjustly occupied positions of authority over the Khmer majority during French domination; thus, many view the exclusion of ethnic Vietnamese in Cambodia as a remedy for past injustices.[26] The State pointed to the migration of ethnic populations into the country as the link between Cambodian's historical greatness and rapid decline.

Through demographic categorizations and legal tools focused on separating citizens from foreigners, nationality was used as a political weapon.[27] For example, when King Siahnouk assumed leadership of Sangkum Reastr Niyum, the dominant political party post-independence, he classified

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[21] *See* Stefan Ehrentraut, *Perpetually Temporary: Citizenship and Ethnic Vietnamese in Cambodia*, 34 Ethnic & Rational Studs. 779, 782 (Jan. 28, 2011).
[22] *Id.*
[23] *See generally* Lyma Nguyen & Christoph Sperfeldt, *A Boat Without Anchors: A Report on the Legal Status of Ethnic Vietnamese Minority Populations in Cambodia under Domestic and International Laws Governing Nationality and Statelessness,* RegNet Research Paper No. 2014/50*,* (2014).
[24] *See* i*d.* at 72-6.
[25] *See* Ehrentraut, *supra* note 21, at 783.
[26] *Id.*
[27] *See* James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 Ethics & Int'l Aff. 321, 322, (Sept 13, 2006).

the population into categories of ethnic groups along typographical lines (hills and lowland). These categories distinguished in-groups, the hill tribes, Cham, and Khmer Krom, from the excluded out-groups, the ethnic Vietnamese and Chinese.[28] These categories continue to be widely used today.[29]

Legal thinking post-independence further formalized the exclusion of many ethnic Vietnamese through citizenship laws based on ethnic descent. These legal changes were made primarily through amendments to the colonial 1920 Civil Code, thus carrying over the legacies of colonialism into the new regime. The law stated that no distinction should be made between Cambodians and Cambodian ethnic minorities. However, ethnic Vietnamese were absent from the list of ethnic minorities included in the Amendment.[30] While on paper this Amendment reads as a non-discrimination measure, in practice, it fosters the link between citizenship and ethnicity.[31] Furthermore, the post-independence regime also introduced *jus soli* citizenship in addition to the *jus sanguinis* principle from the colonial citizenship regime.[32] According to Article 22 of the amended Civil Code, citizenship could be conferred on children who had at least one Cambodian parent and/or on anyone born in Cambodia after 1954 to Cambodian parents.[33] However, most ethnic Vietnamese met neither of these categories and were not listed as a protected group.

Post-colonial nation-building also saw tensions between law and culture. A naturalization law was first introduced in 1954 requiring "sufficient knowledge" of the Khmer language and five years of residency; however, it was rapidly amended in 1959 to require "sufficient assimilation to the customs, morals, and traditions of Cambodia."[34] Many ethnic Vietnamese migrated under French

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[28] *Id.* at 784.
[29] *See* Ehrentraut, *supra* note 21, at 784.
[30] *See* Christoph Sperfeldt, *Report on Citizenship Law: Cambodia*, Global Citizenship Observatory 3 (Jan. 2017); *see also* Kram No. 913-NS of 30 November 1954, amending the 1920 Civil Code from Arts. 21 to 27.
[31] *See* Minority Rights Group International, Minorities in Cambodia, 95(2) MRG Int'l Report, 27-8, (1995).
[32] *See generally,* Sperfeldt, *supra* note 30.
[33] *See* Ehrentraut, *supra* note 21, at 783 (citing Penny Edwards).
[34] *See supra* note 30*; see also* Steve Heder & Judy Ledgerwood, Propaganda, Politics and Violence in Cambodia: Democratic Transition Under United Nations Peace-Keeping 22 (Routledge, 1st ed. 1996).

colonialism and the imposition of an alien culture, language, and institutions; thus, they did not expect to integrate Cambodian culture.[35] Therefore, as citizenship became increasingly linked to ethnicity, the cultural requirements for naturalization exacerbated the uncertainty of citizenship of ethnic Vietnamese in Cambodia. These naturalization requirements were tools for building national identity and versions of these are still present in more recent provisions such as the 1996 Law on Nationality.[36]

As the residues of French colonialism were still present, and leaders weaponized citizenship for political gain and to establish legitimacy, each new citizenship law or amendment increasingly politicized vulnerable ethnic minorities. This sentiment came to an extreme when, in 1963, the National Congress unanimously held that "naturalization be refused in principle to all Vietnamese because they were unassimilable," and that citizenship would be revoked of any naturalized alien who did not "respect our traditions."[37] This nationalist sentiment that had seeped into law then turned into conflict when Lon Nol became president of the 'Khmer Republic.' He proclaimed the Khmer race as superior and advocated for anti-Vietnamese nationalism. A new definition of 'Cambodian' was introduced as having "Khmer blood, Khmer traditions, Khmer culture, Khmer language and who were born on the territory that is the heritage of our Khmer ancestors."[38] Violence erupted as most Vietnamese were expelled to Vietnam and those that remained were killed.

In response, Vietnam occupied Cambodia pushing the Khmer Rouge to the borders and installing the People's Republic of Kampuchea (PRK). While ending the rule of the Khmer Rouge was seen as a positive, Cambodians were quickly angered by the "Vietnamizing" of the country and increasing immigration.[39] It is estimated that 300,000 Vietnamese immigrated to Cambodia in the

[35] *See* Ehrentraut, *supra* note 21, at 782.
[36] *See* Sperfeldt, *supra* note 30, at 5.
[37] *See id.*; *see also* William E. Willmott, *The Chinese in Cambodia*, 35, Vancouver: Publications Centre, University of British Columbia (1967).
[38] *See* Penny Edwards, *Cambodge: The Cultivation of a Nation 1860-1945*, 252, University of Hawaii Press (2007).
[39] *See* Ehrentraut, *supra* note 21, at 786.

1980s.[40] While Vietnamese were a recognized minority in Cambodia, "the question of whether ethnic Vietnamese could become citizens was, however, never resolved."[41] In fact, Vietnamese were considered a separate identity to the Cambodian citizens, and even former Cambodian citizens of Vietnamese ethnicity were deprived of citizenship status. In 1992, the UNTAC was eventually mandated to conduct elections within Cambodia based on residence and the new election law. The 1991 Paris Peace Agreements stated that "every person who has reached the age of eighteen at the time of application to register, or who turns eighteen during the registration period, and who was either born in Cambodia or is the child of a person born in Cambodia, will be eligible to vote in the election."[42] There was extreme pushback on this new conception of citizenship and UNTAC eventually agreed to reduce the number of eligible voters of Vietnamese ethnicity – another example where lack of nationality resulted in a lack of protection of basic rights.[43]

B. Tensions between Domestic and International Law

The tensions between international law and domestic law were exacerbated by the ever-changing domestic legal landscape. As international law left many ethnic Vietnamese de facto stateless without legal recourse, the fluctuating domestic legal landscape in Cambodia widened these protection gaps. Furthermore, the decades of war and regime change destroyed citizenship records, and administrative infrastructure further exacerbated Cambodia's challenges of rebuilding their citizenship regime and registry.[44]

A new Constitution adopted in 1993 painted yet another ambiguous picture of citizenship for ethnic minorities. Many argue that this Constitution had the goal of making citizenship more

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[40] *See* David Chandler, A History of Cambodia 273 (Routledge, 2nd ed. 1993).
[41] *See* Evan R. Gottesman, Cambodia After the Khmer Rouge: Inside the Politics of Nation Building 166-7 (New Haven: Yale University Press 2003).
[42] *See* United Nations, Agreements on a Comprehensive Political Settlement of the Cambodia Conflict, Annex 3 'Elections', ¶ 4, (Oct, 23, 1991).
[43] *See* Heder & Ledgerwood, *supra* note 34, at 24.
[44] *See* Sperfeldt, *supra* note 30, at 8.

accessible, whereas others disagree pointing to the fact that it doesn't define citizenship nor mention any minority cultures, including ethnic Vietnamese.[45] For example, Article 31 of the 1993 Constitution stated that "Khmer citizens shall be equal before the law and shall enjoy the same rights, freedoms and duties, regardless of their race, colour, sex, language, beliefs, religion, political tendencies, birth origin, social status, resources or any other position."[46] While human rights and non-discrimination are cornerstones of the Constitution, by specifically naming "Khmer citizens," it leaves ambiguous whether said human rights apply to all resident groups or merely "Khmer citizens."[47] While it is possible that "Khmer citizen" does not imply ethnicity and therefore the lack of mention of minority cultures emphasizes a retreat from outdated nationalism, even in its most basic reading, the use of "Khmer citizen," promotes an in-group/out-group culture and thus denies basic human rights to anyone without this label.[48]

The 1994 Immigration Law furthered the pattern of ambiguous citizenship requirements much to the detriment of Cambodian residents seeking naturalization. While it made clear that persons without Khmer nationality were defined as aliens, it did not clearly define Khmer nationality. Thus, making it near impossible to reliably assess who is a Cambodian citizen.[49] Further, most ethnic Vietnamese did not meet the new entry requirements of bringing their own passports and acquiring a visa. This new rule led to intense pushback because it de facto called for expulsion and deportation of all aliens who failed to comply—essentially the expulsion and deportation of many ethnic Vietnamese persons.[50]

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[45] *See* Thomas Clayton, *Language Choice in a Nation Under Transition: The Struggle Between English and French in Cambodia*, Language Policy 1, 3-25 (2002); *see also* Ehrentraut, *supra* note 21, at 788.
[46] *See* Constitution of the Kingdom of Cambodia, art. 31 (Sept. 21, 1993).
[47] *See* Sperfeldt, *supra* note 30, at 8.
[48] *See* Jan Ovesen & Ing-Britt Trankell, *Foreigners and Honorary Khmers: Ethnic Minorities in Cambodia*, *in* Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities 253 (Christopher R. Duncan ed., Cornell University Press 2004).
[49] *See* Ehrentraut, *supra* note 21, at 789.
[50] *See* Minority Rights Group International, *supra* note 31, at 27.

To date, ethnic Vietnamese operate largely outside, or at the fringe, of legal institutions. Indeed, the 1996 Nationality law did include a definition of a Khmer citizen, which was equally as ambiguous as any prior language—"any person who has Khmer nationality/citizenship is a Khmer citizen."[51] This circular definition is emblematic of the trials and tribulations of rule of law building around citizenship in Cambodia. A large number of ethnic Vietnamese are unaware of their legal status though would argue that they are not Cambodian citizens. While government officials also do not recognize ethnic Vietnamese as Cambodian citizens, police officers are quick to take bribes in return for identification cards, providing many with official documents but creating another barrier to access for low- or no-income residents.[52] In fact, without citizenship, ethnic Vietnamese are unable to apply for jobs or borrow money from banks, thus promulgating the exclusionary feedback loop preventing them from entering formal institutions. The ethnic Vietnamese minority in Cambodia "cannot call upon their rights to nationality for their protection," thus leaving them highly vulnerable.[53]

III. Conclusion

The exclusionary and ambiguous nature of international law around statelessness coupled with the marginalization experienced through ever-changing domestic laws in Cambodia have left the ethnic Vietnamese minority without legal recourse at either level. International frameworks surrounding statelessness must move beyond legalism to account for the reality of implementation. Domestic laws must fight politicization and serve as a backbone for society rather than a political tool. And thus, statelessness cannot solely be viewed through a legal or administrative lens. It requires a broader view of the legal tensions between nationhood and citizenship at both the international and

[51] *See* Cambodia Law on Nationality, art. 2 (Oct. 9, 1996).
[52] *See* Ehrentraut, *supra* note 21, at 791.
[53] *See* Brad Blitz, *Statelessness, Protection and Equality, Forced Migration Policy Briefing 3*, REFUGEE STUDIES CENTER (Sept. 2009).

domestic levels, including the colonial legacies of the state. The ethnic Vietnamese minority has been living in floating villages for decades, it is time the law provides them with an anchor.

Essay 5

Anti-Sedition Laws: Human Rights Issues as a Result of Colonial Residues

I. INTRODUCTION

Free speech is the bedrock of democracies. Not only does it encourage the free flow of ideas, but free speech, including the notable ability to disagree with the government, can be a useful check on government action, encouraging accountability. Yet not all the world's governments agree to these terms. Countries around the world limit journalistic freedoms, jail human rights activists for highlighting government wrongdoing, and crack down on dissenting protesters. For some former British colonies, colonial-era anti-sedition laws—imported from Britain—are a source of legal empowerment to silence opposition. For others, these laws sit on their books—unused, but with the potential to chill freedom of speech and to be revived as needed. As democracy backslides across the globe and authoritarian regimes rise, abolishing easy access to legal tools which can be wielded to oppress free speech is critical. This Paper will explore the history and prevalence of colonial anti-sedition laws, followed by a discussion of their use and abuse today. Finally, it will examine different avenues for repealing these colonial-era laws and how international pressure is critical to the processes of ensuring domestic reforms.

II. HISTORY AND PREVALENCE OF COLONIAL ANTI-SEDITION LAWS

Anti-sedition laws were born in Britain in 1661.[1] They were the latest in a long series of laws used to prosecute the press or individuals who criticized the Crown. Since the Crown viewed itself as superior to its subjects, rather than accountable to them, it considered open censure of its policies inappropriate, and thus punishable.[2] In addition, widespread sedition was seen as likely to destabilize society by undermining citizens' faith in their government.[3] The Sedition Act of 1661 imposed punishment on anyone who "wrote, printed or preached any words against the King," which was considered a crime against the State.[4] However, the Act only aided the British government at home.[5] In the seventeenth and eighteenth centuries, British defendants and publicists railed against the Sedition Act and other laws "claiming that they were merely extensions of the government's pernicious attitude towards political dissent."[6] Public backlash limited the Crown's willingness to impose anti-sedition laws with a heavy hand on the British populace.[7]

However, anti-sedition laws traveled with the British overseas, taking on new life in the process. As one of the world's most prolific colonizers, the British Empire had 57 colonies at its height.[8] For those colonies over which Britain exacted formal legal authority, it transplanted its criminal code, including anti-sedition laws.[9] These new anti-sedition laws looked very similar, if not identical, to their predecessor in Britain.[10] Colonial powers, like Britain, imported their own criminal codes to use as a tool to control Indigenous populations, with anti-sedition laws in particular enabling

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[1] Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37 STAN. L. REV. 661, 719 (1985).
[2] *Id.*
[3] Gauri Kashyap, *Sedition in the Common Law Jurisdictions: UK, USA, and India*, Supreme Court Observer (May 20, 2021), https://www.scobserver.in/journal/sedition-in-the-common-law-jurisdictions-uk-usa-and-india/.
[4] *See*, *e.g.*, *id.*; Maryam Kanna, *Furthering Decolonization: Judicial Review of Colonial Criminal Laws*, 70 DUKE L. J. 411 (2020).
[5] Hamburger, *supra* note 1.
[6] *Id.*
[7] *Id.*
[8] Richard Halloran, *The Sad, Dark End of the British Empire*, POLITICO (Aug. 26, 2014), https://www.politico.com/magazine/story/2014/08/the-sad-end-of-the-british-empire-110362/#:~:text=At%20its%20most%20extensive%2C%20the,Fiji%2C%20Western%20Samoa%20and%20Tonga.
[9] Kanna, *supra* note 4.
[10] *Id.*

the British to quell any backlash against their seat of power over a territory.[11] The transplanted British penal code looked very similar across colonies, with the Code it developed in India adopted elsewhere in Africa and Asia as a "one size fits all model code."[12] The British subordination of local populations under imperial "law and order" maximized colonizers' "ability to exploit and profit from native resources."[13]

The use of anti-sedition laws in British colonies was far stricter than its implementation in the British Isles. Anti-edition laws were routinely used to control political protest and dissidence in the press and were, in general, more restrictive.[14] In India, the British government introduced its anti-sedition law in 1870, and primarily used it to suppress the writings and speeches of Indian freedom fighters and to crush dissent, jailing many for years at a time.[15] Over time, the British courts in India widened the interpretation of sedition, equating fostering "disaffection" of government with any act that might encourage disloyalty.[16] Similarly in Hong Kong, the British government introduced its anti-sedition law in 1914 and expanded its application from printed materials to include acts and words in 1938.[17] The British largely used the law to prosecute the pro-China press.[18] Though the world experienced a decolonization wave after World War II, it did not end "the persistence of colonial control."[19] While the colonizers retreated to their homelands, they left many things—including their laws—behind.

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[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Sanstuti Nath, *What is British-Era Sedition Law That Govt Has Decided to Reexamine?*, INDIA.COM NEWS DESK (May 11, 2022), https://www.india.com/explainer/explained-what-is-british-era-sedition-law-that-govt-has-decided-to-re-examine-5382289/.
[16] EPW Engage, *Sedition in India: Colonial Legacy, Misuse, and Effect on Free Speech*, EPW ENGAGE (Feb. 27, 2021), https://www.epw.in/engage/article/sedition-india-colonial-legacy-misuse-and-effect.
[17] Candice Chau, *Explainer: Hong Kong's Sedition Law - A Colonial Relic Revived After Half a Century*, Hong Kong Free Press (July 30, 2022), https://hongkongfp.com/2022/07/30/explainer-hong-kongs-sedition-law-a-colonial-relic-revived-after-half-a-century/.
[18] *Id.*
[19] Kanna, *supra* note 4.

III. THE USE AND ABUSE OF ANTI-SEDITION LAWS

Today, the transplanted British criminal codes remain largely intact amongst the former colonies—even as Britain has repealed its own anti-sedition laws with the passage of the Coroners and Justice Act in 2009.[20] Though Britain had ceased to prosecute anti-sedition laws decades prior, other countries continued to cite the law on Britain's books as a reason to keep theirs—leading Britain to formally abolish them.[21] Many remained on the books because of the high costs of re-writing legal systems for newly independent countries with other, more imminent concerns.[22] Some regimes found them too tempting to resist and strengthened their anti-sedition laws post-independence to support the political parties that came to power.[23] Governments have often used anti-sedition laws to target marginalized communities, including political dissidents and ethnic and religious minorities.[24] This section will explore the use of anti-sedition laws in former British colonies, focusing on India and Hong Kong.

Today in Hong Kong, after 50 years of disuse, the authorities have begun to charge citizens with sedition once again.[25] Beijing's imposition of a national security law on the city in 2020 criminalized many formerly protected free speech activities; however, after a Hong Kong court expanded the scope of the statute, authorities have increasingly used colonial anti-sedition laws for prosecutions, as the threshold for arrest is low and the cases are easier to bring and do not clog up the judicial system.[26] Sedition was codified in Hong Kong in the 1938 Crimes Ordinance, instituted by the

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[20] *Id.*
[21] EPW Engage, *supra* note 16.
[22] Maya Berinzon & Ryan Briggs, *60 Years Later, Are Colonial Era Laws Holding Africa Back?*, THE WASHINGTON POST (Jan. 20, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/20/60-years-later-are-colonial-era-laws-holding-africa-back/.
[23] Rhoda Howard, *Legitimacy and Class Rule in Commonwealth Africa: Constitutionalism and the Rule of Law*, 7 THIRD WORLD QUARTERLY 323 (1985).
[24] Kanna, *supra* note 4.
[25] Clooney Foundation for Justice, *Sedition Laws*, https://cfj.org/eyes-on/sedition/.
[26] Hayley Wong, *Hong Kong Supercharges 1938 British Sedition Law to Curb Dissent*, BLOOMBERG (Aug. 23, 2022), https://www.bloomberg.com/news/articles/2022-08-23/hong-kong-supercharges-1938-british-sedition-law-to-curb-dissent?leadSource=uverify%20wall.

British to quell pro-Beijing forces.[27] The Ordinance defines sedition as speech or publications bringing hate or contempt to "Her Majesty, her heirs, or successors" or the government.[28] Sedition charges carry a penalty of a maximum of two years imprisonment; however, for those not convicted, the length of trials, legal fees, and the like can make sedition charges sufficient punishment in and of themselves.[29] Since September 2020, 60 people have been arrested under sedition charges, many of them activists, journalists, and civil society figures, for actions as trivial as opposing the government's COVID-19 policies.[30] All who have gone to trial so far have been convicted. Despite international pressure to repeal the anti-sedition law, Hong Kong authorities are poised to go in the opposite direction and introduce new anti-sedition legislation.[31] Indeed, authorities have defended the colonial-era law claiming it is "not meant to silence expression of any opinion that is only genuine criticisms [sic] against the government based on objective facts."[32] The chilling effect on free speech in Hong Kong has been substantial.

Like political developments in Hong Kong, Prime Minister Narendra Modi's rise to power in India enabled the country's colonial-era anti-sedition law to enjoy a renaissance period as well. Since Modi entered office in 2014, there has been a 28% rise in sedition cases, especially against critics and protesters.[33] Indeed, over 7,000 individuals have been charged with sedition, including journalists, activists, and students.[34] Many of these cases have emerged from major protests or political events critical of the current regime.[35] Such a trend was most visible after nationwide protests erupted

[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Kunal Purohit, *Our New Database Reveals Rise in Sedition Cases in the Modi Era*, ARTICLE 14 (Feb. 2, 2021) https://www.article-14.com/post/our-new-database-reveals-rise-in-sedition-cases-in-the-modi-era.
[34] Clooney Foundation for Justice, *supra* note 25.
[35] Kunal Purohit, *supra* note 33.

protesting the Modi government's Citizenship Amendment Act (CAA) in December 2019.[36] More recently, farmers have been camped around Delhi to protest three new controversial farm laws—a protest which has led to sedition charges against journalists, activists, and politicians.[37] Sedition cases have been charged for a range of expression, from holding a poster to social media posts to raising slogans and private communications.[38] Going back historically, section 124A was used to crack down on protests against British colonialism and is the same law that put Mahatma Gandhi in prison in 1922.[39]

Many of the current sedition cases being brought are in violation of the law laid down by India's Supreme Court. India's anti-sedition law, otherwise known as section 124A, deals with "words, signs, or visual representation that brings or attempts to bring 'into hatred or contempt or excites disaffection against the Government.'"[40] Violation of the law can be punished with life imprisonment or a lower sentence that may extend to 3 years along with a fine.[41] While few of those individuals charged with sedition are successfully convicted, many languish in jail for years "fighting wave after wave of fresh charges" as trials drag on.[42] To minimize the use of 124A, India's Supreme Court previously held that 124A could only be used when there was incitement to violence or intention to create disorder.[43] More recently, the Court suspended the use of 124A completely, claiming the law "was not in tune with the current social milieu, and was intended for a time when this country was under the colonial regime".[44] However, Parliament must act for the law to officially be repealed in

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[36] *Id.*
[37] Hannah Ellis-Petersen, *Disha Ravi: The Climate Activist Who Became the Face of India's Crackdown on Dissent*, THE GUARDIAN (Feb. 17, 2021), https://www.theguardian.com/world/2021/feb/18/disha-ravi-the-climate-activist-who-became-the-face-of-indias-crackdown-on-dissent.
[38] Purohit, *supra* note 33.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Hari Kumar & Sameer Yasir, *India's Top Court Suspends Colonial-Era Sedition Law*, THE N.Y. TIMES (May 11, 2022), https://www.nytimes.com/2022/05/11/world/asia/india-sedition-law-suspended.html.
[43] Purohit, *supra* note 33.
[44] Kumar & Yasir, *supra* note 42.

India's case.[45] This ongoing process, examined in more detail below, is unlikely to be successful in the near future as the Modi government has asked for an indefinite amount of time to "re-examine and reconsider" the law.[46]

IV. REPEALING COLONIAL-ERA LAWS

Colonial laws were crafted to promote discrimination between colonizers and the colonized and still can, and do, create inequality.[47] Even colonial-era laws that appear innocent on their face can further entrench inequities, not to mention laws with more obviously pernicious effects, like anti-sedition laws. As such, they should be repealed by all States. Many Commonwealth countries have already done away with anti-sedition laws, with Singapore and Sierra Leone choosing to do so recently,[48] and more are hopefully on the way. There are multiple ways States can do away with their colonial-era laws, including but not limited to anti-sedition laws. They may be repealed by the legislature—either piecemeal or in one fell swoop—or overturned by the States' courts. While a legislative remedy is preferred due to its staying power and comprehensiveness, often colonial-era laws target groups without adequate representation in the political process, and thus courts may be required to overturn these laws.[49] For States currently benefiting from their anti-sedition laws, international pressure may be needed to encourage their overture.

Legislatures have several options for repealing colonial-era laws. They may investigate and review colonial-era laws one at a time to determine whether removal is appropriate, or they may

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[45] *Id.*
[46] Linda Lakhdhir & Jayshree Bajoria, *Sedition Law: Why India Should Break From Britain's Abusive Legacy*, HUMAN RIGHTS WATCH (July 18, 2022), https://www.hrw.org/news/2022/07/18/sedition-law-why-india-should-break-britains-abusive-legacy.
[47] Agnes Binagwaho & Richard Freeman, *Decolonization of the Legal Code: The End of Colonial Laws in Rwanda and a Model for other Post-Colonial Societies*, 62 HARVARD INT'L L. J. 95 (2021).
[48] Clooney Foundation for Justice, *Sedition Laws Need Urgent Reform, TrialWatch Report Finds* (April 13, 2022), https://cfj.org/news_posts/sedition-laws-need-urgent-reform-trialwatch-report-finds/.
[49] Kanna, *supra* note 4.

abolish all colonial-era laws in one decree.[50] For the former, a task force may be set up to review colonial laws, determine whether they should be abolished, and recommend revised legislation. However, due to the prevalence of colonial-era laws and the difficulty in tracking some of them down—they may be technically on the books from colonial times, but these *physical* books may be difficult to find—this approach can generate extensive costs and delays.[51] India has taken this approach, with limited success. In 2014, India renewed a stalled process to identify and review each of its colonial-era laws one at a time before repealing them, greatly prolonging the process. As this indefinitely long process continues, colonial-era laws are still being used and enforced by courts.[52] India's anti-sedition law will also be subject to this process for official repeal by Parliament, a fact that does not bode well for a speedy elimination of the misused and abused law.

While Sierra Leone and Singapore also took this approach, choosing to invalidate their anti-sedition laws alone through Parliament before turning to other colonial-era laws, the two nations seem to be making quicker progress than India.[53] In any event, legislatures may also use a different, more efficient tactic and repeal all colonial-era laws in one fell swoop. One concern with this approach is that gaping holes might be left behind in the States' legal codes that could be taken advantage of. However, gaps would likely only be left by colonial laws that are generally unknown and unused today—any risk from these gaps is minimal compared to the human rights benefits to be reaped.[54] Rwanda recently took this approach in 2021, with great success.[55]

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[50] Agnes Binagwaho, Richard Freeman, & Gabriela Sarriera, *The Persistence of Colonial Laws: Why Rwanda is Ready to Remove Outdated Legal Barriers to Health, Human Rights, and Development*, 59 HARVARD INT'L L. J. 45 (2018).
[51] *Id.*
[52] Binagwaho & Freeman, *supra* note 47.
[53] *See. e.g.*, Tham Yuen-C, *Singapore Parliament repeals Sedition Act after 83 years*, THE STRAITS TIMES (Oct. 5, 2021), https://www.straitstimes.com/singapore/politics/singapore-parliament-repeals-sedition-act-after-83-years; Abdul Rashid Thomas, *Government of Sierra Leone Agrees to Repeal Criminal and Seditious Libel Laws*, THE SIERRA LEONE TELEGRAPH (Sept. 13, 2019), https://www.thesierraleonetelegraph.com/government-of-sierra-leone-agrees-to-repeal-criminal-and-seditious-libel-laws/.
[54] Binagwaho, Freeman, & Sarriera, *supra* note 50.
[55] *Id.*

If a State's legislature is tied up, activists can turn to the courts for the repeal of colonial-era laws. Many Commonwealth courts considering constitutional challenges employ proportionality principles to determine a law's validity.[56] To begin a proportionality test, the government must justify the continued use of the law by stating its aim and proving that retaining the colonial-era law is the appropriate means to achieve it.[57] Next, the inquiry evaluates how the law achieves these ends by considering three factors: "whether the law is rationally connected to the stated purpose;" "whether the law impairs the right in question as little as possible;" and "whether the limitations are proportional to the objective."[58] This test puts the burden of justification on the government and allows the court to adjust the rigor of its proportionality analysis as it sees fit.[59] The proportionality test largely originated in Canada in response to a clause in its Charter of Rights and Freedoms, which states that rights and freedoms protected within the Charter may only be subject to "reasonable limits" prescribed by law which can be justified in a free and democratic society.[60] Many other Commonwealth nations have similar clauses and have indicated a willingness to adopt Canada's proportionality test.[61] India's Supreme Court has taken this approach, choosing to suspend use of India's anti-sedition law completely while Parliament's review of the law for true elimination is ongoing, though somewhat stalled by the Modi government's clear preference for the law.

For either a legislative or court reform of colonial-era laws to be successful, there must be domestic political will to make it happen. Domestic political will may be lacking either due to apathy or because the current regime is benefiting from colonial-era laws. Indeed, some governments still justify anti-sedition laws as "necessary to preserve public order and communitarian values."[62] As a

[56] Kanna, *supra* note 4.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*

result, international pressure may be key to ensuring domestic reform. The International Covenant on Civil and Political Rights (ICCPR) lends credence to international claims against anti-sedition laws. Human rights organizations have argued that anti-sedition laws violate Articles 19, 21, and 22 of the ICCPR, which respect the freedoms of expression, assembly, and association respectively.[63] The United Nations system and the treaties generated by it—like the ICCPR—affect State behavior by shaping their interests, which become more similar to each other over time.[64] Thus, not only does the ICCPR provide a forum—the Human Rights Committee—to review State compliance with the ICCPR, but it is a normative force driving States' ideologies.

While there is "no statistically significant relationship between treaty ratification and [States'] human rights ratings,"[65] States may be more likely to "name and shame" others who violate ICCPR obligations under the normative theory espoused above. A 2008 study found naming and shaming to be effective in shaping State behavior, noting that "governments that were shamed as human rights violators generally improved their human rights protections."[66] To date, the international community has been highly critical of remnant anti-sedition and other colonial-era laws, and their use and abuse by formerly colonized States. Staff at the U.N., including the U.N. High Commissioner for Human Rights, the Human Rights Committee, and other independent U.N. rights experts, have called out States for their abuse of anti-sedition laws and urged their repeal.[67] However, while NGOs around the world have spotlighted regimes' use of anti-sedition laws and called for their end, many State

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[63] *Id.*
[64] David Bearce & Stacy Bondanella, *Intergovernmental Organizations, Socialization, and Member State Interest Convergence*, 61 INT'L ORG. 703, 708 (2007).
[65] Kanna, *supra* note 4.
[66] *Id.*
[67] *See*, *e.g.*, UN News, Independent UN Rights Experts Call for Decisive Measures to Protect 'Fundamental Freedoms' in China (June 26, 2020), https://news.un.org/en/story/2020/06/1067312; UN News, Malaysia's Anti-Terror and Sedition Laws 'Curtail' Human Rights, Warns UN Rights Chief (April 9, 2015), https://news.un.org/en/story/2015/04/495512-malaysias-anti-terror-and-sedition-laws-curtail-human-rights-warns-un-rights; Hayley Wong, *UN Watchdog Urges Hong Kong to Repeal National Security Law*, BLOOMBERG (July 27, 2022), https://www.bloomberg.com/news/articles/2022-07-28/un-watchdog-urges-hong-kong-to-repeal-national-security-law.

officials—including U.S. officials—have remained quiet on the matter. The EU has been more willing to step up to the plate, condemning Hong Kong's use of sedition charges in statements and monitoring the court hearings of opposition activists in Hong Kong.[68] Additionally, the EU Special Representative on Human Rights has met with the Indian government to discuss its use of anti-sedition laws.[69] However, increased international pressure is likely needed to gain the momentum necessary to continue the abolition of anti-sedition laws.

V. CONCLUSION

Critiquing one's own government, peacefully protesting, and expressing one's beliefs often are not a sign of "disloyalty" and "disaffection" of government, but a profound commitment to one's own country and the desire to make it better. As such, this type of speech should be encouraged and equally protected under freedom of speech guarantees. Anti-sedition laws, originally imported to former colonies by the British, have been used rampantly by former British colonists and several of the new, independent governments that have taken their place. Used to target political opposition, journalists, protesters, students, and others, colonial anti-sedition laws have a chilling effect on activism and citizens' ability to improve their own countries. States with colonial-era anti-sedition laws should abolish them—through their legislatures or their courts—and for those unwilling to part with these colonial-era relics, the international community should apply a full-court press for their repeal.

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[68] Ng Kang-chung, *EU Monitored 81 Court Hearings of Opposition Activists in Hong Kong Last Year, Rights Report Reveals*, THE S. CHINA MORNING POST (April 21, 2022), https://www.scmp.com/news/hong-kong/politics/article/3174955/eu-monitored-81-court-hearings-opposition-activists-hong.

[69] Business Standard, Discussed Sedition, Terror Laws, and J&K Issue with Govt: EU Representative (April 29, 2022), https://www.business-standard.com/article/current-affairs/discussed-with-govt-use-of-sedition-anti-terrorism-laws-j-k-situation-eu-representative-122042900570_1.html.

Essay 6

Restitutio in Integrum | Becoming Whole Again: Colonial Residues on Rights to Reparation

I. INTRODUCTION

Since the outbreak of war between Ukraine and Russia in February of 2022, the international community has rallied to address the devastation of Russia's violations of international law by leveraging seizures of property as a pathway to deterrence. Not only have sanctions played a key role in responding to Russian aggression in Ukraine, but the international community has also begun to discuss reparations as a mechanism for accountability. While reparations for mass victimizations are necessarily only symbolic[1]—after all, how does one compensate for the profound loss of loved ones and property with historical, cultural, and personal value?—reparations are a necessary remedy to help restore victims' sense of continuity and belonging after the devastation of not just mass murder but also mass theft and plunder.[2]

In the past, reparations for mass victimizations have either manifested as decades-long domestic programs with little broad impact,[3] complete non-starters,[4] or, rarer still, compensation

[1] Yael Danieli, *Massive Trauma and the Healing Role of Reparative Justice, in* REPARATIONS FOR VICTIMS OF GENOCIDE, WAR CRIMES AND CRIMES AGAINST HUMANITY: SYSTEMS IN PLACE AND SYSTEMS IN THE MAKING 59 (Carla Ferstman, Mariana Goetz, & Alan Stephens eds., Martinus Nijhoff Publishers 2009) [hereinafter REPARATIONS FOR VICTIMS OF GENOCIDE] ("How does one compensate for three and a half years in concentration camps? For the loss of a child? It is impossible. How do you pay for a dead person? For a Korean woman sexually abused by the Japanese in WWII? It's not money but what the money signifies – vindication. It signifies the governments' own admission of guilt, and an apology. The actual value, especially in cases of loss of life, is, of course, merely symbolic, and should be acknowledged as such.").
[2] *Id.* at 56.
[3] Elizabeth Odio-Benito, *Foreword to* REPARATIONS FOR VICTIMS OF GENOCIDE, *supra* note 1, at 2.
[4] *Id.*

commissions deriving from the United Nations Security Council that take decades to pay out.[5] Each new reparations model has improved on the last in terms of wait time and breadth of impact. However, all remain limited by the international property regime established under colonialism, which upheld the rights of foreign investors to prompt, adequate, and effective remedies[6] while neglecting the rights of formerly colonized peoples seeking reparation for colonial injustices.[7]

Due in part to this legal landscape, which rooted economic injustice in lost opportunity cost rather than unjust enrichment, the remedies available for human rights abuses remain insufficient. While human rights reparations rightfully demand full compensation, if not restitution, for victims' losses, these are still largely measured in private costs rather than systemic injustices. Wealthy nations are enabled, and in some cases bound, by legal precedent to skirt liability and escape property seizure meant for funding. However, now, in an era of war and mass displacement, there is a renewed opportunity to shake the colonial foundation of international law, create more robust reparations regimes, and seek justice for victims.

This Paper will discuss the ways in which colonial-era protections of private property and post-colonial debates over appropriate compensation for international expropriations have impacted legal standards governing compensation for human rights violations. It will outline how compensation in the mass atrocities context differs substantially from the international investment law context, creating limitations for human rights reparation due to challenges in assigning liability, establishing funding, and identifying victims for relief. It will also apply these challenges to the current war in Ukraine and argue that the international response to the war has invigorated new pathways to effective

[5] *See* Security Council Report, Iraq: Briefing and Vote on Draft Resolution on the UN Compensation Commission (UNCC) (Feb. 21, 2022) [hereinafter Iraq Briefing], https://www.securitycouncilreport.org/whatsinblue/2022/02/iraq-briefing-and-vote-on-draft-resolution-on-the-un-compensation-commission-uncc.php.
[6] GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL 220 (1996).
[7] G.A. Res. 3201 (S-VI), Declaration on the Establishment of the New Int'l Econ. Order, art. 4(f) (May 1, 1974).

reparation for victims of mass atrocities and has the potential to bolster other reparations claims arising from colonialism moving into the future.

II. COLONIAL RESIDUES IN INTERNATIONAL PROPERTY LAW: SETTING THE STAGE FOR SEIZURE

In the first half of the twentieth century, international law, with colonizing countries at its helm, recognized a standard for reparation rooted in restitution as a remedy for illegal damage to or seizure of assets. Standards emerged for measuring just compensation for lost enterprises to protect property interests and foreign investment. These standards governed mostly inter-State exchanges and dealt with physical property held by investors from one State and seized by governments of other States. Under the Permanent Court of International Justice (PCIJ) case, *Factory at Chorzow*, States recognized an obligation to "wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act ha[d] not been committed."[8] The United States developed its own doctrine governing the seizure of foreign assets abroad, known as the Hull Doctrine, by which a foreign owner of an expropriated property was entitled to "prompt, adequate, and effective compensation."[9] This became a prominent international standard as well, building on the *Chorzow* obligation.

The Hull Doctrine effectively advocated for full reparation of the enterprise lost at the market value just before expropriation ("adequate"), in usable currency ("effective"), plus interest in cases of an unlawful seizure ("prompt") and payment of "fair compensation" in cases of a lawful seizure.[10] Dividing expropriations by the lawfulness of the taking created two categories of relief based on the

[8] Factory at Chorzów, Judgment No. 13, 1928 PCIJ Ser. A, No. 17, p. 47 (defining the proper compensation in lawful expropriation cases as "the value of the undertaking at the moment of the dispossession plus interest to the day of payment").
[9] ALDRICH, *supra* note 6, at 220.
[10] DAVID COLLINS, AN INTRODUCTION TO INTERNATIONAL INVESTMENT LAW 190 (2017); *see id.*

actions of an expropriating State. A lawful taking created an obligation to pay compensation,[11] whereas an unlawful taking created an obligation to pay damages.[12] Ultimately, four elements defined a lawful taking under customary international law: (1) the taking must serve a public purpose; (2) the taking must not be arbitrary and discriminatory; (3) the taking must follow principles of due process; and (4) the taking must be accompanied by monetary compensation.[13] An unlawful taking thus occurs when any one of these elements is not met. In practice, however, the lawfulness of a taking has largely hinged on the first element: whether a seizure serves a public purpose or not.[14]

While this lawfulness-based compensation paradigm expressed through the Hull Doctrine has survived into modern international law, it was firmly challenged by former colonies, which transformed the notion of fair compensation internationally. Some States adopted the Calvo Doctrine, a theory espousing the sovereign equality of all States regardless of economic size, which approached international property disputes from the host State's perspective as opposed to embracing international legal standards. Under the Calvo Doctrine, the host State decided the measure of compensation for actions like expropriation, reasoning that a State need only compensate foreigners to the extent it would compensate its own nationals.[15] In addition, a host State under this paradigm could reduce compensation after considering the extent of the profits an investor had already made through the venture in question.[16]

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[11] *See* ALDRICH, *supra* note 6, at 227 ("[W]here restitution [is] not possible, such an expropriation requires the 'payment of a sum corresponding to the value which a restitution in kind would bear,' plus the payment of 'damages for loss sustained which would not be covered by restitution in kind or payment in place of it.'").
[12] COLLINS, *supra* note 10, at 157.
[13] *Id.* at 169-72.
[14] *See id.* at 161; *compare* Amoco Int'l Fin. Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189 (1987) (finding that nationalizing the whole petroleum industry in Iran, rather than just one investor, was sufficiently in the public interest as part of a plan to restructure the country's economy and achieve economic stability), *with* ADC Affiliate v. Hungary, ICSID Case No. ARB/03/16 (Oct. 2, 2006) (finding that there was no legitimate purpose in expropriating a foreign investor's project to harmonize Hungary's transportation strategy when there was not enough of a linkage between the seizure and the broader economic goal of interest to the public).
[15] COLLINS, *supra* note 10, at 191; Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 438-39 (1964).
[16] COLLINS, *supra* note 10, at 192.

Thus, the Calvo Doctrine represented an alternative view on international property disputes, favoring a more nationalistic application of standards underpinned by moral considerations. Although the Hull Doctrine dominated international property exchanges through the first half of the twentieth century, creating a windfall for colonizing countries with many assets in foreign territories, the international economic tides shifted after colonial exit in the 1950s and 60s, fomenting an embrace of the Calvo Doctrine and desires for equitable remedies to correct the global income inequality achieved through colonialism.

A. International Property Rights at Colonial Exit & the Rise of the New International Economic Order

Decolonization divided most States into "developing" and "developed," a division that was reflected in international disputes on compensation through the latter half of the twentieth century. By the time former colonies became independent, international agreements like the General Agreement on Tariffs and Trade (GATT)[17] promoted an increase in commodity protectionism by developed countries. This in turn contributed to a growing income inequality between former colonies and formerly colonizing countries.[18] Additionally, decolonization involved a dramatic flow of capital into several emerging tax havens.[19] Decolonization thus formed part of a larger transformation of global money movement away from concrete enterprises susceptible to expropriation towards more mobile wealth streams,[20] paving the way for controversies between investors and expropriating States.

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[17] Kamal Hossain, *Introduction* to LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 2 (Kamal Hossain ed., 1980).

[18] In the early 1950s, developing countries accounted for 32% of world trade, but by 1972, excluding oil-exporting countries, about a hundred developing countries accounted for only about 10% of world trade. Income gaps followed this trend and by 1976, developed countries represented 20% of the world population with ⅔ of the world's income, while developing countries, excluding China, represented 50% of the world population, receiving only ⅛ of the world's income (Hossain, *supra* note 17, at 2-3).

[19] *See* Vanessa Ogle, *Tax Havens: Legal Recoding of Colonial Plunder*, LPE PROJECT BLOG (Nov. 10, 2020), https://lpeproject.org/blog/tax-havens-legal-recoding-of-colonial-plunder/.

[20] *Id.* ("Fear of expropriation, limits placed on the repatriation of profits, and restrictions on foreign activity in key strategic resource industries led investors to think twice about the precise legal form of a business presence on the ground . . . Rather than sink funds into cumbersome and difficult to liquidate brick and mortar trappings, increasingly many investors preferred portfolio investment . . . Decolonization therefore became part of a much broader transformation of global capitalism, one that rendered capital more mobile.").

Decolonization also laid the foundation for States to voice grievances and adopt new standards governing international property law.[21] In the face of trade protectionism, a number of States put forth various resolutions and declarations over the 1950s and 60s establishing legal support for Calvo-esque compensation paradigms. The Declaration on Permanent Sovereignty Over Natural Resources (Res. 1803)[22] rejected the view that expropriation was incompatible with international law and argued that the right to nationalize was inherent in the sovereignty of the State.[23] It codified "appropriate compensation . . . in accordance with the rules in force in the State taking such measures in the exercise of its sovereignty and in accordance with international law" as the correct compensation standard for international takings.[24] It essentially maintained that expropriation could not constitute an international tort (i.e., it could not be unlawful) and therefore could not be subject to a claim for damages (i.e., full restitution).[25]

The Declaration on the Establishment of the New International Economic Order (NIEO, Res. 3201) and its accompanying Charter of Economic Rights and Duties (Res. 3281)[26] further supported "appropriate compensation" determined by a nationalizing State as the correct compensation standard.[27] While rejecting the "prompt, adequate, and effective" standard promoted by developed countries with respect to foreign capital, these instruments still advocated for "restitution and full compensation for the exploitation" of natural and other resources[28] by States

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[21] *See* Sabbatino, 376 U.S. at 429-30 ("Certain representatives of the newly independent and underdeveloped countries have questioned whether rules of state responsibility toward aliens can bind nations that have not consented to them and it is argued that the traditionally articulated standards governing expropriation of property reflect "imperialist" interests and are inappropriate to the circumstances of emergent states.").
[22] The vote was 87 in favor, 2 opposed, 12 abstaining.
[23] G.A. Res. 1803 (XVII), Declaration on Permanent Sovereignty Over Natural Resources (Dec. 14, 1962).
[24] *Id.*; *see* Hossain, *supra* note 17, at 35.
[25] Hossain, *supra* note 17, at 38.
[26] The United States voted against. The final vote was 120 in favor, 6 against, 10 abstentions.
[27] G.A. Res. 3281 (XXIX), Charter of Economic Rights and Duties, at Chapter II, art. 2(c) (Dec. 12, 1974). The Charter also urges "the advancement of more rational and equitable international economic relations … the strengthening of the economic independence of developing countries" and the need for "promotion by the entire international community of economic and social progress of all countries, especially developing countries." Hossain, *supra* note 17, at 6.
[28] G.A. Res. 3201 (S-VI), *supra* note 7.

practicing "coercive policies."[29] Thus, it was not just the definition of compensation that shifted when these instruments were adopted by a majority of developing nations, but the notion of lawfulness as well. What developed countries, often with firmly entrenched traditions of free enterprise and private property rights, viewed as lawful and unlawful often turned on an individualized conception of property rights measured by opportunity cost. Meanwhile, many developing countries conceived of lawfulness as deeply intertwined with the extraction of collective property and unjust enrichment.[30]

B. Post-Colonial Adjudications of "Appropriate Compensation"

A range of arbitration and in-country tribunal decisions arose concurrently with international instruments promoting the rights of nations to seize property on their territory throughout the 1970s and 80s. Under these cases, the "appropriate compensation" standard was upheld, at times in line with the law of nationalizing States.[31] However, the Hull formula remained influential in calculating the extent of compensation. For example, in the 1977 TOPCO-Libya Arbitration decision, "appropriate compensation" was declared to constitute full compensation in the form of *restitutio in integrum* (i.e., restitution) under customary international law.[32] Likewise, the U.S. Second Circuit decision in *Banco Nacional de Cuba v. Chase Manhattan Bank* weighed in on the consensus of nations, holding that full compensation is included in the definition of "appropriate compensation" and that resolutions allowing expropriating States to determine the scope of compensation did not reflect international

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[29] G.A. Res. 3281 (XXIX) art. 16(1) ("It is the right and duty of all States, individually and collectively, to eliminate colonialism, *apartheid*, racial discrimination, neo-colonialism and all forms of foreign aggression, occupation and domination, and the economic and social consequences thereof, as a prerequisite for development. States which practice such coercive policies are economically responsible to the countries, territories and peoples affected for the restitution and full compensation for the exploitation and depletion of, and damages to, the natural and all other resources of those countries, territories and peoples.").

[30] *See* Hossain, *supra* note 17, at 26.

[31] *See* Sabbatino, 376 U.S. at 438-39 (holding that the act of state doctrine precludes U.S. courts from inquiring into the validity of public acts a recognized foreign sovereign power commits within its own territory). The Sabbatino decision was subsequently relied upon by various countries in anticipatory breaches of contracts, later resulting in claims for compensation. *See* Texas Trading and Milling Corp. v. Nigeria, 647 F.2d 300 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982); *see also* Ifeanyi Achebe, *The Legal Problems of Indigenization in Nigeria: A Lesson for Developing Countries*, 12 HASTINGS INT'L & COMPAR. L. REV. 637, 662 (1989).

[32] Texaco Overseas Petroleum Co. (TOPCO) v. Libyan Arab Republic, (Dupuy arb., Award of 19 January 1979).

law, therefore upholding the Hull Doctrine.[33] However, the Court also held that full compensation need not be paid in all circumstances, loosening the previous American rule.[34]

Other arbitration authorities declined to apply bright-line rules in favor of assessing the particular circumstances in each case or applying principles in individualized ways. In the AMINOIL-Kuwait Arbitration decision, arbitrators acknowledged the definition of "appropriate compensation" as set forth in U.N. Res. 1803, which recommended taking account of all circumstances in order to determine an amount of compensation, including lost future profits,[35] returning to restitution as the basis for compensation for illicit acts.[36] The LIAMCO-Libya Arbitration decision went a step further and applied an "equitable compensation" standard despite finding a lawful nationalization.[37] In that case, full compensation included lost profits, departing from even the Hull Doctrine. Thus, throughout the decisions governing property transfers in the post-colonial period, a range of principles arising from the Hull Doctrine, the Calvo Doctrine, and the NIEO-era resolutions have created a flexible, yet restitution-forward set of legal standards dictating the financial remedies arbitration bodies and in-country tribunals are willing to offer for financial harms into the present.

III. MILLENNIUM-ERA MODELS FOR PROPERTY TRANSFERS: REPARATIONS AS TRANSITIONAL JUSTICE

While reparation in the international investment arena usually plays out in a contained set of scenarios, where the property to be returned or recompensed and the actors held liable can be easily identified, reparation in the human rights context encounters a variety of complexities. Drawing from the standards laid out in *Chorzow* up through the NIEO-era, reparations for human rights violations are usually defined under the U.N.'s Basic Principles and Guidelines on the Rights to a Remedy and

[33] Banco Nacional de Cuba v. Chase Manhattan Bank, 658 F.2d 875, 892 (2d Cir. 1981).
[34] *Id.*
[35] *See* ALDRICH, *supra* note 6, at 237.
[36] AMINOIL, para. 138, *in* ALDRICH, *supra* note 6, at 234.
[37] *See* LIAMCO-Libya Arbitration (1981): Arbitrator Sobhi Mahmassani, *in* ALDRICH, *supra* note 6, at 233-34.

Reparation for Victims of Gross Violations of Human Rights and Serious Violations of Humanitarian Law (Basic Principles on the Rights to a Remedy and Reparation). Therein, victims' rights to reparation are measured under the Hull Doctrine—that is, victims have a right to "adequate, effective, and prompt reparation for harm suffered."[38] The forms of reparation also include more than just restitution and compensation, but also rehabilitation, satisfaction, and guarantees of non-repetition,[39] acknowledging the limitations of restitution in cases of severe loss of human life and irreplaceable possessions. Though not officially codified in a treaty, these are further supported under customary international law.[40]

Although human rights reparations appropriately build on the strongest legal protections for international investment originally meant to protect colonizing interests, enforcement of these reparations has been profoundly lacking, unlike in the investment context. While international law has consistently upheld the property rights of investors with truly prompt, adequate, and effective compensation in most cases, it has taken decades, if not centuries for many of the same countries to engage in reparative transitional justice for historical harms like genocide and African slavery.[41] It has taken Germany 92 years to complete its World War I reparations,[42] and reparations have been complete non-starters in other instances, like in the case of the Former Yugoslavia.[43] In addition, the manner in which human rights reparations are to be funded encounters challenges, whether through seizure itself or Security-Council-imposed claims commissions as in the case of Iraq after its 1990

[38] G.A. Res. 60/147, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, ¶ 11 (Dec. 16, 2005) [hereinafter Basic Principles on the Right to a Remedy and Reparation].
[39] *Id.* ¶ 18.
[40] ILC Articles on Responsibility of States for Internationally Wrongful Acts, art. 1: ILC YB 2001 [hereinafter ARSIWA].
[41] *See UK to Compensate Kenya's Mau Mau Torture Victims*, THE GUARDIAN, (June 6, 2013), https://www.theguardian.com/world/2013/jun/06/uk-compensate-kenya-mau-mau-torture; *see also* Jeff Israely, *Italy Pays Reparations to Libya*, TIME (Sept. 2, 2008), https://content.time.com/time/world/article/0,8599,1838014,00.html.
[42] Allan Hall, *Germany Ends World War One Reparations After 92 Years with £59m Final Payment*, DAILYMAIL.COM (Sept 28, 2010), https://www.dailymail.co.uk/news/article-1315869/Germany-end-World-War-One-reparations-92-years-59m-final-payment.html.
[43] Odio-Benito, *supra* note 3.

invasion of Kuwait.[44] Finally, the recipients of reparations in the human rights context can be much more dispersed—indeed, in Colombia, more than one fifth of the population is registered as a victim and the reparations process will likely take decades.[45]

While these challenges are daunting and make it difficult to maintain hope that victims will receive financial support and recognition of their sufferings, a new openness to property seizure may reinvigorate the impact of reparations on the lives of victims and countries devastated by international harms. With the level of humanitarian harm and refugee diaspora outpouring from Ukraine, a level not seen since World War II, the international community is poised to reconsider the value of more fluid laws governing the seizure of foreign assets for compensation purposes. Perhaps the international community is even in a position to embrace a reorientation of international law in favor of NIEO-style standards, turning its focus from individual investor harm to the potential for restitution for collective harms to place and person. The war in Ukraine may indeed offer the world an opportunity to, with renewed vigor, begin the process of making individuals, peoples, and nations whole again.

A. Who is Responsible? Rights to Reparation & Liability Challenges in the Twenty-First Century

While colonial-era compensation obligations arose from narrow investor-State contexts, where liability could be easily assigned, such decisions left few guidelines for assigning liability in the human rights context. Necessarily, there are other sources of law that govern the right to reparation in human rights contexts, further refining State obligations to victims of international harms. The Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) set out the customary international law governing reparations for actions or omissions attributable to States that "constitute a breach of an international obligation."[46] Article 31 of ARSIWA establishes that

[44] *See* Iraq Briefing, *supra* note 5.
[45] Luke Moffett, *Ukraine Symposium – Reparations for War: What Options for Ukraine?*, LIEBER INSTITUTE (Nov. 15, 2022), https://lieber.westpoint.edu/about/lieber/.
[46] ARSIWA, art. 2.

responsible States are under an obligation to make "full reparation" for an injury caused, which includes "any damage, whether material or moral" caused by the State committing a wrongful act.[47] Forms of reparation include restitution,[48] compensation,[49] and satisfaction[50] either on their own or in combination. States may claim guarantees of non-repetition from a responsible State as well.[51] In addition, under Article 48, any State other than an injured State is entitled to invoke responsibility if (a) an obligation breached is owed to a group of States, including that State, and it is in the protection of a collective interest of the group; or (b) if the obligation breached is owed to the international community as a whole. This may have implications for States invoking responsibility for slavery and other harms that are transcontinental in nature and usually invoke *jus cogens*.[52] These forms of compensation are reflected in the U.N.'s Basic Principles on the Rights to a Remedy and Reparation,[53] Article 75 of the Rome Statute, which mandates judges to establish principles on reparations,[54] in addition to multiple other sources of law.[55]

While ARSIWA represents a progressive leap forward in the codification of State responsibility for human rights violations, it has its limitations. Most of the language in ARSIWA creates an "obligation" but does not compel nations to operate in accordance with it or establish

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[47] *Id.* art. 31.
[48] *Id.* art. 34. With respect to restitution, ARSIWA limits its extent, upholding an obligation as long as restitution is not impossible and does not involve a burden "out of all proportion" to the benefit conferred by restitution as opposed to compensation.
[49] *Id.* art. 36. Compensation under ARSIWA includes any "financially assessable damage" and includes lost profits, a nod to the "equitable compensation" standard. *See* LIAMCO-Libya Arbitration (1981): Arbitrator Sobhi Mahmassani, *in* ALDRICH, *supra* note 6, at 233-34).
[50] ARSIWA, art. 37. Satisfaction under ARSIWA may consist of "an acknowledgment of the breach, an expression of regret, a formal apology or another appropriate modality."
[51] *Id.* art. 48(2).
[52] *Id.* art. 48(1).
[53] Basic Principles on the Right to a Remedy and Reparation, *supra* note 38, ¶ 11.
[54] Odio-Benito, *supra* note 3.
[55] The right to an effective remedy is established in a multitude of international instruments that are widely accepted by States, including: the Universal Declaration of Human Rights (Article 8), the International Covenant on Civil and Political Rights (Article 2), the International Convention on the Elimination of All Forms of Racial Discrimination (Article 6), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Article 14), the Convention on the Rights of the Child (Article 39). This is also reflected in a variety of regional human rights treaties. Theo van Boven, *Victims' Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines, in* REPARATIONS FOR VICTIMS OF GENOCIDE, *supra* note 1, at 22.

explicit individual rights to reparation. It also features an intertemporal principle that limits State responsibility for reparations to acts that were internationally wrongful at the time the State committed them.[56] Indeed, the same year that it was adopted, the World Conference Against Racism was held in Durban, South Africa, where leaders of predominantly developing nations underscored the need for reparations for slavery, the slave trade, apartheid, genocide, and other historical harms,[57] highlighting the failures of modern international law.

The debate over reparations for slavery and the slave trade that featured prominently in the 2000s centered around the liability of modern nations for historical acts. The debate showcased one of the central complexities accompanying human rights reparations—their relationship with time, specifically the ongoing effects of past harms on individuals and societies, and a State's responsibility for its past.[58] While some nations have granted reparations and acknowledged past harms dating back to World War II,[59] very few nations have been willing to concede reparations for slavery or genocide as a result of colonization, some referencing the passage of time and the fact that slavery was legal during the colonial era and did not create legal responsibilities based on a violation.[60] In response, scholars have argued that because a cause of action did not exist in international law during that era, the statute of limitations did not begin to run until slavery became accepted as a facet of *jus cogens*.[61]

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[56] Tendayi Achiume, Rep. of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, ¶ 32, U.N. Doc. A/74/321 (Aug. 21, 2019) [hereinafter Special Rapporteur].
[57] *Id.* ¶ 30.
[58] *See* Tuneen E. Chisolm, *Sweep Around Your Own Front Door*, 147 U. PA L. REV. 677, 713-14 (1999) ("[C]ompensation is not just about money, it is about the symbolic recognition of a moral debt, and a commitment to teach new generations. Nobody wants to paint respectable modern German companies with a Nazi tar brush. Six million people were murdered because they were Jews, and for them or their relatives, there is no compensation on earth. But as a secondary crime, they were also robbed. That is an issue we can and should do something about. Wherever it is still possible, it is still necessary.").
[59] Ryan Michael Spitzer, Note, *The African Holocaust: Should Europe Pay Reparations To Africa For Colonialism And Slavery?*, 35 VAND. J. TRANSNAT'L L. 1313, 1338-39 (2002) (highlighting that, in 1999, German companies agreed to pay $1.8 billion in additional reparations to Holocaust victims; in 1998, the United States settled a class-action lawsuit filed by victims of the Japanese internment camps; and in 1999, at least fifteen lawsuits were filed against German companies that benefited from slave labor during the Nazi era).
[60] *See* Rachel Anderson, Comment, *Redressing Colonial Genocide Under International Law: The Hereros' Cause of Action Against Germany*, 93 CAL. L. REV. 1155, 1185 (2005); *see also* Kenneth L. Lewis, Jr., *The Namibian Holocaust: Genocide Ignored, History Repeated, Yet Reparations Denied*, 29 FLA. J. INT'L L. 133, 143-44 (2017).
[61] Spitzer, *supra* note 59, at 1342.

Most reparations determinations in the slavery context have played out in domestic tribunals[62] or have been confined to theoretical discussion.[63] However, international instruments have emerged calling for reparations anew[64] based on the legal theory that extensions in time for international responsibility apply when an act and its effects are ongoing and continue to a time when the act is considered to be a violation of international law.[65] Thus, while international instruments like ARSIWA laid the foundation for robust and expanded rights to reparation, States with reparations claims have needed to develop creative arguments to overcome persistent challenges from former colonies on the basis of liability.

In the context of Ukrainian reparations, the liability of the Russian Federation is largely uncontested; however, there are difficulties in assigning that liability as a precursor to granting compensation. For one, Russia, as a member of the U.N. Security Council can veto any unilateral resolution to compel reparations. The particular harms suffered are not in the remote past, so there is little comparison between the harms of slavery and the harms of Ukraine's current armed conflict; however, arguments for reparations on the basis of colonialism and ongoing harms begun during colonial rule may directly apply to Ukraine, which has argued for international recognition of its own past genocide, the Holodomor, for decades.[66] Thus, international sympathy for Ukraine in this current moment and its own potential claims which configure well with the slavery reparations arguments against the application of ARSIWA's intertemporal principle[67] may open a door for greater

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[62] *Id.* at 1342-43; *see* Complaint and Jury Trial Demand, Farmer-Paellman v. FleetBoston Fin. Corp., P 45 (E.D.N.Y. filed 2002).
[63] *Id.* at 1343.
[64] The Special Rapporteur mentions the Ten-Point Plan for Reparatory Justice adopted in 2014 by the Caribbean Comunity (CARICOM), which aims to achieve reparations for "victims of genocide, slavery, slave trading and racial apartheid." Achiume, *supra* note 56, ¶ 17.
[65] *Id.* ¶ 32.
[66] *European Parliament Recognizes Holodomor Famine in Ukraine as Genocide*, RADIOFREEEUROPE/RADIOLIBERTY (Dec. 15, 2022), https://www.rferl.org/a/european-parliament-recognizes-holodomor-famine-genocide/32178177.html.
[67] *See* Special Rapporteur, *supra* note 56, ¶ 50 ("When Member States and even international lawyers insist on the application of the intertemporal principle as a bar to pursuing reparation and remediation of racial injustice and inequality, they are, in effect, insisting on the application of neocolonial law.").

international accountability for the effects of slavery and racial apartheid. However, this is probably less a function of the law and more a function of politics.

B. Who Will Pay? Funding Sources & Compensation Commissions

While post-colonial adjudications of property seizure could easily identify an individual funding source and incentivize compensation for diplomatic purposes, there appears to be little international incentive to volunteer funding sources for human rights abuses absent the adoption of international and domestic legislation. Although reparations for mass victimizations have largely gone unpaid, those States that have made payments have done so through treaty agreements and compensation commissions. For example, under the 1946 Paris Agreement on Reparation, Allied powers seized German property located in the territory of the parties to the agreement.[68] Compensation commissions work differently from treaties. Under compensation commissions, the U.N. Security Council authorizes a method of obtaining funds from a violator State in order to compensate a violated State. The 1991 U.N. Compensation Commission (UNCC), for example, generated funds by placing a levy on Iraqi oil exports to compensate Kuwait for Iraq's illegal invasion in 1990.[69] When Iraq refused to comply with these terms, the Security Council advised States that had frozen Iraqi assets to liquidate these and transfer the funds into a U.N. account, a portion of which was also distributed as compensation.[70] This created a precedent giving the U.N. Security Council the authority to threaten the liquidation of assets for compensating damages. Ultimately, pursuant to the UNCC's mandate, Iraq was obliged to pay up to 30% of the annual value of its oil exports.[71] Over the

[68] *See* NEW LINES INSTITUTE FOR STRATEGY AND POLICY, MULTILATERAL ACTION MODEL ON REPARATIONS: DEVELOPING AN EFFECTIVE SYSTEM FOR REPARATION AND COMPENSATION FOR UKRAINE AND UKRAINIANS FOR DAMAGE CAUSED BY THE RUSSIAN FEDERATION 5-6 (Oct. 2022) [hereinafter MULTILATERAL ACTION MODEL ON REPARATIONS], https://newlinesinstitute.org/wp-content/uploads/20221031-MAMOR-Doc-w-toc-NLISP.pdf.
[69] S.C. Res. 687 (Apr. 3, 1991); *see* Iraq Briefing, *supra* note 5 ("[T]he Council reaffirmed that Iraq was liable under international law for any direct loss, damage, or injury to foreign governments, nationals, and corporations 'as a result of its unlawful invasion and occupation of Kuwait.'").
[70] Sean D. Murphy, *The Security Council, Legitimacy, and the Concept of Collective Security After the Cold War*, 32 COLUMBIA J. TRANSNAT'L L. 201, 238 (1994).
[71] S.C. Res. 705 (Aug. 19, 1991).

next three decades, that percentage gradually declined until it was fully paid by February of 2022.[72] In total, over the course of 30 years, the UNCC paid approximately $52.4 billion to more than 1.5 million Kuwaiti claimants.[73] It took about fifteen years to sort through over 2.7 million claims.[74]

Prospects for compensation commissions in 2022 are less hopeful, especially while the U.N. Security Council is composed of Member States with credible claims for compensation against them. As Russia sits on the Security Council, the Council will not unilaterally enforce a compensation commission like the UNCC in the case of Ukraine as a State or for individual Ukrainian claimants. However, compensation commissions can also be established through multilateral action through the U.N. General Assembly or through a conference of States to address exigent circumstances around the world, circumventing the enforcement power of the Security Council.[75] However, these States must possess leverage in the form of seized or frozen assets to first persuade a violating State to comply with an inter-State agreement on reparations or to later liquidate those assets for distribution to victims. In the case of Ukraine, an international compensation commission might go further than simply collecting funds as in the case of Iraq and Kuwait. It could leverage an international consensus on liability to obligate Russia under ARSIWA to engage in outright restitution; for example, in taking actions to return forcibly removed Ukrainian children to Ukraine.[76] Because compensation is not punitive, international claims commissions do not normally support awarding sums in excess of what is "financially assessable."[77]

In Ukraine's case, other forms of reparation like satisfaction, in the absence of Russian admission of liability, could be fulfilled through another financial mechanism like a trust fund.[78] Thus,

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[72] Iraq Briefing, *supra* note 5.
[73] *Id.*
[74] *Id.*
[75] *See* MULTILATERAL ACTION MODEL ON REPARATIONS, *supra* note 68, at 5.
[76] *Id.* at 18.
[77] ARSIWA, art. 36.
[78] *See* MULTILATERAL ACTION MODEL ON REPARATIONS, *supra* note 68, at 19-20.

Ukrainian claims for reparation in 2022 could result in a compensation commission, supplemented by any necessary in-country reparation program,[79] with the power to apply the forms of reparation envisioned in the U.N.'s Basic Principles on the Rights to a Remedy and Reparation, opening a pathway for other States to make claims. Indeed, the U.N. General Assembly has already called for Ukrainian reparations through a preliminary registry of claims for damage, building on a similar register created to record Palestinian claims against Israel.[80]

There are some challenges with liquidating foreign assets in this manner. On one hand, "countermeasures" are usually permitted to temporarily coerce another State to fall in line with international law by itself violating international law; in this case, by seizing property.[81] However, "countermeasures" are only permitted if they are temporary, and if Russian assets are liquidated for compensation purposes, the seizure would no longer be temporary.[82] A number of other critiques have arisen citing the limits of in-country powers to liquidate foreign assets without disrupting the international order and opening the floodgates for more arbitrary seizures against States that seize Russian assets.

In the United States, for example, the International Emergency Economic Powers Act (IEEPA) prevents the executive branch from vesting a foreign asset for forty years,[83] and a 2001 amendment limits the president's authority to vest some foreign assets to situations in which the United States is engaged in "armed hostilities" or has been attacked by another State.[84] The United

[79] Moffett, *supra* note 45 (arguing that an independent hybrid mechanism combining an international commission-like body and a national reparation program would overcome challenges presented by either a compensation commission or separate domestic program).
[80] Chiara Giorgetti, Markiyan Kliuchkovsky, Patrick Pearsall & Jeremy K. Sharpe, *Historic UNGA Resolution Calls for Ukraine Reparations*, JUST SECURITY (Nov. 16, 2022), https://www.justsecurity.org/84146/historic-unga-resolution-calls-for-ukraine-reparations/; *see also* UNITED NATIONS REGISTER OF DAMAGE CAUSED BY THE CONSTRUCTION OF THE WALL IN THE OCCUPIED PALESTINIAN TERRITORY (UNROD), http://unrod.org/ (last visited Jan. 11, 2023).
[81] Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets.
[82] *See* Evan Criddle, *Rebuilding Ukraine Will Be Costly. Here's How to Make Putin Pay*, POLITICO (Mar. 30, 2022), https://www.politico.com/news/magazine/2022/03/30/rebuilding-ukraine-make-putin-pay-00021649.
[83] Anderson & Keitner, *supra* note 81.
[84] 50 USC 1702(A)(1)(C) (1977), *amended by* Pub. L. No. 107–56, §106(1)(D) (2001).

States could also seize Russian assets as civil forfeiture, which allows federal law enforcement to take title to assets used in criminal activities, but this approach would only affect oligarch assets, not Russian central bank assets.[85] Thus, in the United States at least, an effort to enable such seizures goes beyond colonial-era international legal mechanisms and would likely require new national legislation and a willingness to gamble the international enforceability of collective standards of behavior into the future.[86]

C. Who is Entitled to Relief? Individual, Collective, and State-Level Reparations

State-to-State and State-to-business level reparations have been the standard for most internationally wrongful acts throughout the colonial era. Only after World War II did State-to-individual compensation figure more prominently in domestic reparations regimes.[87] While there is a strong tendency for States to acknowledge a legal entitlement to reparations for individuals, and the right to reparation has a basis in treaty law,[88] no individual right to reparation is actually codified.[89] In practice, individual reparations in the form of restitution and compensation are the most common,[90] as in the case of the UNCC.

However, these remedies often exclusively aim to repair an individual's private interests, diverting attention from the persistent societal problems that may have led to their victimization to begin with, whether in the context of armed conflict or mass victimizations of other sorts.[91] Especially

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[85] Anderson & Keitner, *supra* note 81.
[86] *See id.*; *see also* Andrew Boyle, Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets Are Legally Unavailable, JUST SECURITY (Apr. 18, 2022), https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/.
[87] Odio-Benito, *supra* note 3, at 1.
[88] Art. 3 of the 1907 Hague Convention (IV); Article 91 of 1977 Additional Protocol I to the 1949 Geneva Conventions; *see* Friedrich Rosenfeld, *Collective Reparation for Victims of Armed Conflict*, 92 INT'L REV. OF THE RED CROSS 731, 738 (Sept. 2010).
[89] Rosenfeld, *supra* note 88, at 732-33.
[90] *Id.*
[91] *See* Anne Saris & Katherine Lofts, *Reparation Programmes: A Gendered Perspective, in* REPARATIONS FOR VICTIMS OF GENOCIDE, *supra* note 1, at 89-90 (quoting Genevieve Painter, *Towards Feminist Theoretical Approaches to Reparations* (Conference Paper, September 2006) [unpublished] at 3) ("[R]estoring a victim to her position before the conflict began would be tantamount to returning her to a state of marginalization and inequality that to some extent facilitated the harms experienced in the first place").

in the context of gender-based violence, individual entitlements can be of critical importance for women's well-being; however, compensation will inevitably be disproportionate to the harm, potentially trivializing the suffering or reducing the reparation to mere "blood money."[92] In recent years, collective reparation has also begun to gain traction as a reparation distribution mechanism for harms affecting communities or ethnic groups, aiming to reach beyond an individualistic framework for reparation.

Collective reparations are indivisible, so victims who receive collective reparation must share it with other victims, and they come in forms beyond restitution and compensation,[93] including constructing schools or hospitals,[94] establishing memorials,[95] or renaming streets.[96] While collective reparation is also uncodified in international law, the U.N.'s Basic Principles on the Right to a Remedy and Reparation, though not binding on States, references collective harm as a basis for an effective remedy in reparation.[97] The ICC's Rules of Procedures and Evidence also reference collective reparation, but do not explicitly define a right to collective reparation.[98]

In addition, regional tribunals like the Inter-American Court of Human Rights have granted awards to Indigenous communities based on collective reparation, considering the community to be the holder of a collective right to property, especially in matters involving land restitution.[99] Defining awards by a collective identity; however, also presents challenges. As in the case of the UNCC, many

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[92] *Id.* at 89.
[93] Rosenfeld, *supra* note 88, at 733.
[94] *Id.* (Peruvian Truth and Reconciliation Commission).
[95] *Id.* (Commission for Reception, Truth and Reconciliation in Timor-Leste).
[96] *Id.* (South African Truth and Reconciliation Commission).
[97] Basic Principles on the Right to a Remedy and Reparation, *supra* note 38, ¶ 8 ("[P]ersons who individually or collectively suffered harm, including physical or mental injury … [etc.] through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.").
[98] Rules of Procedure and Evidence of the ICC, Adopted by the Assembly of States Parties, New York, 3–10 September 2002, Official Records ICC-ASP/1/3 (Under Rule 97, the Court may award reparations on an individual or collective basis, and Rule 98 acknowledges the possibility of a collective award).
[99] Rosenfeld, *supra* note 88, at 739-40; *see* Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 167 (Aug. 31, 2001); *see also* Moiwana v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 145, ¶ 131 (June 15, 2005).

observers of the Iraq compensation strategy argued that the claims process could become more credible if victims were not excluded based on nationality—that if Iraqi nationals could also make claims against Iraqi coalition forces, such an approach would help reinforce adherence to international law and help ease the post-war reconciliation process, avoiding worsening nationally-directed resentment between States and improving accountability.[100]

The war in Ukraine has produced 7 million refugees and 6.5 million internally displaced persons,[101] which does not include the millions of people affected by atrocities and deprivations in their local areas and untold forced deportation outside of occupied zones. International practice strongly supports individual reparations for Ukrainians as well as separate reparations to the Ukrainian State.[102] In this conflict, there is also a basis for collective reparations for victims of conflict-related sexual violence, groups of forcibly removed children, victims of filtration camps, and POWs mistreated in Russian custody—all groups whose claims could support further codification of individual and collective victims' rights to reparation, if not further development of customary international law. This conflict also offers an opening for considering the claims of complex victims,[103] such as Russian collaborators or separatists with unpopular or seditious political opinions. The involvement of international mechanisms to process claims for reparations is, therefore, central to creating a lasting and human-rights-centered precedent in the post-conflict reconciliation process.

IV. CONCLUSION

While international collaboration on reparations is key to supporting societies and victims in memorializing what was lost and rebuilding a more hopeful future, the legacies of colonialism on international property law undeniably influence the remedies available today. The colonial era

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[100] Murphy, *supra* note 70.
[101] Moffett, *supra* note 45.
[102] *See* MULTILATERAL ACTION MODEL ON REPARATIONS, *supra* note 68, at 17.
[103] *See generally* Luke Moffett, *Reparations for 'Guilty Victims': Navigating Complex Identities of Victim–Perpetrators in Reparation Mechanisms*, 10 INT'L J. OF TRANSITIONAL JUST. 146 (Dec. 4, 2015).

produced an international property regime that sanctified individual investors' rights over the rights of Indigenous peoples, rooting injustice in lost opportunity cost rather than unjust enrichment. These principles remain inscribed in international property disputes today, including in the realm of human rights. While reparations in the human rights context rightfully demand full compensation or restitution for victims' losses, these are still largely measured in private costs as opposed to systemic injustices. Wealthy nations are enabled, and in some cases bound, by legal precedent to skirt liability and escape property seizure meant for funding. In 2022, in an era of war and mass displacement, there is a renewed opportunity in the face of the bold and absurd actions by aggressors to shake the colonial foundation of international law, create more robust reparations regimes, and seek justice for the world's most vulnerable.

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- Sonia Geba and Eliza Lafferty, Project Leaders

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