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### **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.<sup>8</sup> 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.<sup>9</sup> 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**

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<sup>5</sup> 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).

<sup>6</sup> *Id.* at 99.

<sup>7</sup> *Id.* at 90.

<sup>8</sup> See DEBORAH J. YASHAR, *HOMICIDAL ECOLOGIES: ILLICIT ECONOMIES AND COMPLICIT STATES IN LATIN AMERICA* 96 (2018).

<sup>9</sup> *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 “18<sup>th</sup> Street” Gang (Barrio 18), form powerful local and transnational networks across Central America and have contributed to some of the highest homicide rates globally.<sup>10</sup>

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.<sup>11</sup> It is predicted that 5% of the male population of Honduras between the ages of 15 and 24 belongs to a criminal gang.<sup>12</sup> 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.<sup>13</sup> 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

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<sup>10</sup> Clare Ribando Seelke, *Gangs in Central America*, CONGRESSIONAL RESEARCH SERVICE (Aug. 29, 2016), <https://sgp.fas.org/crs/row/RL34112.pdf>.

<sup>11</sup> See *Honduras: Events of 2021*, HUMAN RIGHTS WATCH (2021), <https://www.hrw.org/world-report/2022/country-chapters/Honduras>.

<sup>12</sup> *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*].

<sup>13</sup> See *Honduras: Events of 2021*, *supra* note 11.

of crime.<sup>14</sup> In turn, outbound migration from the region has reached its peak, resulting in the flight of over two million people since 2014.<sup>15</sup>

### 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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup> 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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<sup>14</sup> 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>.

<sup>15</sup> Amelia Cheatham & Diana Roy, *Central America's Turbulent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (June 22, 2022), [https://www.cfr.org/background/central-americas-turbulent-northern-triangle?gclid=Cj0KCQjwk5ibBhDqARIsACzmgLREhOqcAhWkJQv1\\_vBCkIw6Be4UhdJWu4wD-AoAQKT5DnI1w47Gw0aAsAiEALw\\_wcB](https://www.cfr.org/background/central-americas-turbulent-northern-triangle?gclid=Cj0KCQjwk5ibBhDqARIsACzmgLREhOqcAhWkJQv1_vBCkIw6Be4UhdJWu4wD-AoAQKT5DnI1w47Gw0aAsAiEALw_wcB).

<sup>16</sup> DIEGO GAMBETTA, *THE SICILIAN MAFIA* (1993).

<sup>17</sup> See DIETER HALLER & CRIS SHORE, *The Sack of Two Cities: Organized Crime and Political Corruption in Youngstown and Palermo*, in *CORRUPTION: ANTHROPOLOGICAL PERSPECTIVES* (2005).

<sup>18</sup> 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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup> For example, if a remark made about another gang member's romantic

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<sup>19</sup> 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).

<sup>20</sup> Elyssa Pachico, Juan José Martínez, & Steven Dudley, *Gangs in Honduras*, INSIGHT CRIME & CTR. FOR LATIN AMERICAN & LATINO STUD. 26 (Dec. 9, 2015).

<sup>21</sup> *Id.*

partner is perceived to be offensive, a violent reaction may be triggered in response and is considered justified.<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup> 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

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<sup>22</sup> *Id.*

<sup>23</sup> *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](https://www.unodc.org/pdf/research/Central_America_Study_2007.pdf).

<sup>24</sup> *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.<sup>25</sup> 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.<sup>26</sup> 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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<sup>25</sup> John Negroponete et al., *Building a Better Future*, ATLANTIC COUNCIL (May 5, 2017), <https://www.atlanticcouncil.org/in-depth-research-reports/report/building-a-better-future/>.

<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup> 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.<sup>29</sup>

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,<sup>30</sup> signed on December 15, 1995, in San Pedro Sula, Honduras by Costa Rica, Honduras, El

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<sup>27</sup> Farrah, *supra* note 5, at 97.

<sup>28</sup> *Transnational Organized Crime*, *supra* note 12, at 11-13.

<sup>29</sup> Farrah, *supra* note 5, at 101.

<sup>30</sup> 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.<sup>31</sup> 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.<sup>32</sup> 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.<sup>33</sup> 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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<sup>31</sup> Negroponete, *supra* note 25, at 31.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> 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."<sup>34</sup> By strengthening institutions to improve governance and the rule of law, stability, and development in the Northern Triangle will likely soon follow.

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<sup>34</sup> 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.<sup>1</sup> 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,<sup>2</sup> approximately 6.2 percent of that population is Indigenous.<sup>3</sup> Until recently, Indigenous peoples have been systematically excluded from the international legal arena, yet still subjected to the rules created in those spaces.<sup>4</sup>

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<sup>1</sup> 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>.

<sup>2</sup> The World Bank, Data: Population, Total (2021), <https://data.worldbank.org/indicator/SP.POP.TOTL>.

<sup>3</sup> 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).

<sup>4</sup> 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.<sup>5</sup> 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.<sup>6</sup>

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.<sup>7</sup> The Convention was the ILO’s first effort to apply a non-assimilationist approach to Indigenous rights<sup>8</sup>

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<sup>5</sup> 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.

<sup>6</sup> 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.”).

<sup>7</sup> ILO Conv. No. 169 (1989).

<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup>

The U.N. General Assembly took almost two decades to follow up on the ILO's work, passing UNDRIP on September 13, 2007.<sup>11</sup> UNDRIP addresses Indigenous peoples' rights to self-determination in the contexts of culture, religion, education, language, property, healthcare, and social security, among other topics.<sup>12</sup> 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

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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](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314).

<sup>9</sup> Dhir, *supra* note 3, at 32-33.

<sup>10</sup> *Id.*

<sup>11</sup> *See generally* G.A. Res. 61/295, UN Declaration on the Rights of Indigenous Peoples (Sep. 13, 2007) [hereinafter UNDRIP].

<sup>12</sup> *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.<sup>13</sup>

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.<sup>14</sup> 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;<sup>15</sup> 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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<sup>13</sup> 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/>.

<sup>14</sup> 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.

<sup>15</sup> 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.<sup>16</sup> Colombia experienced a bloody internal conflict known as *La Violencia* first inspired by regional guerilla movements<sup>17</sup> starting around 1948 and lasting approximately a decade.<sup>18</sup> Guerilla bands emerged during *La Violencia*, and government forces fought against competing bands all around the country.<sup>19</sup> The violence was so horrific that more than 200,000 people were killed over the course of a decade.<sup>20</sup> 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.<sup>21</sup> 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.<sup>22</sup>

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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<sup>16</sup> 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>.

<sup>17</sup> *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].

<sup>18</sup> Norman A. Bailey, *La Violencia in Colombia*, 9 J. INTER-AM. STUD. 561, 566 (1967).

<sup>19</sup> *Id.* at 567.

<sup>20</sup> Steven Boraz, *Case Study: The Colombia-Venezuela Border*, in UNGOVERNED TERRITORIES: UNDERSTANDING AND REDUCING TERRORISM RISKS 243, 244 (RAND Corporation 2007).

<sup>21</sup> *Id.*

<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> Approximately 41 percent of those displaced and 99 percent of those confined are Afro-Colombian or Indigenous peoples.<sup>25</sup> Furthermore, 483,260 internally displaced Indigenous peoples were registered by the Colombian government between January to June 2021.<sup>26</sup> However, both “international organizations and NGOs remained concerned regarding the slow and insufficient institutional response to displacement.”<sup>27</sup>

Communities such as the Awá people living in southwest Colombia and northeast Ecuador<sup>28</sup> struggle to survive on their original ancestral land due to the conflict; some have been relocated to other places within Colombia.<sup>29</sup> They fight to maintain their shared culture, despite losing their ancestral homelands and facing discrimination in more urban settings.<sup>30</sup> Approximately 29,000

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<sup>23</sup> *Id.* at 2.

<sup>24</sup> *Colombia Situation*, UNHCR (last visited Dec. 20, 2022), <https://reporting.unhcr.org/colombiasituation> [hereinafter *Colombia Situation*].

<sup>25</sup> *Id.*

<sup>26</sup> Colombia 2021 Human Rights Report, U.S. Department of State, <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/colombia/>.

<sup>27</sup> *Id.*

<sup>28</sup> 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*].

<sup>29</sup> Begue, *supra* note 16.

<sup>30</sup> *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.<sup>31</sup> 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.<sup>32</sup>

In general, Colombia’s Indigenous peoples frequently live on resource-rich lands located in “strategic areas” fought over by armed groups.<sup>33</sup> Although the 2016 peace agreement brought the promise of progress, violence against Indigenous communities persists.<sup>34</sup> 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.<sup>35</sup> Indigenous communities also face barriers to participation in the legal processes created for Indigenous land stewardship and restitution.<sup>36</sup> The communities are also subject to higher incidences of poverty and child mortality.<sup>37</sup> Furthermore, generalized violence, as well as limited access to justice and security disproportionately affect Indigenous communities and continue to threaten their survival.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup> These communities may seek to maintain their “invisibility” to government officials for fear of

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<sup>31</sup> Acosta, *supra* note 15.

<sup>32</sup> *Id.*

<sup>33</sup> *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](https://www.ecoi.net/en/file/local/2083878/2022_12_EUAA_COI_Report_Colombia_Country_focus.pdf).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 120.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 118.

<sup>39</sup> *Colombia Situation*, *supra* note 24.

<sup>40</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 1.

discrimination.<sup>41</sup> 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.<sup>42</sup> 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."<sup>43</sup> 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

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<sup>41</sup> *Id.* at 3.

<sup>42</sup> *The Awá: Colombia's Tribal People*, BBC NEWS: AMERICAS (Aug. 27, 2009, at 8:48PM), <http://news.bbc.co.uk/2/hi/americas/8224593.stm>.

<sup>43</sup> 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.”<sup>44</sup> 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.”<sup>45</sup> 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.<sup>46</sup> 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,

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<sup>44</sup> ILO Conv. No. 169, Preamble.

<sup>45</sup> UNDRIP, art. 3.

<sup>46</sup> UNDRIP, art. 4.

self-determination can manifest in local self-government or participation in negotiations between Indigenous peoples and governments, among other means.<sup>47</sup>

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.”<sup>48</sup> 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.<sup>49</sup> 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.<sup>50</sup> 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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<sup>47</sup> See IMPLEMENTING UNDRIP, *supra* note 6, at 16.

<sup>48</sup> *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)).

<sup>49</sup> “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).

<sup>50</sup> 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.<sup>51</sup> 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.”<sup>52</sup> The ILO more clearly places the responsibility of ensuring this right of bi-national movement and maintenance of community relations on State governments.<sup>53</sup> 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.<sup>54</sup> 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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<sup>51</sup> ILO Conv. No. 169, art. 16; UNDRIP, art. 10.

<sup>52</sup> UNDRIP, art. 36(1).

<sup>53</sup> 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.”

<sup>54</sup> 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.<sup>55</sup> 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.<sup>56</sup> The OAS Declaration emphasizes self-determination and informed, free, and prior consent like UNDRIP and ILO Conv. No. 169 as well.<sup>57</sup> 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.”<sup>58</sup> 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.”<sup>59</sup> Although the official language of Colombia is Spanish,

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<sup>55</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 7.

<sup>56</sup> *See generally* American Declaration on the Rights of Indigenous Peoples, AG/RES.2888 (XLVI-O/16), Organization of American States [OAS] (June 15, 2016).

<sup>57</sup> *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).

<sup>58</sup> *Id.* art. XXIII(2), note 3.

<sup>59</sup> 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.”<sup>60</sup> Indigenous peoples are granted Colombian citizenship under the Constitution “straddling border areas, in application of the principle of reciprocity according to public international treaties.”<sup>61</sup> The application of these Constitutional principles in practice, however, has been called into question.<sup>62</sup> While Colombia has enforced some of these constitutional provisions,<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup>

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.<sup>66</sup> Firstly, Ecuador recognizes Kichwa and Shuar, two Indigenous languages, as “official languages for intercultural ties.”<sup>67</sup>

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<sup>60</sup> *Id.* art. 10.

<sup>61</sup> *Id.* art. 96(2)(c).

<sup>62</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 10.

<sup>63</sup> 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.

<sup>64</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 10-11.

<sup>65</sup> 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](https://www.ilo.org/dyn/normlex/en/F?p=NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:4023016).

<sup>66</sup> CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DEL ECUADOR, Oct. 20, 2008, art 6, arts 56, 57.

<sup>67</sup> *Id.* art. 2.

The Constitution explicitly prohibits discrimination on the basis of “ethnic belonging.”<sup>68</sup> 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.”<sup>69</sup>

The Constitution further enumerates specific Indigenous rights centered around developing identity;<sup>70</sup> judicial independence;<sup>71</sup> freedom from discrimination;<sup>72</sup> a right to receive compensation from damages resulting from discrimination;<sup>73</sup> property rights;<sup>74</sup> representation in government;<sup>75</sup> free, prior, and informed consent;<sup>76</sup> communication across borders;<sup>77</sup> and collective action and ownership.<sup>78</sup>

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.”<sup>79</sup> 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.<sup>80</sup> In practice, however, Indigenous communities

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<sup>68</sup> *Id.* art. 11(2).

<sup>69</sup> *Id.* art. 21.

<sup>70</sup> *Id.* art. 57(1).

<sup>71</sup> *Id.* art. 171.

<sup>72</sup> *Id.* art. 57(2).

<sup>73</sup> *Id.* art. 57(3).

<sup>74</sup> *Id.* arts. 57(4)-(8), (11).

<sup>75</sup> *Id.* arts. 57(15), (16).

<sup>76</sup> *Id.* art. 57(17).

<sup>77</sup> *Id.* art. 57(18).

<sup>78</sup> *Id.* arts. 57(59), (60).

<sup>79</sup> *Id.* art. 40.

<sup>80</sup> *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.<sup>81</sup> Additionally, Ecuador has a recognized asylum process through which refugees may apply within 90 days of arriving in the country.<sup>82</sup> However, Indigenous communities still face obstacles to obtaining asylum. Colombians in Ecuador report high levels of discrimination, barriers to accessing education and crime.<sup>83</sup> Many Colombian refugees resort to invisibility in Ecuador as a survival mechanism.<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> Overall, the UNHCR advocates for supporting collective Indigenous rights, protecting Indigenous leaders, and promoting protection through raising awareness of Indigenous identities and values.<sup>87</sup>

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<sup>81</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 13.

<sup>82</sup> *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.

<sup>83</sup> 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>.

<sup>84</sup> *Id.*

<sup>85</sup> UNHCR *Research Paper No. 263*, *supra* note 28, at 17.

<sup>86</sup> *Id.* at 18-19.

<sup>87</sup> *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.<sup>88</sup> 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.

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<sup>88</sup> 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.<sup>1</sup>

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.<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup>

#### 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.<sup>5</sup>

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.<sup>6</sup> 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.”<sup>7</sup>

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<sup>1</sup> 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).

<sup>2</sup> See *id.* at 125.

<sup>3</sup> 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).

<sup>4</sup> See *id.*

<sup>5</sup> See Perina, *supra* note 1, at 125.

<sup>6</sup> See de Groot & Vonk, *supra* note 3, at 324.

<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup>

### 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.<sup>10</sup> Now, the historical legal principles applied in acquiring citizenship remain a way to understand a country's culture and how it views nationality.<sup>11</sup> 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.<sup>12</sup> Inhabitants were either "French Subjects," "French Protected Persons," "French-administered Persons," or possessing their own citizenships.<sup>13</sup>

## II. NATIONALITY LAWS ON THE COLONIES WHEN EXITING

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<sup>8</sup> See Irish Nationality and Citizenship Act, § 16(a).

<sup>9</sup> See Gerard-René de Groot et al., *Loss of Citizenship: Trends and Regulations in Europe*, EUDO CITIZENSHIP COMP. CITIZENSHIP ANALYSES 29 (2010).

<sup>10</sup> See Perina, *supra* note 1, at 126.

<sup>11</sup> See *id.* at 125.

<sup>12</sup> See Władysław Czapliński, *A Note on Decolonization and Nationality*, L. & POL. AFR., ASIA & LATIN AM. 329, 330 (1985).

<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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”).<sup>16</sup> At the time, only British Citizens could live and work freely in the United Kingdom.<sup>17</sup> 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.”<sup>18</sup>

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.”<sup>19</sup> Meanwhile, no person born on

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<sup>14</sup> See *id.*

<sup>15</sup> See Patrick Weil, *Access to Citizenship: A Comparison of Twenty-five Nationality Laws*, CITIZENSHIP TODAY: GLOBAL PERSP. AND PRAC. 17, 25 (2001).

<sup>16</sup> See British Nationality Act 1981.

<sup>17</sup> See *id.*

<sup>18</sup> 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).

<sup>19</sup> 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*.<sup>20</sup>

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.<sup>21</sup> 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.<sup>22</sup> 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.<sup>23</sup>

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.<sup>24</sup> 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.<sup>25</sup> In the twentieth

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<sup>20</sup> See *id.*

<sup>21</sup> See The Hong Kong (British Nationality) Order 1986.

<sup>22</sup> 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.

<sup>23</sup> 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.

<sup>24</sup> See Weil, *supra* note 15, at 30.

<sup>25</sup> See *id.* at 29.













## ***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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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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<sup>1</sup> See Malak Benslama, *Decolonising Statelessness: Unpacking Colonial Legacies and Deconstructing Forms of Epistemic Violence*, Melbourne Law School CSS Blog (Jan. 2021).

<sup>2</sup> See Christoph Sperfeldt, *Statelessness in Southeast Asia: Causes and Responses*, *Global Citizenship Observatory* (Mar. 9, 2021).

<sup>3</sup> See e.g., *Statelessness in Numbers: 2020 An Overview and Analysis of Global Statistics*, Institute on Statelessness and Inclusion (2020).





































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.<sup>56</sup> 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.<sup>57</sup> 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."<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Many other Commonwealth nations have similar clauses and have indicated a willingness to adopt Canada's proportionality test.<sup>61</sup> 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."<sup>62</sup> As a

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<sup>56</sup> Kanna, *supra* note 4.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *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.<sup>63</sup> 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.<sup>64</sup> 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,”<sup>65</sup> 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.”<sup>66</sup> 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.<sup>67</sup> 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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<sup>63</sup> *Id.*

<sup>64</sup> David Bearce & Stacy Bondanella, *Intergovernmental Organizations, Socialization, and Member State Interest Convergence*, 61 INT’L ORG. 703, 708 (2007).

<sup>65</sup> Kanna, *supra* note 4.

<sup>66</sup> *Id.*

<sup>67</sup> *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-malysias-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.<sup>68</sup> Additionally, the EU Special Representative on Human Rights has met with the Indian government to discuss its use of anti-sedition laws.<sup>69</sup> 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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<sup>68</sup> 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>.

<sup>69</sup> 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](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<sup>1</sup>—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.<sup>2</sup>

In the past, reparations for mass victimizations have either manifested as decades-long domestic programs with little broad impact,<sup>3</sup> complete non-starters,<sup>4</sup> or, rarer still, compensation

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<sup>1</sup> 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.”).

<sup>2</sup> *Id.* at 56.

<sup>3</sup> Elizabeth Odio-Benito, *Foreword to REPARATIONS FOR VICTIMS OF GENOCIDE*, *supra* note 1, at 2.

<sup>4</sup> *Id.*

commissions deriving from the United Nations Security Council that take decades to pay out.<sup>5</sup> 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<sup>6</sup> while neglecting the rights of formerly colonized peoples seeking reparation for colonial injustices.<sup>7</sup>

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

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<sup>5</sup> 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>.

<sup>6</sup> GEORGE H. ALDRICH, *THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISIONS OF THE TRIBUNAL* 220 (1996).

<sup>7</sup> 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 Chorzów*, 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.”<sup>8</sup> 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.”<sup>9</sup> This became a prominent international standard as well, building on the *Chorzów* 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.<sup>10</sup> Dividing expropriations by the lawfulness of the taking created two categories of relief based on the

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<sup>8</sup> *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”).

<sup>9</sup> ALDRICH, *supra* note 6, at 220.

<sup>10</sup> 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,<sup>11</sup> whereas an unlawful taking created an obligation to pay damages.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup> 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.<sup>16</sup>

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<sup>11</sup> 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.’”).

<sup>12</sup> COLLINS, *supra* note 10, at 157.

<sup>13</sup> *Id.* at 169-72.

<sup>14</sup> 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).

<sup>15</sup> COLLINS, *supra* note 10, at 191; *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 438-39 (1964).

<sup>16</sup> 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)<sup>17</sup> 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.<sup>18</sup> Additionally, decolonization involved a dramatic flow of capital into several emerging tax havens.<sup>19</sup> Decolonization thus formed part of a larger transformation of global money movement away from concrete enterprises susceptible to expropriation towards more mobile wealth streams,<sup>20</sup> paving the way for controversies between investors and expropriating States.

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<sup>17</sup> Kamal Hossain, *Introduction to LEGAL ASPECTS OF THE NEW INTERNATIONAL ECONOMIC ORDER 2* (Kamal Hossain ed., 1980).

<sup>18</sup> 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  $\frac{2}{3}$  of the world’s income, while developing countries, excluding China, represented 50% of the world population, receiving only  $\frac{1}{8}$  of the world’s income (Hossain, *supra* note 17, at 2-3).

<sup>19</sup> 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/>.

<sup>20</sup> *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.<sup>21</sup> 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)<sup>22</sup> 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.<sup>23</sup> 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.<sup>24</sup> 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).<sup>25</sup>

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)<sup>26</sup> further supported “appropriate compensation” determined by a nationalizing State as the correct compensation standard.<sup>27</sup> 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<sup>28</sup> by States

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<sup>21</sup> 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.”).

<sup>22</sup> The vote was 87 in favor, 2 opposed, 12 abstaining.

<sup>23</sup> G.A. Res. 1803 (XVII), Declaration on Permanent Sovereignty Over Natural Resources (Dec. 14, 1962).

<sup>24</sup> *Id.*; see Hossain, *supra* note 17, at 35.

<sup>25</sup> Hossain, *supra* note 17, at 38.

<sup>26</sup> The United States voted against. The final vote was 120 in favor, 6 against, 10 abstentions.

<sup>27</sup> 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.

<sup>28</sup> G.A. Res. 3201 (S-VI), *supra* note 7.

practicing “coercive policies.”<sup>29</sup> 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.<sup>30</sup>

*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.<sup>31</sup> 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.<sup>32</sup> 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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<sup>29</sup> 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.”).

<sup>30</sup> See Hossain, *supra* note 17, at 26.

<sup>31</sup> 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 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).

<sup>32</sup> *Texaco Overseas Petroleum Co. (TOPCO) v. Libyan Arab Republic*, (Dupuy arb., Award of 19 January 1979).

law, therefore upholding the Hull Doctrine.<sup>33</sup> However, the Court also held that full compensation need not be paid in all circumstances, loosening the previous American rule.<sup>34</sup>

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,<sup>35</sup> returning to restitution as the basis for compensation for illicit acts.<sup>36</sup> The LIAMCO-Libya Arbitration decision went a step further and applied an “equitable compensation” standard despite finding a lawful nationalization.<sup>37</sup> 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

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<sup>33</sup> *Banco Nacional de Cuba v. Chase Manhattan Bank*, 658 F.2d 875, 892 (2d Cir. 1981).

<sup>34</sup> *Id.*

<sup>35</sup> See ALDRICH, *supra* note 6, at 237.

<sup>36</sup> AMINOIL, para. 138, *in* ALDRICH, *supra* note 6, at 234.

<sup>37</sup> 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.”<sup>38</sup> The forms of reparation also include more than just restitution and compensation, but also rehabilitation, satisfaction, and guarantees of non-repetition,<sup>39</sup> 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.<sup>40</sup>

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.<sup>41</sup> It has taken Germany 92 years to complete its World War I reparations,<sup>42</sup> and reparations have been complete non-starters in other instances, like in the case of the Former Yugoslavia.<sup>43</sup> 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

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<sup>38</sup> 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].

<sup>39</sup> *Id.* ¶ 18.

<sup>40</sup> ILC Articles on Responsibility of States for Internationally Wrongful Acts, art. 1: ILC YB 2001 [hereinafter ARSIWA].

<sup>41</sup> 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>.

<sup>42</sup> 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>.

<sup>43</sup> Odio-Benito, *supra* note 3.

invasion of Kuwait.<sup>44</sup> 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.<sup>45</sup>

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.”<sup>46</sup> Article 31 of ARSIWA establishes that

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<sup>44</sup> See Iraq Briefing, *supra* note 5.

<sup>45</sup> Luke Moffett, *Ukraine Symposium – Reparations for War: What Options for Ukraine?*, LIEBER INSTITUTE (Nov. 15, 2022), <https://lieber.westpoint.edu/about/lieber/>.

<sup>46</sup> 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.<sup>47</sup> Forms of reparation include restitution,<sup>48</sup> compensation,<sup>49</sup> and satisfaction<sup>50</sup> either on their own or in combination. States may claim guarantees of non-repetition from a responsible State as well.<sup>51</sup> 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*.<sup>52</sup> These forms of compensation are reflected in the U.N.’s Basic Principles on the Rights to a Remedy and Reparation,<sup>53</sup> Article 75 of the Rome Statute, which mandates judges to establish principles on reparations,<sup>54</sup> in addition to multiple other sources of law.<sup>55</sup>

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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<sup>47</sup> *Id.* art. 31.

<sup>48</sup> *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.

<sup>49</sup> *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).

<sup>50</sup> 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.”

<sup>51</sup> *Id.* art. 48(2).

<sup>52</sup> *Id.* art. 48(1).

<sup>53</sup> Basic Principles on the Right to a Remedy and Reparation, *supra* note 38, ¶ 11.

<sup>54</sup> Odio-Benito, *supra* note 3.

<sup>55</sup> 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.<sup>56</sup> 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,<sup>57</sup> 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.<sup>58</sup> While some nations have granted reparations and acknowledged past harms dating back to World War II,<sup>59</sup> 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.<sup>60</sup> 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*.<sup>61</sup>

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<sup>56</sup> 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].

<sup>57</sup> *Id.* ¶ 30.

<sup>58</sup> 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.”).

<sup>59</sup> 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).

<sup>60</sup> 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).

<sup>61</sup> Spitzer, *supra* note 59, at 1342.

Most reparations determinations in the slavery context have played out in domestic tribunals<sup>62</sup> or have been confined to theoretical discussion.<sup>63</sup> However, international instruments have emerged calling for reparations anew<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup> 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<sup>67</sup> may open a door for greater

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<sup>62</sup> *Id.* at 1342-43; *see* Complaint and Jury Trial Demand, *Farmer-Paellman v. FleetBoston Fin. Corp.*, P 45 (E.D.N.Y. filed 2002).

<sup>63</sup> *Id.* at 1343.

<sup>64</sup> The Special Rapporteur mentions the Ten-Point Plan for Reparatory Justice adopted in 2014 by the Caribbean Community (CARICOM), which aims to achieve reparations for "victims of genocide, slavery, slave trading and racial apartheid." Achiume, *supra* note 56, ¶ 17.

<sup>65</sup> *Id.* ¶ 32.

<sup>66</sup> *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>.

<sup>67</sup> *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.<sup>68</sup> 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.<sup>69</sup> 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.<sup>70</sup> 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.<sup>71</sup> Over the

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<sup>68</sup> 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>.

<sup>69</sup> 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.’”).

<sup>70</sup> 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).

<sup>71</sup> S.C. Res. 705 (Aug. 19, 1991).

next three decades, that percentage gradually declined until it was fully paid by February of 2022.<sup>72</sup> In total, over the course of 30 years, the UNCC paid approximately \$52.4 billion to more than 1.5 million Kuwaiti claimants.<sup>73</sup> It took about fifteen years to sort through over 2.7 million claims.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup> Because compensation is not punitive, international claims commissions do not normally support awarding sums in excess of what is “financially assessable.”<sup>77</sup>

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.<sup>78</sup> Thus,

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<sup>72</sup> Iraq Briefing, *supra* note 5.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> See MULTILATERAL ACTION MODEL ON REPARATIONS, *supra* note 68, at 5.

<sup>76</sup> *Id.* at 18.

<sup>77</sup> ARSIWA, art. 36.

<sup>78</sup> 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,<sup>79</sup> 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.<sup>80</sup>

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.<sup>81</sup> 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.<sup>82</sup> 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,<sup>83</sup> 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.<sup>84</sup> The United

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<sup>79</sup> 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).

<sup>80</sup> Chiara Giorgetti, Markiyani 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).

<sup>81</sup> 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>.

<sup>82</sup> 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>.

<sup>83</sup> Anderson & Keitner, *supra* note 81.

<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup>

*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.<sup>87</sup> 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,<sup>88</sup> no individual right to reparation is actually codified.<sup>89</sup> In practice, individual reparations in the form of restitution and compensation are the most common,<sup>90</sup> 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.<sup>91</sup> Especially

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<sup>85</sup> Anderson & Keitner, *supra* note 81.

<sup>86</sup> *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/>.

<sup>87</sup> Odio-Benito, *supra* note 3, at 1.

<sup>88</sup> 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).

<sup>89</sup> Rosenfeld, *supra* note 88, at 732-33.

<sup>90</sup> *Id.*

<sup>91</sup> *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."<sup>92</sup> 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,<sup>93</sup> including constructing schools or hospitals,<sup>94</sup> establishing memorials,<sup>95</sup> or renaming streets.<sup>96</sup> 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.<sup>97</sup> The ICC's Rules of Procedures and Evidence also reference collective reparation, but do not explicitly define a right to collective reparation.<sup>98</sup>

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.<sup>99</sup> Defining awards by a collective identity; however, also presents challenges. As in the case of the UNCC, many

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<sup>92</sup> *Id.* at 89.

<sup>93</sup> Rosenfeld, *supra* note 88, at 733.

<sup>94</sup> *Id.* (Peruvian Truth and Reconciliation Commission).

<sup>95</sup> *Id.* (Commission for Reception, Truth and Reconciliation in Timor-Leste).

<sup>96</sup> *Id.* (South African Truth and Reconciliation Commission).

<sup>97</sup> 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.").

<sup>98</sup> 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).

<sup>99</sup> Rosenfeld, *supra* note 88, at 739-40; *see* *Mayagna (Sumo) Awás 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.<sup>100</sup>

The war in Ukraine has produced 7 million refugees and 6.5 million internally displaced persons,<sup>101</sup> 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.<sup>102</sup> 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,<sup>103</sup> 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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<sup>100</sup> Murphy, *supra* note 70.

<sup>101</sup> Moffett, *supra* note 45.

<sup>102</sup> See MULTILATERAL ACTION MODEL ON REPARATIONS, *supra* note 68, at 17.

<sup>103</sup> 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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