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# The Social Science Approach to International Law

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## Abstract

*For over a hundred years, scholars have argued that international law should be studied using a “scientific” approach. Throughout the twentieth century, however, the most prominent methods used to study international law primarily consisted of different theoretical and analytical claims about how international law should be developed, interpreted, and critiqued. It is only in the first two decades of the twenty-first century that the conventional social science approach to research—identifying a specific question, developing hypotheses, using a research design to test those hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which these conclusions are based and the level of uncertainty associated with the results—became widely used by scholars of international law. International law research using the social science approach has been notably more normatively restrained, empirically informed, and skeptical than past international law scholarship. This Essay describes the rise of the social science approach and advocates for its continued adoption.*

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## Table of Contents

I. Introduction.....	3
II. A Thumbnail History of Recent International Legal Scholarship .....	8
A. Real-World Problems .....	8
B. Trends in the Academy .....	11
III. International Law as Social Science .....	15
A. The Basics .....	16
B. Some Issues Specific to International Law .....	17
C. Comparing Social Science and Other Approaches to International Law ...	20
D. The Social Science Approach in Action.....	21
E. The Limits of the Social Science Approach.....	22
IV. Conclusion.....	23

## I. INTRODUCTION

At the start of the twentieth century, in 1908, the *American Journal of International Law* (*AJIL*) published an article by Lassa Oppenheim titled “The Science of International Law: Its Task and Method.”<sup>1</sup> In the article, Oppenheim argued that there was a distinctive science of international law, but that too many students of the subject went to “work without a proper knowledge of the task of our science, without knowing how to make use of the assertions of authorities, and without the proper views for the valuation and appreciation of the material at hand.”<sup>2</sup> Oppenheim further argued that there are seven “tasks to which our science must devote itself . . . : Exposition of the existing rules of law, historical research, criticism of the existing law, preparation of codification, distinction between the old customary and the new conventional law, fostering of arbitration, and popularization of international law.”<sup>3</sup> After discussing how each of these tasks could be addressed scientifically, Oppenheim concluded by arguing that there was only one appropriate method to apply to those tasks—what he dubbed the “positive method”—which he claimed, “can successfully be applied only by those workers who are imbued with the idealistic outlook on life and matters.”<sup>4</sup>

At the end of the twentieth century, in 1999, *AJIL* hosted a symposium on the then-prevailing methods to study international law.<sup>5</sup> The organizers, Professors Steven Ratner and Anne-Marie Slaughter, began by noting that there had been major developments in the science of international law in the nine decades since the publication of Oppenheim’s article.<sup>6</sup> Most notably, they argued that the scope of international affairs regulated by international law had expanded dramatically, and at the same time, the scope of methods used to study international law correspondingly dramatically expanded.<sup>7</sup> The Symposium then highlighted seven methods that the organizers believed to “represent the major methods of international legal scholarship” at the time: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics.<sup>8</sup> Prominent scholars associated with each of these methods wrote essays explaining

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<sup>1</sup> L. Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT’L L. 313 (1908).

<sup>2</sup> *Id.* at 314.

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

<sup>4</sup> *Id.* at 355.

<sup>5</sup> Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291 (1999).

<sup>6</sup> *Id.* at 291.

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

<sup>8</sup> *Id.* at 293.

their approach and its value.<sup>9</sup> The organizers specifically asked each scholar to apply their method to analyze the same open question in international law: what is the responsibility of individuals for human rights violations in non-international armed conflicts?<sup>10</sup> Although a few of the methods highlighted by the Symposium quickly fell out of favor,<sup>11</sup> other prominent methods were excluded,<sup>12</sup> and at least one of the world's most prominent international law scholars pointedly refused to participate.<sup>13</sup> The Symposium can still be seen as a snapshot of common approaches to international law roughly twenty years ago.

Although there were certainly major changes in the study of international law in the ninety-one years between Oppenheim's article and Ratner and Slaughter's Symposium, it is remarkable that they share two core assumptions about the purpose of international law research. First, neither project considered

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<sup>9</sup> *Id.* at 298.

<sup>10</sup> *Id.* at 295.

<sup>11</sup> For example, as far as we can identify, the only published articles that have mentioned or referenced the New Haven School since 2000 described the approach but did not actually use it themselves. See Halil Rahman Basaran, *Sovereign Immunity, Quo Vadis?*, 27 N.Y. INT'L L. REV. 1, 18–19 (2014); Christian Lee González, Note, *Law As A Means to Human Flourishing: Law, Morality, and Natural Law in Policy-Oriented Perspective*, 14 INTERCULTURAL HUM. RTS. L. REV. 289 (2019). One article claims that there is a New-New Haven School: Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007). For classic papers using the New Haven approach, see Myres S. McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952); HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* (1992). In contrast, "International Legal Process" was a label that evolved out of the eponymous school in American legal thought and is still deployed today. See, e.g., Mary Ellen O'Connell, *New International Legal Process*, 93 AM. J. INT'L L. 334 (1999). For example, since 2010, 284 articles on Westlaw have used the term "International Legal Process," as of mid-May 2021. See WESTLAW, <https://www.westlaw.com/SharedLink/a985462a609647a581444c0a221f03bc?VR=3.0&RS=cb1t1.0>. Classic studies include ABRAM CHAYES, *THE CUBAN MISSILE CRISIS: INTERNATIONAL CRISIS AND THE ROLE OF LAW* (1974) and ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995).

<sup>12</sup> For example, the Symposium ignored approaches that were vital at the time, chiefly Marxism and the just-emerging Third World Approaches to International Law (TWAAIL). This was noted at the time in a letter from Henry Richardson to the editors. Henry J. Richardson, III, *Letter to the Editor*, 94 AM. J. INT'L L. 99, 99 (2000) (expressing disappointment that perspectives of "people of color" were not represented). See generally B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* (1st ed. 1993) (articulating an integrated Marxist approach to international law); James Thuo Gathii, *TWAAIL: A Brief History of its Origins, its Decentralized Network, and a Tentative Bibliography*, 3 TRADE L. & DEV. 26 (2011) (tracing TWAAIL's contemporary origins in the late 1990s). See also James Thuo Gathii, *The Promise of International Law: A Third World View*, Grotius Lecture Presented at the 2020 Virtual Annual Meeting of the American Society of International Law (June 25, 2020), <https://perma.cc/26YB-5KAZ> (arguing that international law scholars need to go outside the current beltway of the discipline).

<sup>13</sup> The *AJIL*'s designated representative of critical legal studies, the eminent Finnish scholar Martti Koskenniemi, completely refused to answer the question posed, and characterized the whole horse-race exercise as reflecting "the logic of consumer capitalism." Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 352 (1999).

the possibility that the “science” of international law should be a conventional social science. Instead, both projects mainly conceived of “methods” as a set of assumptions and theoretical claims that should be leveraged by scholars trying to understand international legal obligations.<sup>14</sup> Second, both projects viewed international legal scholarship as an enterprise focused on studying the substantive obligations of international law. That is, both projects understood the tasks of international legal scholarship to be writing about how international law should be developed, interpreted, and critiqued. Using the distinction made famous by H.L.A. Hart, both projects primarily adopted an “internal” view of international law—that is, an approach that, whether descriptive or normative, is at its core a doctrinal exercise—as opposed to an “external” view of international law—that is, an approach that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world.<sup>15</sup>

In the first two decades of the twenty-first century, both of these assumptions have been cast aside as a new generation of international legal scholars have applied conventional social science methods to study external questions about international law. By conventional methods of social science, we refer to a research approach that involves clearly stating a research question, developing hypotheses, using a research design to test those hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which they are based and the level of uncertainty associated with those results. By external approach, we mean that instead of arguing about topics like the best way to interpret treaties, these scholars have studied topics like why countries sign treaties or the effect that signing treaties has on behavior. These scholars have spent less time arguing about topics like the merits of realism or constructivism, and more time arguing about topics like the best way to empirically assess whether human rights treaties improve human rights outcomes.

In this Essay, we document the rise of the social science approach to international law, explain the basics of the method, and advocate for its continued adoption. Our goal is to explain and advocate for an existing approach to researching international law that focuses on testing hypotheses about how international law works in practice. We endorse the study of external questions about international law. But by describing the social science approach to international law, we do not intend to restart a new debate about terms, labels, or

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<sup>14</sup> See Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 3 (2012) (“The tendency, until recently, for international legal scholarship to be aloof to empirical methods is reflected in the concept of ‘method’ used in the *AJIL*’s 1999 *Symposium on Method in International Law*. Not one contribution in the symposium addressed method in a social science sense, suggesting a significant gap between legal and social science scholarship. Rather, the alternative ‘methods’ all involved theoretical and analytical claims.”).

<sup>15</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* (1st ed. 1961).

schools. We are quite happy, in fact, that researchers in this field no longer have to expend any time figuring out if they would like to be known as a realist, constructivist, or some other “-ist.” Instead, our intent with writing this Essay is to hopefully complete the move away from these kind of labels by pointing out that it is possible to be an international law scholar without committing oneself to any assumptions, theories, or philosophies beyond those required of any other social science researcher.

Before continuing, it is important to clarify the scope of our argument. First, we are not the first to document the emergence of this line of international law scholarship. Simply put, this line of research is not a well-kept secret; it has been published by leading scholars in prominent journals for at least twenty years.<sup>16</sup> Moreover, the basic outlines of the social science approach to international law were discussed at least as early as 2005 when Jack Goldsmith and Eric Posner called for a “New International Law Scholarship,”<sup>17</sup> and the research produced by this movement has been the subject of several review essays.<sup>18</sup> Over the last few years, the trend towards social science research of international law has continued, but in addition to the quantity of scholarship increasing, so has the quality. There have been major projects to collect and code new datasets of the contents of international law,<sup>19</sup> as well as to incorporate research methods that make the causal

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<sup>16</sup> To provide a sense of the relative weights of these different fields over time, we looked at Certificates of Merit given by the American Society of International Law for books published since 1990. Each year, the Society gives three awards: (1) for a “preeminent contribution to creative scholarship”; (2) in “a specialized area of international law”; and (3) for “high technical craftsmanship and utility to practicing lawyers and scholars.” *Honors and Awards*, AM. SOC’Y INT’L L., <https://perma.cc/73SQ-5EZA>. For example, in 2020, in addition to the volume on feminist judgements, other Certificates of Merit were given to a technical volume that provides an internal view of the Convention on the Rights of the Child and a volume on the treatment of international organizations using the analogy to states. Our categorization of the books earning the awards since 1990 suggests that 15 of 96 have been awarded to projects that are social science in nature. *Past Recipients*, AM. SOC’Y INT’L L., <https://perma.cc/LL8X-ZZ6C> (categorization of recipients’ work on file with authors).

<sup>17</sup> Jack Goldsmith & Eric A. Posner, Response, *The New International Law Scholarship*, 34 GA. J. INT’L & COMP. L. 463 (2006).

<sup>18</sup> For reviews of empirical literature on the effectiveness of international law, see Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273 (2010); Shaffer & Ginsburg, *supra* note 14; Emilie M. Hafner-Burton, *A Social Science of Human Rights*, 51 J. PEACE RES. 273 (2014); Kevin L. Cope & Cosette D. Creamer, Response, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT’L L. 459 (2016); Adam S. Chilton, *Experimentally Testing the Effectiveness of Human Rights Treaties*, 18 CHI. J. INT’L L. 164 (2017); Kevin L. Cope, Cosette D. Creamer & Mila Versteeg, *Empirical Studies of Human Rights Law*, 15 ANN. REV. L. & SOC. SCI. 155 (2019); Adam Chilton & Katerina Linos, *Preferences and Compliance with International Law*, THEORETICAL INQUIRES L. (forthcoming 2021).

<sup>19</sup> See, e.g., BARBARA KOREMENOS, *THE CONTINENT OF INTERNATIONAL LAW: EXPLAINING AGREEMENT DESIGN* (2016).

estimates produced by this research more credible.<sup>20</sup> Our goal is, thus, not to identify new trends that have not previously been documented; instead, it is to more fully describe and justify this social science approach than prior efforts.

Second, we do not believe the social science approach is the *only* useful way to study international law. Instead, there are many other valid approaches to studying international law, many of which we have previously used ourselves. Social science approaches to international law should instead be understood as one way to do research that scholars should embrace when appropriate to the research question at hand.

Third, the social science approach to researching international law is not a single method. Instead, scholars have used many methods taking a social science approach to international legal scholarship, including the use of large-N observational data,<sup>21</sup> text analysis,<sup>22</sup> survey experiments,<sup>23</sup> field experiments,<sup>24</sup> and qualitative field research.<sup>25</sup> However, although the research designs and data used by these methods differ, the basic approach to research used by all these methods—defining research questions, developing hypotheses, using data to test those hypotheses, etc.—is the same.

Fourth, we are not unbiased observers of the trends we are describing. We all have a background in international law and political science, and we are thus advocating for the continued use of the methods that we have used throughout our academic careers.

This Essay proceeds in three parts. Section II provides a thumbnail sketch of the developments in international legal scholarship during the twentieth century that set the stage for the social science approach to become more prominent in the twenty-first century. Section III then describes the basics of the social science

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<sup>20</sup> See, e.g., Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration*, J. LEGAL STUD. (forthcoming).

<sup>21</sup> See, e.g., Rachel Brewster & Adam Chilton, *Supplying Compliance: Why and When the United States Complies with WTO Rulings*, 39 YALE J. INT'L L. 201 (2014); Pierre-Hughes Verdier & Erik Voeten, *Precedent, Compliance and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014); Pierre-Hughes Verdier & Mila Versteeg, *International Law in National Legal Systems: An Empirical Investigation*, 109 AM. J. INT'L L. 514 (2015); Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 AM. J. INT'L L. 54 (2019).

<sup>22</sup> See, e.g., Julian Nyarko & Jerome Hsiang, *Conforming Against Expectations: The Formalism of Non-Lawyers at the WTO*, 48 J. LEGAL STUD. 341 (2019); Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. J. INT'L L. 357 (2020).

<sup>23</sup> See, e.g., Adam S. Chilton, *The Influence of International Human Rights Agreements on Public Opinion: An Experimental Study*, 15 CHI. J. INT'L L. 110 (2014); Anton Strezhnev, Beth A. Simmons & Matthew D. Kim, *Rulers or Rules? International Law, Elite Cues and Public Opinion*, 30 EUR. J. INT'L L. 1281 (2019).

<sup>24</sup> See, e.g., Michael G. Findley, Daniel L. Nielsen & J.C. Sharman, *Using Field Experiments in International Relations: A Randomized Experiment of Anonymous Incorporation*, 67 INT'L ORG. 657 (2013).

<sup>25</sup> See, e.g., GALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012).



approach to research and explains several ways this approach differs from prior efforts to study international law. Section IV concludes.

## II. A THUMBNAIL HISTORY OF RECENT INTERNATIONAL LEGAL SCHOLARSHIP

Many articles have documented the evolution of international law scholarship, and a full accounting is beyond the scope of this Essay. But, broadly speaking, since Oppenheim's call for greater scientific rigor in the study of international law in 1908, there have been two main sources of influence on the evolution of scholarship in this area: (1) the real-world problems that international law was asked to address and (2) broader research trends in the academy. These real-world problems generated new questions and debates that social science research methods were suitable to answer, and the broader research trends in the academy integrated international legal scholarship more directly with the empirical revolutions taking place across relevant fields, including international relations and public law. We discuss each of these trends in turn.

### A. Real-World Problems

In the United States, international legal scholarship has been closely linked with legal practice, at least since Secretary of State Elihu Root founded the American Society of International Law in 1906.<sup>26</sup> Perhaps even more so than other disciplines within the legal academy, scholarship and advocacy were mutually reinforcing in international law scholarship. Advocates would write academic articles supporting litigation positions, and in many cases in the explicit interest of their national governments. As a result, international legal scholarship has been closely influenced by key events in international affairs.

Since 1908, the international community has experienced three major transformational moments, after which it has turned to law to solve problems. Those moments followed major global conflict: World War I, World War II, and the Cold War. After each of these conflicts, new international agreements were drafted, and new international institutions were established. Each set of new agreements and institutions was greeted with hope, but soon politics intervened again, and expectations were diminished.

First, after World War I, the League of Nations was established along with the Permanent Court of International Justice. These institutions consolidated an earlier round of developments that began with the Hague Peace Conference of 1899 and reflected a new optimism that international organizations could help secure peace. War was outlawed by the Kellogg-Briand Treaty in 1928, reflecting

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<sup>26</sup> *ASIL History*, AM. SOC'Y INT'L L., <https://perma.cc/Y5TK-2RJZ>.

great faith in the power of law to help states beat swords into plowshares.<sup>27</sup> We know, of course, how this era of liberalism ended. It was pilloried by E.H. Carr in his classic *The Twenty Years' Crisis*, which was published just as the world descended again into war.<sup>28</sup>

Second, in the aftermath of World War II, new problems of international organization came to the fore. Notably, the United Nations was established, and almost immediately, it became the repository of many hopes for a more peaceful future. The Bretton Woods institutions—the World Bank and the International Monetary Fund—were established to stabilize the international monetary system, the General Agreement on Tariffs and Trade was promulgated to regulate international trade, human rights discourse flowered, and the Geneva Conventions were revived and expanded to codify the laws of war. Many international legal scholars actively participated in the drafting of these agreements and the establishment of these organizations. In fact, the law of international organizations emerged as a distinct field.<sup>29</sup> Additionally, the emergence of new nations in the process of decolonization led to important debates on sovereignty and the role of capital. It is worth noting that, despite the initial hope during this period, by the mid-1960s, international lawyers often expressed frustration at the inability of law to constrain power.<sup>30</sup>

Third, the aftermath of the Cold War marked a new era for international relations, and for international legal scholarship as well. American hegemony and the end of the Cold War breathed new life into international institutions, just as it had at the end of World War II and, to a lesser extent, World War I. The U.N. Security Council's formal authorization of the first Iraq war, the most significant military conflict that had occurred since the Korean War, suggested that the U.N. Charter's collective security regime might have some new life.<sup>31</sup> Enthusiasts of globalization produced a whole series of new agreements to facilitate trade, including the institutionalization of the World Trade Organization.<sup>32</sup> The European Union's integration project, which had been revitalized by the 1987

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<sup>27</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

<sup>28</sup> See generally EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS: 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (1st ed. 1939).

<sup>29</sup> See generally Oscar Schachter, *United Nations Law*, 88 AM. J. INT'L L. 1 (1994); G. G. Fitzmaurice (Special Rapporteur), *Law of Treaties*, [1956] 2 Y.B. INT'L L. COMM'N 104, 108, U.N. Doc A/CN.4/101 (describing four constituent elements of international organizations). To be sure, international organizations had existed well before World War II, but their number and scope expanded dramatically thereafter. Madeline Herren, *International Organizations 1865–1945*, in OXFORD HANDBOOK INT'L ORG. (Jacob Katz Cogan, Ian Hurd & Ian Johnstone, eds., 2016).

<sup>30</sup> See generally WOLFGANG FRIEDMANN, *LAW IN A CHANGING SOCIETY* (1964).

<sup>31</sup> S.C. Res. 678 (Nov. 29, 1990).

<sup>32</sup> Richard Steinberg, *The Uruguay Round: A Legal Analysis of the Final Act*, 6 INT'L Q. 1 (1994).

Single European Act, deepened with the 1992 Maastricht Agreement.<sup>33</sup> A network of bilateral investment treaties began to expand toward the end of the decade. Together, this meant the rapid legalization of international economic life.<sup>34</sup>

During the 1990s, a desire to respond to mass atrocities also led to the development of new international institutions. The ad hoc criminal tribunals for Rwanda and former Yugoslavia presaged developments of “hybrid” efforts in Cambodia, Sierra Leone, and Lebanon. And the 1998 Rome Statute set up a permanent International Criminal Court with jurisdiction over citizens of states that had not consented to the agreement.<sup>35</sup> Meanwhile, new efforts at nation-building and trusteeship involved the U.N. deeply in problems of administration, in which it managed states coming out of conflict.<sup>36</sup>

The new international agreements and institutions created by these three transformational moments all produced new directions in international legal scholarship.<sup>37</sup> For example, the expansion of international economic law through new trade and investment rules created thriving and technical fields of legal research.<sup>38</sup> Similarly, the expansion of international tribunals created academic research programs like the Project on International Courts and Tribunals, which cataloged some twenty-five international tribunals.<sup>39</sup> Many of these involved what Karen Alter called the “New Terrain” of International Law, in parts of the world far from Europe and North America.<sup>40</sup> These tribunals were of course agents of further legalization and judicialization.<sup>41</sup> In turn, theorists anticipated that

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<sup>33</sup> Finn Laursen & Sophie Vanhoonacker, *The Maastricht Treaty: Creating the European Union*, in OXFORD RSCH. ENCYCLOPEDIA POL. (2019).

<sup>34</sup> Zachary Elkins, Andrew T. Guzman & Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 60 INT’L ORG. 811 (2006).

<sup>35</sup> Rome Statute of the International Criminal Court, arts. 1, 12, July 17, 1998, 2187 U.N.T.S. 90.

<sup>36</sup> See generally SIMON CHESTERMAN, YOU, THE PEOPLE: THE UNITED NATIONS, TRANSITIONAL ADMINISTRATION, AND STATE BUILDING (2004).

<sup>37</sup> As just one small example, the journal *International Organization* produced scholarship focused on the legalization of world politics to explore how law influenced the activities of international institutions and organizations. Judith Goldstein et al., *Introduction: Legalization and World Politics*, 54 INT’L ORG. 385 (2000); Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000).

<sup>38</sup> See, e.g., Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 251 (2006); Anu Bradford, *When the WTO Works, and How It Fails*, 51 VA. J. INT’L L. 1 (2010); Mark Wu, *The “China, Inc.” Challenge to Global Trade Governance*, 57 HARV. INT’L L.J. 261 (2016).

<sup>39</sup> *The Project on International Courts and Tribunals*, in THE MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Ruth Mackenzie et al. eds., 2d ed. 2010).

<sup>40</sup> See generally KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW (2014).

<sup>41</sup> See generally MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002).

judicialization might mean the expansion of governance, with a virtuous cycle of governance by law.<sup>42</sup>

## B. Trends in the Academy

Beyond the impact of these major world events, international legal scholarship was also influenced by developments in adjacent academic subjects and disciplines. As international law became more important, political scientists and international relations theorists became interested in it.<sup>43</sup> During the Cold War period, scholars of the realist school were able to describe international law as “epiphenomenal,” since it did not seem to have much bearing on the major international relations questions of the day.<sup>44</sup> The claim became harder to defend when states were voluntarily legalizing their international relationships at a rapid pace. To understand these developments, scholars turned to newly revived institutionalist approaches in the social sciences and integrated these into law.<sup>45</sup> The institutionalist turn in the social sciences happened just as the fall of the Soviet Union shifted attention away from ideology as the core target of political and sociological analysis, and after the cycle of behaviorism that had dominated some fields in the preceding decades had run its course.<sup>46</sup>

Institutionalism stood for the idea that individual agents were embedded in broader institutional structures and that these structures “mattered,” meaning they shaped outcomes. While various disciplines adopted slightly different approaches to the study of institutions, a concise and influential formulation among economists and political scientists was that institutions demand attention because

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<sup>42</sup> See generally Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMP. POL. STUD. 147 (1999).

<sup>43</sup> Social science approaches to international law initially focused on connecting with international relations theory. This literature featured a set of stylized schools—realist, institutionalist, constructivist—that put forth grand propositions about the possibilities of cooperation. See, e.g., John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139 (1996).

<sup>44</sup> See generally John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SEC. 5 (1994–1995) (describing law as epiphenomenal).

<sup>45</sup> See generally JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS (1989); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter W. Powell & Paul J. DiMaggio eds., 1991); SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999). A fundamental contribution for international law is ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (2d ed. 2005).

<sup>46</sup> Behaviorism had emphasized the study of observable and quantifiable behavior as opposed to formal rules and institutions and tended to focus on the individual decision-maker. One can see traces of this in the New Haven School approach with “decision” as the central explanandum. The focus was on providing a formula for the authoritative international decision-maker to optimize, weighing the various policy-oriented considerations. See generally LASSWELL & MCDUGAL, *supra* note 11.

they are the rules of the game that structure behavior.<sup>47</sup> Whether deployed by political scientists, sociologists, or economists, institutionalism emphasized collective structures, and this represented a paradigm shift away from behaviorism as the object of scientific inquiry. Institutionalism fit easily with law, as a social device that explicitly provides rule of the game, and so spurred much work on international law.

A major development in this field during the 1990s was the development of a liberal school of international relations and international law. Starting with a positive observation about state behavior, namely that liberal states tended to observe their promises to each other, scholars like Anne-Marie Slaughter drew on the economic insight that law served as a commitment device.<sup>48</sup> By providing a way of imposing costs over time, law made promises more credible, and thus more valuable. States that tied their hands through law could cooperate more easily across borders.

This scholarship combined positive and normative analysis and sought to move international law in a direction that was more protective of individual interests and human rights.<sup>49</sup> The North Atlantic Treaty Organization (NATO) bombing of the former Yugoslavia to protect Kosovar Albanians in 1999 was a major development in that it purported to reach into the borders of a sovereign state to protect a persecuted population. Some international lawyers argued that it marked an evolution in the regime governing the use of force.<sup>50</sup> In the words of the Independent International Commission on Kosovo, the invasion by NATO had been “illegal but legitimate.”<sup>51</sup> The next year the Canadian government

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<sup>47</sup> See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990) (describing an alternative approach to institutionalism in sociology that attacked rational choice theory and sought to focus on social, cultural, and organizational forces that shaped behavior). See THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS, *supra* note 45 (describing another approach, historical institutionalism, that traced path dependencies and critical junctures over time).

<sup>48</sup> See generally JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS (2000); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 134 (1995).

<sup>49</sup> For example, Slaughter supported projects like the International Criminal Court and the doctrine of a Responsibility to Protect, which would justify international intervention as a last resort in situations of mass atrocity. She was a central figure in the formation of the Princeton Principles on Universal Jurisdiction, which promised to hold perpetrators of mass atrocity accountable before national courts. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001), <https://perma.cc/S559-TCTM>.

<sup>50</sup> See generally MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO (2001); Ralph Zacklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention*, 41 VA. J. INT'L L. 923 (2001); Emily Schroeder, Note, *The Kosovo Crisis: Humanitarian Imperative Versus International Law*, 28 FLETCHER F. WORLD AFF. 179 (2004); Julie Mertus, *Reconsidering the Legality of Humanitarian Intervention: Lessons from Kosovo*, 41 WM. & MARY L. REV. 1743 (2000).

<sup>51</sup> THE INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000).

established the International Commission on Intervention and States Sovereignty, which coined the phrase the “responsibility to protect.”<sup>52</sup>

However, the liberal school’s project began to flounder with the circumstances of the second Iraq war. The idea that liberal states complied with international law was hard to maintain with the American invasion, unsupported as it was by a U.N. Security Council Resolution or any viable claim of self-defense under international law. Instead, it looked like an example of what Detlev Vagts called “hegemonic international law,” in which the sole superpower ignored basic rules of the international legal order.<sup>53</sup>

During this time, several approaches to international legal scholarship that rejected many of the assumptions of past research emerged. Notably, Jack Goldsmith and Eric Posner published *The Limits of International Law*, which argued that international law should be better understood as endogenous to state preferences instead of as an exogenous constraint on state behavior.<sup>54</sup> In a world of independent nation-states, cooperation was possible, but only in response to particular conditions. Using game theory, Goldsmith and Posner laid out these conditions, while arguing against utopian and idealistic views.<sup>55</sup>

A separate set of critiques of prior approaches came from a different academic direction, namely the emergence and expansion of critical legal studies and connected scholarly movements. Critical legal studies was a scholarly movement in American legal academia that became prominent in the late 1970s, utilizing techniques of deconstruction to show the indeterminacy of law. In the case of international law, this was not a particularly hard project. But critical scholars took as their aim some of the liberal pieties about rights and remedies. David Kennedy’s *The Dark Sides of Virtue* was one particularly pointed example.<sup>56</sup> The emphasis was on exposing the internal contradictions of others rather than building up an affirmative program.

Additionally, feminist legal theory began to play an important role in the early 1990s for international lawyers. Hilary Charlesworth, Christine Chinkin, and Shelly Wright applied the general approaches of feminist legal theory to

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<sup>52</sup> INT’L COMM’N ON INTERVENTION AND STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT (2001).

<sup>53</sup> Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT’L L. 843 (2001).

<sup>54</sup> JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

<sup>55</sup> The reaction to Goldsmith and Posner’s book from traditional international lawyers was notably critical. See, e.g., Balakrishnan Rajagopal, *Book Review*, 19 ETHICS & INT’L AFF. 106 (2005); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006) (reviewing GOLDSMITH & POSNER, *supra* note 54). See generally MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW (2008).

<sup>56</sup> DAVID KENNEDY, THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM (2004).

international law, by looking at the actual impact of doctrines on women.<sup>57</sup> They tied the feminine voice to the voice of the non-Western world, with both being examples of what would be called the “subaltern” in other parts of the academy. A number of scholars have followed in articulating a feminist approach to international law.<sup>58</sup> For example, last year’s ASIL Certificate of Merit for Creative Scholarship went to *Feminist Judgments in International Law*.<sup>59</sup> This work is part of a broader line of legal scholarship, rewriting judicial opinions in many areas of law from a feminist perspective.<sup>60</sup> The feminist work originated with a theoretical insight and is clearly a normative project that has had some success, informing several developments in international criminal law.<sup>61</sup>

Another line of critical work emerged with Third World Approaches to International Law (TWAAIL), a field that began to consolidate with the publication of Antony Anghie’s *Imperialism, Sovereignty and the Making of International Law* in 2004.<sup>62</sup> This was a historical look at the deep links between modern international law and European colonialism. TWAAIL scholars focused on international law’s close entwinement with imperialism, arguing that the connection was not just limited to the classical era but is continually being re-enacted today. This is an external view that emphasizes power and history and is increasingly popular: a *TWAAIL Law Review* has just been launched.<sup>63</sup> In this vein, we have also seen a recent push for a Critical Race Theory approach to international law.<sup>64</sup>

There has also been a “historical turn” among other critical scholars. Koskenniemi’s ambitious project is central to this enterprise.<sup>65</sup> Taking international legal argument as his object, Koskenniemi’s two major volumes have laid out a critical history of international law as a “Gentle Civilizer of Nations.”<sup>66</sup>

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<sup>57</sup> Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613 (1991).

<sup>58</sup> See generally Karen Knop & Annelise Riles, *Space, Time, and Historical Injustice: A Feminist Conflict-of-Laws Approach to the “Comfort Women” Settlement*, 102 CORNELL L. REV. 853 (2017); Anne Orford, *Feminism, Imperialism, and the Mission of International Law*, 71 NORDIC J. INT’L L. 275 (2002).

<sup>59</sup> FEMINIST JUDGEMENTS IN INTERNATIONAL LAW (Loveday Hodson & Troy Lavers eds., 2019); see *Honors and Awards*, AM. SOC’Y INT’L L., *supra* note 16.

<sup>60</sup> FEMINIST JUDGEMENTS: FROM THEORY TO PRACTICE (Rosemary Hunter, Clare McGlynn & Erika Rackley eds., 2010).

<sup>61</sup> See, e.g., Navanethem Pillay, *Sexual Violence: Standing by the Victim*, 42 CASE W. RES. J. INT’L L. 459 (2009).

<sup>62</sup> ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>63</sup> TWAAIL: THIRD WORLD APPROACHES INT’L L. REV., <https://perma.cc/E979-HGG5>.

<sup>64</sup> See generally Anna Spain Bradley, *Human Rights Racism*, 32 HARV. HUM. RTS. J. 1 (2019); Makau Matua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000).

<sup>65</sup> Anne Orford, *International Law and the Limits of History*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI 297, 297* (Wouter Werner, Marieke de Hoon & Alexis Galan eds., 2017).

<sup>66</sup> MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001).

Anne Orford has similarly sought to approach history from the perspective of a sociologist of knowledge, drawing on Foucault.<sup>67</sup>

Finally, several scholars, including many of those using historical approaches, began to look away from the traditional European roots of international law. Emblematic here is the *Oxford Handbook of the History of International Law*, which importantly sought to decenter Europe in the history of the discipline.<sup>68</sup> Scholars from Asia such as Yasuaki Onuma sought to lay out alternative framings,<sup>69</sup> while other scholars sought to recover how international law was encountered by societies outside the European core. Arnulf Becker Lorca's book *Mestizo International Law* was an important contribution in this regard.<sup>70</sup> This non-Western turn was also embodied in the work of Emilia Justyna Powell on Islamic Law,<sup>71</sup> a major edited volume on the Bandung Conference,<sup>72</sup> and Anthea Roberts' book, *Is International Law International?*, which uses an empirical approach to answer the question decidedly in the negative.<sup>73</sup> And China's rise has given impetus to work articulating a Chinese view of the field, including an English-language *Chinese Journal of International Law*.<sup>74</sup>

As this brief discussion illustrates, broad academic trends—for instance, toward institutional analysis in the social sciences and critical theory in law, and away from Europe in history—have all affected the progression of international legal scholarship.

### III. INTERNATIONAL LAW AS SOCIAL SCIENCE

Both the real-world developments in international relations and the incorporation of theories from other legal subjects and academic disciplines moved international legal scholarship toward social science. As Shaffer and Ginsburg documented almost a decade ago, international law subsequently took an empirical turn, and broad debates about the efficacy of law have been replaced by the study of conditional effects, examining where and when law is effective.<sup>75</sup>

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<sup>67</sup> ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (forthcoming June 2021).

<sup>68</sup> OXFORD HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW (Bardo Fassbender & Anne Peters eds., 2012).

<sup>69</sup> ONUMA YASUAKI, INTERNATIONAL LAW IN A TRANSCIVILIZATIONAL WORLD (2017).

<sup>70</sup> ARNULF BECKER LORCA, MESTIZO INTERNATIONAL LAW (2014).

<sup>71</sup> EMILIA JUSTYNA POWELL, ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES (2020).

<sup>72</sup> BANDUNG, GLOBAL HISTORY AND INTERNATIONAL LAW: CRITICAL PASTS AND PENDING FUTURES (Luis Eslava et al. eds., 2017).

<sup>73</sup> ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

<sup>74</sup> CHINESE J. INT'L L., <https://perma.cc/U3BX-J876>. See also CONGYAN CAI, THE RISE OF CHINA AND INTERNATIONAL LAW: TAKING CHINESE EXCEPTIONALISM SERIOUSLY (2019).

<sup>75</sup> Shaffer & Ginsburg, *supra* note 14.



In this essay, we go one step further and argue that it is not just the case that international legal research has become increasingly empirical. Instead, a growing body of research treats international law as a subject to be studied using the conventional approach to social sciences.

#### A. The Basics

The basic social science approach to research is based on the scientific method. Simply put, a researcher hoping to gain new knowledge about the world begins by identifying a specific research question. For instance, one research question that has consumed a great deal of attention in international legal circles is whether signing Bilateral Investment Treaties (BITs) leads to increased investment flows between the countries that sign them.<sup>76</sup>

After identifying the research question, the next step is to develop a specific hypothesis that can be empirically assessed. A hypothesis in a social science framework stipulates a possible empirical relationship between two or more variables. For our BITs example, one hypothesis a researcher may be interested in testing is whether signing BITs increases investment flows between the countries that sign them. Alternatively, the hypothesis may put forth a conditional theory in some way. For example, a hypothesis may be that BITs only increase investments when they are signed by large countries with pre-existing investment flows. Relatedly, as part of specifying the hypothesis, the research specifies a null hypothesis (typically that there is no relationship between the variables of interest) and identifies the conditions under which the null hypothesis is rejected. Or, put another way, the researcher identifies the conditions under which the research can claim support for the hypothesis.

Next, the researcher identifies a research design and data that will make it possible to assess the validity of their hypothesis. This research design should ideally make it possible, under a set of clearly articulated assumptions, to provide direct evidence to prove or disprove the hypothesis. For instance, a basic research design that could be used to test the effect of BITs on investments may involve collecting data on bilateral investment flows between all countries over a given period, and then comparing the change in investment between pairs of countries that signed a BIT in a given year to other pairs of countries that did not. That said, a problem with this research design is that evidence that BITs are associated with higher investment flows may not be enough to claim that the BITs cause those higher flows. This is because other factors may have caused both the signing of the BIT and the changes of investment. Ideally then, a research design would make

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<sup>76</sup> See, e.g., Jason Webb Yackee, *Do BITs 'Work'? Empirical Evidence from France*, 7 J. INT'L DISPUTE SETTLEMENT 55 (2016); Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, in 2009–2010 Y.B. INT'L INV. L. POL'Y 539 (Karl P. Sauvant ed., 2010).

it possible to rule out the possibility that changes in the outcome of interests were attributable to the phenomena being studied. For instance, a researcher could leverage a natural experiment that changed the legal protection of some BITs but not others in a quasi-random way to see if those changes are associated with increased investment.<sup>77</sup>

It is important to note that there are a wide range of different social science research designs, and correspondingly, a wide range of data that can be used to empirically assess the validity of different hypotheses. For instance, our running example of testing the effects of BITs by looking at data on investment flows could be described as a reduced-form analysis using observational data. But it would be possible to test the effects of BITs in other ways using quantitative data, and it would also be possible to assess the effects of BITs using qualitative data. As one example, a researcher could explore whether corporate executives report that signing BITs influences their decisions on where to invest.<sup>78</sup>

Finally, in addition to stating the results when using the research design, a hallmark of social science research is clearly identifying the assumptions that are required for the conclusions of the analysis to be valid and also explaining the uncertainty of that estimate. In our example, instead of simply saying “BITs do not change investment flows,” a careful social science researcher would want to explain the assumptions implicit in their research design and say how confident they can be in their conclusion based on their evidence.

## B. Some Issues Specific to International Law

There is nothing particularly complicated about importing this basic social science approach to research into the study of international law. That said, the approach does have some differences with many prior approaches to the study of international law that are worth noting.

First, the social science approach typically adopts an “external” view of international law.<sup>79</sup> Any legal field, including international law, has an internal viewpoint, and scholarship plays a role in producing it. In international law, however, the internal viewpoint has continued to play a particularly prominent role. For instance, the role of scholarship is explicitly recognized in Article 38(1)(d)

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<sup>77</sup> See Cree Jones, *Do Enforcement Provisions Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network* (Working Paper, 2019), <https://perma.cc/TQL8-N7CU>.

<sup>78</sup> See Jason Webb Yackee, *Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence*, 51 VA. J. INT'L L. 397 (2011).

<sup>79</sup> As previously explained, following H.L.A. Hart's distinction, an internal view is one that is addressed to legal decision-makers; it can be descriptive or normative, but is at its core a doctrinal exercise. An external view of law, in contrast, is one that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world. See generally HART, *supra* note 15.

of the Statute of the International Court of Justice, providing that the “teachings of the most highly qualified publicists” can help inform the Court in determining the content of international law.<sup>80</sup> This invites doctrinal scholarship, and its impact is evident in many sub-fields of international law. Treatises and whole journals are devoted to doctrinal developments: the *Journal of International Criminal Law*, for example, focuses on developments in that field, as does the *ICSID Review: Foreign Investment Law Journal*.<sup>81</sup> This is what we might call primary scholarship, designated “positivism” in the *AJIL* Symposium. It is embodied in the work of the International Law Commission, where scholars from various countries come together to “progressively develop” international law.<sup>82</sup> In contrast, scholars using the social science approach to study international law have focused on external questions like why states make international commitments, how international institutions make decisions, and whether international commitments or the decisions of international institutions produce changes in state behavior.

Second, unlike some traditional international law scholarship, the reach and efficacy of international law under the social science approach are not to be assumed but rather are treated as empirical matters to be assessed.<sup>83</sup> This requires that the target of study is not international law as a whole. A research project using the social science approach is unlikely to try and make broad generalizations like “treaties do not change behavior.” Instead, a project would study the influence of specific regimes involving specific countries at specific times.

Third, the social science approach does not adopt a teleology. There is no assumption that the world is shifting in one direction or another over time, either toward compliance or legalism. In this, a social science approach contrasts with some of the more optimistic scholarship of the liberal school of the 1990s. It also does not assume that legalization or judicialization is a one-way street: indeed, two of us recently co-authored a paper on the “Dejudicialization” of international politics.<sup>84</sup> In general, the world may be getting better or worse, but as E.H. Carr

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<sup>80</sup> Statute of the International Court of Justice art. 38(1)(d), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993.

<sup>81</sup> See J. INT'L CRIM. L., <https://perma.cc/RQ3R-4EGJ>; ICSID REVIEW, <https://perma.cc/3B7W-KWML>.

<sup>82</sup> See U.N. Charter, art 13 ¶ 1(a) (United Nations to “initiate studies and make recommendations for the purpose of . . . encouraging the progressive development of international law and its codification”).

<sup>83</sup> This is similar to the point made by Shaffer and Ginsburg about the importance of looking at the conditional effects of international law. See Shaffer & Ginsburg, *supra* note 14, at 5.

<sup>84</sup> Daniel Abebe & Tom Ginsburg, *The Dejudicialization of International Politics?*, 63 INT'L STUD. Q. 521 (2019).

long ago noted, there is no natural “harmony of interests” to which states are evolving.<sup>85</sup>

Fourth, the social science approach does not view itself as a normative project. While every scholar certainly has normative priors, social scientists are engaged in a positivist enterprise of trying to describe the world as it is, rather than how it should be. International law is itself not viewed as either “good” or “bad”; rather it is a mechanism through which states “do things” together to achieve common goals.<sup>86</sup> Put another way, philosophers remind us that one can never derive an “ought” from an “is”; in the academic division of labor, social science is squarely focused on the “is.”<sup>87</sup> To be clear, this is not to say that normative views play no role in social science. Indeed, scholars’ normative priors influence the projects they pursue, the methods they use, and the way they interpret their results.<sup>88</sup> Good social scientists should be reflexive about these priors, and aware of any biases they might engender. And while the conclusions of social science research can also help inform normative conclusions about what international law ought to be, social scientists have no special expertise here. Normative matters require debate on normative terrain.

Fifth, social scientists, in general, tend to begin with a healthy skepticism about the efficacy of law: the effect of law is not assumed, but must be demonstrated. This skepticism is not only because one should be critical of claimed empirical relationships as a starting point for empirical research, but also because social science research has frequently found that policies do not have their intended effect. For instance, scholarship in development economics has found that many large, directed interventions have no measurable effect on poverty reduction. Scholars familiar with this kind of this research are perhaps more likely to be skeptical of the notion that treaties without enforcement mechanisms are likely to produce profound change in sticky areas like human rights, environmental protection, or poverty reduction.<sup>89</sup>

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<sup>85</sup> See generally PHILIP CUNLIFFE, *THE NEW TWENTY YEARS’ CRISIS: A CRITIQUE OF INTERNATIONAL RELATIONS, 1999–2019* (2020).

<sup>86</sup> IAN HURD, *HOW TO DO THINGS WITH INTERNATIONAL LAW* (2017).

<sup>87</sup> Lawrence B. Solum, *Legal Theory Lexicon 014: Fact and Value*, LEGAL THEORY LEXICON, <https://perma.cc/4JA4-QZRL>.

<sup>88</sup> Cf. Adam S. Chilton & Eric A. Posner, *An Empirical Study of Political Bias in Legal Scholarship*, 44 J. LEGAL STUD. 277 (2015); Eric A. Posner, *Martti Koskenniemi on Human Rights*, in *THE LAW OF INTERNATIONAL LAWYERS: READING MARTTI KOSKENNIEMI*, *supra* note 65, at 121, 134.

<sup>89</sup> See, e.g., Adam S. Chilton & Eric A. Posner, *The Influence of History on States’ Compliance with Human Rights Obligations*, 56 VA. J. INT’L L. 211 (2016); Daniel Abebe, *Does International Human Rights Law in African Courts Make a Difference?*, 56 VA. J. INT’L L. 527 (2016).

### C. Comparing Social Science and Other Approaches to International Law

Although the social science approach to studying international law begins with a healthy skepticism about the effect of laws, it is of course not the only skeptical approach to studying international law. One major difference with many of the other skeptical approaches on offer is that the social science approach endorses the view that multiple methods can and should be used to tackle the question at hand, so long as it helps with inference. The *AJIL* Symposium of 1999 was built on an assumption that different methodological approaches, captured by labels, would lead to different outcomes. A social scientist's approach to method is different. It would make less sense to run a horse race between quantitative and qualitative methods, for example. Instead, one should pick the methods most appropriate to the problem at hand and move between them to establish propositions. This makes social scientists skeptical about labels. Even the term "empirical legal studies" can be interpreted more narrowly (for example, to refer to quantitative methods) or broadly (to refer to any systematic approach to data).

A second distinction is that social science is committed to a modernist view of knowledge. Facts are to be ascertained and, once established, are considered to be valid until falsified. This is a fundamental distinction with critical theory, which is committed to a critique of objectivity.<sup>90</sup> To be sure, critical scholars have called for conversation with empirical social science. But at the end of the day, some of the critical calls for engagement have tended to place the normative commitments above positive inquiry.<sup>91</sup>

At the same time, there are some commonalities between a social science approach and a critical approach to international law. Both recognize the role of power as an important factor in determining outcomes, for example. But even here there are differences. Critical scholars tend toward Foucauldian rather than material conceptualizations of power. And social scientists do not explicitly incorporate normative orientations into the analysis: whether or not developing countries benefit or not from international law is treated as an empirical question rather than an assumption or a normative commitment to be demonstrated. Critical scholars might accuse social scientists of burying the normative commitments in the posing of questions to be answered; but once the method is deployed, the answers are to be pursued neutrally.

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<sup>90</sup> Posner, *supra* note 88.

<sup>91</sup> Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. SOC. SCI. 149, 149 (2014) ("A collaboration between CRT and social science risks undermining CRT critiques of objectivity and neutrality and potentially limits the theory's ability to combat structural forms of racial inequality?").

## D. The Social Science Approach in Action

International legal scholarship using the social science approach has re-orientated many debates toward concrete questions about the causes and consequences of international agreements and institutions. Not only have these projects explored a wide range of topics, but they have also spurred several high-profile debates within the international legal academy.

Perhaps, most prominent, has been a debate over the effectiveness of international human rights agreements. In an important book on the topic, Beth Simmons produced evidence that human rights commitments tended to be observed when they were supported by domestic constituencies.<sup>92</sup> It has been followed by many other studies that also show the importance of domestic constituencies.<sup>93</sup> But it was contested with another important contribution by Eric Posner, which argued that we are in the “Twilight” of international human rights.<sup>94</sup> Notably, both scholars made empirical arguments using similar data to try and assess whether international human rights treaties can be shown to produce changes in the human rights records of countries that sign them. Although they reached different conclusions, they argued that social science should be the way the debate is resolved. This debate has continued to produce active disagreements between international law scholars and political scientists.

As another example, social science approaches have produced a number of debates about the efficacy of international dispute resolution. In seeking to understand when international courts might be effective, Tom Ginsburg and Richard McAdams put forward a coordination theory to explain the caseload of the International Court of Justice.<sup>95</sup> They argued that the evidence suggested that international courts could be effective in resolving certain kinds of problems, even without the power to impose sanctions for non-compliance.<sup>96</sup> In contrast, Eric Posner and John Yoo surveyed a broader set of international courts and argued that they were likely to succeed only when they were “dependent” on appointing

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<sup>92</sup> BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009).

<sup>93</sup> See, e.g., Katerina Linos & Tom Pegrum, *What Works in International Human Rights Institutions?*, 111 *AM. J. INT'L L.* 628 (2017).

<sup>94</sup> ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

<sup>95</sup> Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 *WM. & MARY L. REV.* 1229 (2004).

<sup>96</sup> *Id.*

states.<sup>97</sup> This argument generated responses that put forward a more nuanced theory about the conditions for successful international courts.<sup>98</sup>

There have also been debates on topics such as whether countries comply with WTO agreements, why countries sign bilateral investment agreements, and the influence of regional organizations on international regulation. We view these debates as a sign of a healthy field, in which evidence is subjected to multiple analyses and interpretations. The result is a step-by-step process of scientific discovery.

### E. The Limits of the Social Science Approach

Although there are many advantages to the social science approach, there are at least two limitations that we would be remiss to not mention. A first limitation is that positivist social science has, in general, been subjected to massive criticisms within the philosophy of science.<sup>99</sup> Data is not self-creating, and normative considerations can creep into the identification of measurement of data, as can the underlying concepts that motivate research questions. No doubt, these general critiques apply to social science work on international law as much as other fields. Careful scholarship and scholars must be skeptical about methods and their application.

The question is whether this critique should lead us to reject the approach. From our point of view, as social scientists, we think of positivist social science as a “research program” deploying a common set of assumptions, with the goal of explanation. The key question in replacing a research program is whether a better approach is possible.<sup>100</sup> The advantage of a social science orientation is that decisions on conceptualization and measurement are themselves to be made transparent. Social science practices seem to us to be superior to any alternative. Further, the idea that knowledge is provisional invites attempts to disprove propositions. Falsifying particular studies is a sign of progress, not a reason to reject a research program.

A second limitation is that social science may not provide immediate answers as to how to navigate the rapidly changing world. Many areas of international cooperation are currently in a moment of transition. Among the issues that are transforming the world are the return of the state, the climate crisis, a reduction

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<sup>97</sup> Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 CAL. L. REV. 1 (2005).

<sup>98</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005); Tom Ginsburg, Response, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631 (2005); KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW* (2014).

<sup>99</sup> See, e.g., MARTIN HOLLIS, *THE PHILOSOPHY OF SOCIAL SCIENCE* 76 (1994).

<sup>100</sup> Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 91, 116 (Imre Lakatos & Alan Musgrave eds., 1970).

in global integration, and the rise of demands for indigenous recognition. The rise of China is no doubt a preeminent development that has profound challenges for international law.<sup>101</sup>

The general approach of positivist social science may provide help tackling these issues, but there is a critical caution that must be observed. Positivist social science looks backward to existing data. It will then assess the patterns to see how they comport with theory and will put forward conditional propositions about the research questions asked. But, if one seeks to apply existing models and findings to new phenomena and configurations, one needs to take external validity seriously. This means closely considering the conditional effects of current findings and speculating on how changing international configurations affect these underlying conditions. While we are not confident that the world in ten or twenty years will look the same as it does today, we do believe that this kind of rigorous, cautious, and skeptical approach is necessary for international law to continue to make progress as a field.

#### IV. CONCLUSION

Oppenheim thought that the science of international law should be practiced by those “who are imbued with the idealistic outlook on life and matters.”<sup>102</sup> In contrast, we hope that the social science of international law will continue to be normatively restrained, empirically informed, and more skeptical than the international law scholarship of the past.

Additionally, we hope that international legal scholars continue to build bridges between the practice of international law, the legal academy, and other social science departments. International agreements and institutions pose a range of topics worthy of research, institutions require legal expertise to fully understand, and the social sciences are continually developing new methods to improve the credibility of research. In short, we hope that others will continue to join the effort to bring social science approaches to the study of international law.

In a parallel field, Professor Ran Hirschl made a similar call for interdisciplinarity when he proposed moving from “Comparative Constitutional Law” to “Comparative Constitutional Studies.”<sup>103</sup> Hirschl’s call was for the integration of social science and law to understand a dynamically changing field. International legal studies should follow this trajectory to better understand the promise and limits of international law.

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<sup>101</sup> CAI, *supra* note 74.

<sup>102</sup> Oppenheim, *supra* note 1, at 355.

<sup>103</sup> RAN HIRSCHL, *COMPARATIVE MATTERS* (2014).



# Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa

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## Abstract

*In their Lead Essay for the 2021 Chicago Journal of International Law Symposium, Daniel Abebe, Adam Chilton, and Tom Ginsburg offer an account of “the rise of the social science approach to international law, explain the basics of the method, and advocate for its continued adoption.” This Essay critically assesses how and why one might use socio-legally inspired methods (analytical, empirical, and normative) for the study of international economic law (IEL) in Africa. It illustrates the empirical method’s importance in understanding one of the most challenging aspects of the study of IEL in Africa: capturing the data and dynamism of informal cross-border trade phenomenon. It argues that, by conceptualizing IEL in Africa as a social phenomenon, socio-legal approaches open IEL in Africa to the application of other social science methods, which enables us to understand the context in which African regional trade agreements are implemented and their contribution to the scholarly field of IEL.*

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## Table of Contents

I. Introduction.....	26
II. International Economic Law in Africa as a Social Phenomenon .....	27
III. The Promise of Socio-Legally Inclined Empirical Methods for Deepening Understanding of Trade Regimes in Africa.....	30
A. Opportunities for Socio-Legal Analyses of African IEL.....	31
B. Challenges Facing Socio-Legal Approaches to African IEL.....	34
IV. Conclusion: Empirically Informed Research for Policy Formation .....	35

## I. INTRODUCTION

The growing attention to embedding empirical and theoretical analyses into legal scholarly work has raised concerns about whether legal scholars could borrow methods from social science research, adopting an interdisciplinary approach.<sup>1</sup> In their Lead Essay for the 2021 *Chicago Journal of International Law* Symposium, Daniel Abebe, Adam Chilton, and Tom Ginsburg<sup>2</sup> offer an account of “the rise of the social science approach to international law, explain the basics of the method, and advocate for its continued adoption.”<sup>3</sup> They advocate for an approach with the goal of accounting for “how international law works in practice.”<sup>4</sup> This Essay builds on their analysis and focuses on international economic law (IEL)<sup>5</sup> as a subfield of international law.<sup>6</sup> More specifically, this Essay takes up Abebe, Chilton, and Ginsburg’s invitation and builds upon their perspective to reflect on the value of socio-legal approaches in deepening our knowledge of IEL and its variations in Africa.

This Essay critically assesses how and why one might use socio-legally inspired methods (analytical, empirical, and normative) for the study of IEL in Africa. It illustrates the empirical method’s importance in understanding one of the most challenging aspects of the study of IEL in Africa: capturing the data and dynamism of informal cross-border trade (ICBT) phenomenon. It argues that, by conceptualizing IEL in Africa as a social phenomenon, socio-legal approaches open IEL in Africa to the application of other social science methods, which enables us to understand the *context* in which African regional trade agreements

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<sup>1</sup> See, e.g., T. Brettel Dawson, *Legal Research in a Social Science Setting: The Problem of Method*, 14 DALHOUSIE L.J. 445 (1992).

<sup>2</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT’L L. 1 (2021).

<sup>3</sup> *Id.* at 5.

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

<sup>5</sup> I define international economic law (IEL) as the international law of trade agreements regulating cross- and trans-border transactions in goods, services, investments, and intellectual property, both in the formal and informal economic sense. Similar to Detlev F. Vagts, I exclude private international law and economic warfare. See Detlev F. Vagts, *International Economic Law and the American Journal of International Law*, 100 AM. J. INT’L L. 769 (2006) (discussing the history of international economic law since the *American Journal of International Law* was first published in 1907).

<sup>6</sup> For example, Joel Trachtman advocates for a “total de-fragmentation” and “a full integration of the field of trade law with every other kind of international law.” Joel P. Trachtman, *Functionalism, Fragmentation, and the Future of International (Trade) Law*, 20 J. WORLD INV. & TRADE 15, 16 (2019). On the debate regarding whether the World Trade Organization (WTO) is part of public international law, see Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?*, 95 AM. J. INT’L L. 535 (2001); Joel P. Trachtman, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, 98 AM. J. INT’L L. 855 (reviewing Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (2003)).

(RTAs) are implemented.<sup>7</sup> The empirical socio-legal approach to IEL in Africa pluralizes the false universal narratives of conventional IEL. It deepens our understanding of the informal cross-border networks that characterize African trade regimes. As James Thuo Gathii has noted, African RTAs are perceived as “flexible legal regimes” and platforms of cooperation and should be understood as such.<sup>8</sup>

This Essay contains three substantive sections. Section II explicates IEL in Africa as a social phenomenon. Section III focuses on the promise of a socio-legally inclined theoretical and empirical analysis for deepening our understanding of African trade regimes. Lastly, in Section IV, I synthesize this Essay’s core arguments and identify three challenges in the socio-legal analysis of informal trade in Africa: data collection, insufficient training in empirical analysis, and funding.<sup>9</sup>

## II. INTERNATIONAL ECONOMIC LAW IN AFRICA AS A SOCIAL PHENOMENON

Trade regimes in Africa are a socio-political, legal phenomenon and a form of social interaction. Suppose we want to fully understand the variations in regional economic communities in Africa. To do so, we must reach beyond the discipline of law to other social sciences such as political science, economic sociology, history, social conflict theory, and anthropology.<sup>10</sup> Thus, conceptualizing IEL in Africa as a social phenomenon is a multidisciplinary exercise. Consequently, IEL regimes in different regions are constituted by varying underlying socio-political, cultural, and historical factors. Whether in Europe, North America, Asia, Latin America, the Caribbean, or Africa, IEL involves a unique constellation of local conditions, forces, and factors that coalesce in the

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<sup>7</sup> Olabisi D. Akinkugbe, *Revisiting the Economic Community of West African States: A Socio-Legal Analysis* (2017) (Ph.D. thesis, University of Ottawa).

<sup>8</sup> See JAMES THUO GATHII, *AFRICAN REGIONAL TRADE AGREEMENTS AS LEGAL REGIMES* 1 (2011); Olabisi D. Akinkugbe, *Theorizing Developmental Regionalism in Narratives of African Regional Trade Agreements (RTAs)*, 1 *AFR. J. INT’L ECON. L.* 297 (2020).

<sup>9</sup> Gregory Shaffer and Tom Ginsburg speak aptly of the “structural tilt in the ability of larger states and interests within them to shape and deploy World Trade Organization (WTO) rules to advance their interests, directly and diffusely, through using material, ideological, and institutional resources.” Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 *AM. J. INT’L L.* 1, 32 (2012).

<sup>10</sup> Clair Gammage, *(Re)conceptualising International Economic Law: A Socio-Legal Approach to Regionalism*, in *SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT* (Amanda Perry-Kessaris ed., 2013); Amanda Perry-Kessaris, *What Does It Mean to Take a Socio-Legal Approach to International Economic Law?*, in *SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT*, *supra* note 10.

mantra: context matters.<sup>11</sup> Further, the effectiveness of the regulation of economic interactions in IEL through trade agreements (in social fields) should not be assumed.

As a multidisciplinary method, socio-legal approaches focus on the mutually constitutive interaction between law and society. Generally, socio-legal approaches deepen our understanding of the role of law and legal institutions in social interactions,<sup>12</sup> but their methodologies may vary.<sup>13</sup> Some conventional socio-legal methods focus on the conceptual analysis of legal phenomena to understand the nature of law, its relationship to society, and how legal institutions function.<sup>14</sup> The utility of this approach lies in the ways it widens our understanding of the effectiveness of public institutions—such as courts and the broader social reforms that their decisions engender beyond strict implementation.<sup>15</sup> Others provide a detailed empirical examination of the research problem under study, combining qualitative and quantitative research methods. For instance, using semi-structured interviews and participant observations to gather data for a more sophisticated and interpretive analysis of law and legal institutions' interconnectedness.<sup>16</sup> Data and information gathered based on semi-structured interviews provide firsthand information that fills existing scholarship gaps and generates new theoretical explanations inductively.<sup>17</sup> Another strand of research

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<sup>11</sup> As Celine Tan aptly puts it,

the self-referential lens of formalist legal theory focusing on purely textual and interpretive aspects of international rules and institutions fail to account for their contemporary context . . . . It is only with the aid of a socio-legal eye that we can capture the constitutive function of law, especially how law influences modes of thought, which in turn shapes the conduct of legal actors.

Celine Tan, *Navigating New Landscapes: Socio-Legal Mapping of Plurality and Power in International Economic Law*, in SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT, *supra* note 10, at 26.

<sup>12</sup> See Lisa Webley, *The Why and How to of Conducting a Socio-Legal Empirical Research Project*, in ROUTLEDGE HANDBOOK OF SOCIO-LEGAL THEORY AND METHODS 58 (Naomi Creutzfeldt et al. eds., 2019).

<sup>13</sup> See, e.g., Paddy Hillyard, *Law's Empire: Socio-legal Empirical Research in the Twenty-First Century*, 34 J.L. & SOC'Y 266 (2007).

<sup>14</sup> See, e.g., Roger Cotterrell, *The Sociological Concept of Law*, 10 J. L. & SOC'Y 241 (1983).

<sup>15</sup> See generally Olabisi D. Akinkugbe, *Towards an Analyses of the Mega-Political Jurisprudence of the ECOWAS Community Court of Justice*, in THE PERFORMANCE OF AFRICA'S INT'L COURTS 149 (James Thuo Gathii ed., 2020) (contending that incorporating the social, political, economic contexts that gave rise to disputes and their uses afterwards as levers for socio-political reform—even when the parties do not win—widens our understanding of the judicialization of mega-political disputes in ways that the traditional analyses do not).

<sup>16</sup> See, e.g., LUIS ESLAVA, LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT 52 (2015).

<sup>17</sup> See Titilayo Adebola, *Intellectual Property Rights for Plant Varieties in Nigeria: Critical Reflections on TWAIL, Empirical and Comparative Methodologies*, AFRONOMICSLAW (Jan. 22, 2020), <https://perma.cc/QDN7-S4YF>.

combines legal and social science theoretical approaches to analyze asymmetry in the interaction of trade actors and the “hidden social, cultural and political consequences of economic transactions and relationships . . . that are framed in formalistic legal language.”<sup>18</sup>

Integrating social science techniques—and notably, socio-legal approaches—in the research of IEL is not new.<sup>19</sup> In spite of the increasing demand for, and the potential of, socio-legal research,<sup>20</sup> the formalist approach to understanding IEL dominates the study of conventional, or ‘mainstream,’ IEL. International legal scholars in this mode are concerned with the set of rules of the global trade regime that guide and constrain governments’ behaviors.<sup>21</sup> However, the study of IEL in Africa through socio-legal methods remains underexplored. In the African context, IEL is intricately interwoven into African societies’ historical, political, social, and economic peculiarities and diversity. As a result, the conventional, formalist, and doctrinal approaches do not effectively capture the heterogeneity of African trade regimes. As Büthe and Kigwiru note, research on African IEL grounded in theoretical and empirical analysis, particularly by African scholars, is scarce.<sup>22</sup> This leads to a significant blind spot in our understanding of IEL.

Demystifying the false universal pretenses of conventional IEL is, however, not a prerogative of socio-legal scholarship.<sup>23</sup> Therefore, this Essay does not suggest the primacy of the socio-legal approach over other methods. Instead,

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<sup>18</sup> Clair Gammage, *Critical Perspectives of International Economic Law*, AFRONOMICSLAW (Jan. 15, 2020), <https://perma.cc/FU6Z-DTVF>.

<sup>19</sup> See generally SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT, *supra* note 10 (focusing on the distinctive virtues and vices of socio-legal approaches by identifying and interrogating three [analytical, empirical, normative] approaches to law and locating socio-legal approaches to international economic law along the stretch); INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE (Colin B. Picker et al. eds., 2008); see also Moshe Hirsch, *The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Trade Agreements in the World Trading System*, 19 EUR. J. INT’L L. 277 (2008).

<sup>20</sup> Stuart A. Nagel, *Law and the Social Sciences: What Can Social Science Contribute?*, 51 ABA J. 356 (1965).

<sup>21</sup> See Gathii, *supra* note 8; Gregory Shaffer, *A New Legal Realism: Method in International Economic Law Scholarship*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE 29, *supra* note 19, at 29–42 (classifying the varieties of IEL scholarship into formalist/doctrinal, normative/activist, theoretical/analytical, and empirical while arguing for a new legal realist empirical approach to the study of IEL).

<sup>22</sup> See Tim Büthe & Vellore Kigwiru, *The Spread of Competition Law and Policy in Africa: A Research Agenda*, 1 AFR. J. INT’L ECON. L. 41, 42 (2020).

<sup>23</sup> Third World Approaches to International Law (TWAAIL) is an active arena where scholars have exposed the biases of conventional international law. Also, Cecilia Juliana Flores Elizondo’s fascinating analysis examines the question: “Can a reflexive law approach facilitate the construction of an international economic law that is just, in the sense that it balances economic and wider social interests and values?” See Cecilia Juliana Flores Elizondo, *Reflexive International Economic Law: Balancing Economic and Social Goals in the Construction of Law*, in SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT, *supra* note 10, at 118–32.

socio-legal approaches include diverse perspectives that consider the relationship between law, economy, and society.<sup>24</sup>

The underlying factor that unifies the different methods is the desire to broaden our understanding of the law by integrating socio-political contexts.<sup>25</sup> But socio-legal methods deepen the *contextual* understanding of formal and informal African trade regimes' heterogeneity, while revealing the precarity of ICBT in Africa, which helps inform policymaking. Perspectives that are rooted in socio-legal analysis, whether qualitative or quantitative, in combination with disciplines in broader social science (for example, politics, sociology, anthropology, ethnography, and history), highlight the constitutive power of IEL in Africa, the norms underpinning cross-border trade, and their embeddedness in social relations. In short, theoretical and empirical socio-legal research with a focus on the informal economy in Africa, when linked to policy, will enhance the expanded purpose of trade agreements for social inclusion.<sup>26</sup>

### III. THE PROMISE OF SOCIO-LEGALLY INCLINED EMPIRICAL METHODS FOR DEEPENING UNDERSTANDING OF TRADE REGIMES IN AFRICA

African IEL as a social phenomenon, like law, is not static. Instead, it is constitutive, changing, and embodies fundamental principles that reflect and shape society's values. IEL in Africa has evolved and been shaped not only by colonialism and post-colonial realities but also by social conflict within the region, economic orthodoxies, externalities, and regional struggle for power. Envisioning African IEL as a social phenomenon opens the pathway to reimagining different aspects of the field that have constrained ideas from the periphery.<sup>27</sup> It opens up space for a deeper understanding of the variations, norms, standards, principles, processes, and practices of African IEL and their interaction with the Western or traditional processes on their own terms. The emergent interaction will likely improve the global community's economic and social governance.

A socio-legal approach to IEL enables us to discern and appreciate the significance of two key related trends. *First*, the existence of emergent sites of normative authority for international economic rules and regulations outside the

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<sup>24</sup> For recent publications that explore the “socio” and “legal” in “socio-legal” research, see generally EXPLORING THE ‘SOCIO’ OF SOCIO-LEGAL STUDIES (Demnot Feenon ed., 2013); EXPLORING THE ‘LEGAL’ IN SOCIO-LEGAL STUDIES (David Cowan & Daniel Wincott eds., 2015).

<sup>25</sup> Akinkugbe, *supra* note 7.

<sup>26</sup> Gregory Shaffer, *Retooling Trade Agreements for Social Inclusion*, 1 U. ILL. L. REV. 2 (2019).

<sup>27</sup> Gammage, *supra* note 10, at 67 (“Moving away from the notion of the Westphalian state, these socio-cultural theories offer an alternative model of regionalism that conceptualise trade as a social phenomenon.”).

traditional interstate system.<sup>28</sup> And *second*, the shifting modalities of power in global economic governance that enable dominant actors to embed and globalize their models of economic organization. In the latter mode, innovative ideas and norms about African IEL can influence or inform changes in mainstream IEL.

In this section, I outline six opportunities and three challenges facing the implementation of socio-legal analyses in African IEL, specifically in the context of ICBT.

### A. Opportunities for Socio-Legal Analyses of African IEL

First, an empirically grounded socio-legal approach illuminates how socio-political, historical, and cultural factors influence and shape Africa's international economic interactions. African countries trade more with countries outside the continent. A significant level of intra-African trade occurs in the *informal* economy.<sup>29</sup> Although the IEL regime on intra-African trade is dominated by ICBT, the influence of ICBT on legal policy, negotiation, design, and interpretation of trade agreements has been minimal. There is a critical lack of research to inform policy. Unfilled, this critical void perpetuates a stereotype of failure and ineffectiveness of IEL in Africa. The socio-legal approach to IEL in Africa offers an important avenue for the systematic documentation of the regime of informal economy in Africa. An empirically informed analysis would show the multiplicity of legal orderings at the national and regional levels<sup>30</sup> and would explain the ineffectiveness in the formal aspects of regional integration in Africa.<sup>31</sup>

Second, the analytical and empirical assessment of data will enhance our understanding of the IEL regimes' performance. Hence, while practical work on formal aspects of intra-African trade abounds, the paucity of data and information on the practices of informal trade regimes in Africa is a source of concern for a holistic assessment of the regimes. The generation of consistent and reliable data on ICBT in Africa is essential for optimizing the gains of the sector and for policy

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<sup>28</sup> For how different legal orderings matter for our understanding of IEL in the indigenous context, see INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS (John Burrows & Risa Schwartz eds., 2020); Sergio Puig, *International Indigenous Economic Law*, 52 U.C. DAVIS L. REV. 1243 (2019) (exploring the extent to which the main fields of international law that are tasked with promoting economic interdependence—international finance, investment, trade, and intellectual property—address the rights and interests of indigenous peoples).

<sup>29</sup> See NANCY BENJAMIN ET AL., *THE INFORMAL SECTOR IN FRANCOPHONE AFRICA: FIRM SIZE, PRODUCTIVITY, AND INSTITUTIONS* (2012).

<sup>30</sup> See, e.g., PEBERDY SALLY, *CALIBRATING INFORMAL CROSS-BORDER TRADE IN SOUTHERN AFRICA* (2015).

<sup>31</sup> See, e.g., Sami Bensassi, Joachim Jarreau & Cristina Mitaritonna, *Regional Integration and Informal Trade in Africa: Evidence from Benin's Borders*, 28 J. AFR. ECON. 89 (2019) (empirically analyzing the relationship between trade barriers and informality of trade based on recording informal and formal CBT flows between Benin and its direct neighbors).



making. However, many African states do not collect ICBT data on a regular and systematic basis.<sup>32</sup> For example, as it relates to the COVID-19 pandemic, a contextual analysis is emerging that advances our understanding of the impact on informal markets.<sup>33</sup> The informal economy is vulnerable to suffering more from the negative implications of external shocks. With the shutdown of borders, the socio-economic impact of COVID-19 on the informal sector and its actors and their performance during the pandemic will be enriched by socio-legal methods.

Third, socio-legal analysis of IEL improves our understanding of the heterodox trade regimes in Africa. ICBT in Africa is often homogenized in the literature, but it is heterogeneous. The heterogeneity of ICBT is interconnected with local skills, resources, and geographic conditions, among other factors.<sup>34</sup> An empirically informed socio-legal analysis will help tease out the practices of each sector. In the context of the Agreement Establishing the African Continental Free Trade Area,<sup>35</sup> empirical methods in socio-legal analysis will exemplify the heterogeneity of ICBT in Africa and provide a clearer understanding of the dynamics in specific sectors, regional variations in cross-border practices, informal trade between neighboring states, movement of persons, goods and services as well as which goods and services to mention a few. In effect, the outcome of such a method will likely yield more effective policy making.

Fourth, socio-legal method for the study of IEL in Africa illuminates our understanding of the actors' perceptions of trade regimes—specifically, how they may influence institutional changes and inclusive development. One of the recipes that has been suggested for African trade policy is the formalization of the informal economy in trade agreements. Formalizing ICBT in Africa may attenuate the precarity of the sector and its actors. The perennial problems encountered at the borders that contribute to the growth of ICBT can be better understood through socio-legal methods of research.<sup>36</sup> Empirical data on the factors that lead to the incessant border challenges and their costs are germane to illuminating Africa's trade policy making. ICBT is rooted in long standing indigenous trade

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<sup>32</sup> Rwanda and Uganda are the exceptions in this regard. See AFRICAN EXPORT-IMPORT BANK, AFRICAN TRADE REPORT 2020: INFORMAL CROSS-BORDER TRADE IN AFRICA IN THE CONTEXT OF THE AFCFTA 17 (2020).

<sup>33</sup> Various ongoing country projects have been commissioned that focus on resilience of the informal sector in light of the COVID-19 pandemic. See, e.g., Nathan Fiala & Jörg Peters, *Resilience and Recovery: The Economic Impact of COVID-19 on the Informal Sector in Uganda*, <https://perma.cc/5UAM-7QY5>; Jessica Gottlieb & Adrienne LeBas, *Resilience & Risk in the Informal Sector: Responses to Economic & Security Risks of COVID-19 in Lagos, Nigeria*, <https://perma.cc/P77H-9EBX>.

<sup>34</sup> See Eldrede Kahiya & Djavlonbek Kadirov, *Informal Cross Border Trade as a Substratum Marketing System: A Review and Conceptual Framework*, 40 J. MACROMARKETING 88 (2020).

<sup>35</sup> Agreement Establishing the African Continental Free Trade Area, adopted Mar. 21, 2018 (entered into force May 30, 2019).

<sup>36</sup> See generally Erick Mwakibete, *The EAC and the Never Ending Cross-Border Headaches*, THE CITIZEN (Mar. 14, 2021), <https://perma.cc/V9PY-N72N>.

practices of African communities.<sup>37</sup> It also predates the artificial division of African communities into states as a result of the colonial encounter. As such, ICBT is critical to deepening inclusive trade and sustainable development in Africa. Consequently, policy making based on the incorporation of the experiences and perspectives of the actors would be important to sustaining trade and cultural linkages.

Fifth, socio-legal approaches in African IEL provide an opportunity to generate theoretical frameworks that implicitly examine research from African perspectives. The process of developing theories occurs through the case studies, hypothesis analysis and observation of the repetitive patterns of phenomenon.<sup>38</sup> In Africa, the discourse of decolonizing IEL's embedded universalism and Eurocentricity is still unraveling. Mainstream narrative of IEL belies the heterogeneity of methods, approaches, and conceptualizations of international economic law across regions and spaces. To date, Eurocentric theoretical frameworks have dominated research on African IEL. While focusing on methods are useful, they do not do the work that belongs to theory in research. The quest for theory-building offers a contextual understanding of the factors that drive the actual performance of informal trade and actor preference. Theorizing on the basis of such studies would gradually enhance, rather than position informal trade as an exception to mainstream studies of IEL. Studies of African IEL grounded in data collected from the continent will give insight to the consistent phenomenon in intra-African trade. Overtime, these ideas can be the basis of the development of theories that situate and effectively contextualize the phenomenon of formal and informal trade in Africa.<sup>39</sup> From an economic development dimension, the bottom-up theorizing of IEL complements other arguments that show the deficit of IEL in engaging processes that are attentive to local situations.<sup>40</sup>

Sixth, socio-legal approaches provide scholars of African IEL with a broader set of research tools. Data visualization, ethical considerations, reliability of data, and validity are concepts that many lawyers who base their research on secondary

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<sup>37</sup> See Stephen S. Golub & Jamie Hansen-Lewis, *Informal Trading Networks in West Africa: The Mourides of Senegal/ the Gambia and the Yoruba of Benin/ Nigeria in Benjamin and Mbaye*, in *THE INFORMAL SECTOR IN FRANCOPHONE AFRICA: FIRM SIZE, PRODUCTIVITY, AND INSTITUTIONS*, *supra* note 29, 173–93.

<sup>38</sup> Roberto Cipriani, *Empirical Data and Theory Construction: An Example of Application in Social Science Research*, 118 *BULL. SOCIO. METHODOLOGY* 73 (2013).

<sup>39</sup> See generally Richard Swedberg, *Theorizing in Sociology and Social Science: Turning to the Context of Discovery*, 41 *THEORY & SOC'Y* 1 (2012).

<sup>40</sup> Akinkugbe, *supra* note 7. See generally David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1062 *WIS. L. REV.* 1062 (1974).

data miss out on.<sup>41</sup> For example, the rise of digital trade has added to the complexity of African IEL.<sup>42</sup> Also, the normative foundations of IEL are expanded today by data governance.<sup>43</sup> Robust policy making on African IEL is significantly inhibited by the paucity of data on digital economy and data governance that are expanding the structure of IEL. Practically, this hinders researchers from formulating good research questions, hypotheses, sampling techniques, and theoretical frameworks to explain a particular outcome.

## B. Challenges Facing Socio-Legal Approaches to African IEL

For all its promises, empirically inclined socio-legal analysis of IEL in Africa engenders some challenges. The approach requires a lot of training and familiarity with the research tools of social scientists. The challenges are not unique to geographical boundaries. Legal scholars, untrained in the methods of social science, face this challenge globally. Hence, legal scholars “lack the tools of consequentialist social science empiricism, which are most importantly used to assess the social effects of rules.”<sup>44</sup> As such, there is a professional training dimension to this proposal. African law schools, institutes, and organizations must be willing to assist with the training required to undertake this form of research.<sup>45</sup>

The perennial challenge that scholars face across the world is that of funding for empirical research. Many African scholars may not easily afford the financing associated with comprehensive empirical research. Empirical research, which involves fieldwork and complicated software to analyze data, is costly. The assistance offered by a semi-structured interview that leverages technological opportunities is limited depending on the audience that is the focus of the research. One way to address the financial burden is more collaboration between Global North researchers and institutions and their Global South counterparts. This recommendation has potential ethical challenges. The power imbalance resulting from the provision of funds by the Global North institutions can easily become a challenge in relation to intellectual property and ownership of the research work. The challenges should not prevent institutions from the Global

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<sup>41</sup> See generally AMANDA PERRY-KESSARIS, *DOING SOCIOLEGAL RESEARCH IN DESIGN MODE* (forthcoming).

<sup>42</sup> See Franziska Sucker, *COVID-19 Pushes Digital Solutions and Deepens Digital Divides: What Role for African Digital Trade Law*, AFRONOMICSLAW (May 9, 2020), <https://perma.cc/VZ8E-RZKG>.

<sup>43</sup> See generally Neha Mishra, *International Trade Law Meets Data Ethics: A Brave New World*, 53 N.Y.U. J. INT'L. & POL. 303 (2021); Thomas Streinz, *RCEP's Contribution to Global Data Governance*, AFRONOMICSLAW (Feb 19, 2021), <https://perma.cc/FAT2-ZE4L>.

<sup>44</sup> Joel P. Trachtman, *International Economic Law Research: A Taxonomy*, in INTERNATIONAL ECONOMIC LAW: THE STATE AND FUTURE OF THE DISCIPLINE, *supra* note 19, at 43.

<sup>45</sup> The Cardiff Law and Global Justice socio-legal writing workshops for socio-legal scholars is an example of this initiative. See generally *Socio-Legal Journals Global South Initiative*, CARDIFF LAW AND GLOBAL JUSTICE, <https://perma.cc/JF9F-M7HQ>.

South and Global North from embracing the opportunities to collaborate. The key would be to ensure that it is done on equal terms.

Lastly, the promise of an empirically inclined socio-legal analysis is enriched by a theoretical framework. A theoretical framework is an ideological or practical lens that informs the researcher's understanding of the law. The theoretical framework permeates all aspects of the decision-making process and the analysis of the data. As such, it is essential. Global South scholars have a variety of critical theoretical approaches to draw on depending on their research's focus. Whether one chooses to answer a research question through one or a combination of feminism, political economy, Third World Approaches to International Law, comparative, or other approaches, the overall research must both account for how the theoretical approach is effectively accommodated by the data and illustrate the method.<sup>46</sup>

#### IV. CONCLUSION: EMPIRICALLY INFORMED RESEARCH FOR POLICY FORMATION

Africa's contemporary complex regime of trade agreements calls for a diversity of methods to tell its own unique narratives on its own terms. The ideal IEL research centers multidisciplinary approaches that weaves in theory (for example Third World Approaches to International Law) with the appropriate choice of method to illuminate our understanding of specific trade regimes. Such an approach focuses on the diversity of actors (focusing on gender and social inclusion), their social interactions in the formal and informal trade they co-constitute, and the legal institutions affected by these trade regimes. The ideal research will also seek to foreground the different legal orderings that are at work and the roles of law. For example, it would be interesting to know the legal orderings that are 'internal' to the social structure that supports ICBT in contrast to the 'external' legal ordering of the state and institutions that support formal trade regimes.

There is a significant opportunity for empirically inclined socio-legal research methods to produce insight and knowledge to inform trade policy in Africa. For

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<sup>46</sup> See, e.g., AMAKA VANNI, *PATENT GAMES IN THE GLOBAL SOUTH: PHARMACEUTICAL PATENT LAW-MAKING IN BRAZIL, INDIA AND NIGERIA* (2020) (adopting a combination of TWAIL and nodal governance theory to explore how the confluence of various actors frame the way(s) pharmaceutical patents are adopted and implemented in a given locale within the confines of World Trade Organization Agreement on Trade-Related Aspects of Intellectual Property Rights); Adérayò Sànúsí, *Patent Law-Making in Context and the Value of Socio-Legal Approaches to Studying Intellectual Property in Global South Countries*, *AFRONOMCISLAW* (Feb. 5, 2021), <https://permac.cc/WN4C-EJLK> (reviewing Vanni's book and arguing that the future research of intellectual property requires creative application of interdisciplinary methods (historical, ethnographic) and theoretical frameworks (law, history, anthropology, political theory, STS) that respond to the unique socio-material circumstances shaping scientific innovations and legal processes in the local context under study).

example, in addition to understanding the dynamics of informal economies and cross-border trading at the regional levels, the African Continental Free Trade Area Agreement provides another layer of research enterprise. We will need to understand the distributive effect of this new trade regime on both formal and informal trade in Africa. The future of research on IEL in Africa will need to incorporate more social science and socio-legal methods in particular, as well as theoretical frameworks that respond to and account for the socio-political and economic context of African societies' interactions.

As the practice of IEL in Africa deepens, social science approaches and socio-legal methods in particular offer an important lens to substantiate the innovation of the regime. The decision on which theoretical and methodological approach is best for one's research is not easy for researchers. Finding a creative combination of approaches, theories, and methods that address these challenges is the key to documenting the narrative of IEL in Africa based on their own logic.<sup>47</sup>

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<sup>47</sup> See Olabisi D. Akinkugbe, *Symposium Introduction: Assessing the Roles of Theory and Methodology in the Study of IEL in Africa*, AFRONOMICSLAW (Jan. 13, 2020), <https://perma.cc/ZR59-NNEQ>.

# On Relating Social Sciences to International Law: Three Perspectives

Yifeng Chen\*

## Abstract

*This Essay offers a critical yet constructive reading of the social science approach to international law. In seeking to frame international legal studies alongside the positivistic social sciences, the social science approach has suffered from important methodological deficiencies. Though appearing to be an objective science, the social science approach requires a scholar to make subjective decisions throughout the research process. A reductionistic social science approach to international law risks consolidating existing inequalities and imperialistic institutions in the name of objective science. A healthy interaction between international law and the social sciences requires enriched conceptions of both international law and the social sciences, as well as a proper perspective on their working relationship. This dynamic perspective recognizes the constitutive role of international law in carrying out the social science approach. It further emphasizes the importance of internalizing interdisciplinarity within international legal scholarship itself.*

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## Table of Contents

I. Introduction.....	39
II. Social Sciences Within International Law.....	40
III. Social Science Approach to International Law .....	41
IV. Relating International Law to Social Sciences .....	44
V. Conclusion.....	47

## I. INTRODUCTION

The social science approach to international law, as advocated by Daniel Abebe, Adam Chilton, and Tom Ginsburg, is a recent academic effort to frame international legal studies alongside the positivistic, fact-based, and empirical social sciences. The social science approach starts “with a healthy skepticism about the efficacy of law” and tests “hypotheses about how international law works in practice” through observation and data collection.<sup>1</sup> By describing and explaining what the world is, the social science approach reclaims the methodological rigor, scientism, and legitimacy of international law.

The social science approach should be understood within the context of the law and society movement of American legal academia, which harbors a long-standing tradition of skepticism toward the normative-formalistic concept of law. Its application to international law motivates a wide range of approaches including the New Haven School,<sup>2</sup> economic analysis of international law,<sup>3</sup> international law and international relations,<sup>4</sup> international law as behavior,<sup>5</sup> the empirical turn,<sup>6</sup> the experimental turn,<sup>7</sup> and others. Yet, at a time when international law is increasingly perceived as “indeterminate and illegitimate” in the United States,<sup>8</sup> the call for a social science approach may be understood as an attempt to reclaim its domestic relevance by recourse to empirical methods and scientism.

Contrary to a simplistic polarization between the normative approach and empirical research, this Essay suggests that the relationship between international law and the social sciences is complex and nuanced. A detailed account of their relationship casts light on the possibilities and limitations of the social science approach, and also provides useful insights for developing an inclusive and engaging international legal scholarship.

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<sup>1</sup> See Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1, 19, 5 (2021).

<sup>2</sup> See generally Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972); WESLEY L. GOULD & MICHAEL BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1970).

<sup>3</sup> See generally JACK GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>4</sup> See generally Anne-Marie Slaughter Burley, *International Law and International Relations: A Dual Agenda*, 87 AM. J. INT'L L. 205 (1993).

<sup>5</sup> See generally Harlan Grant Cohen & Timothy Meyer, *International Law as Behavior*, in *INTERNATIONAL LAW AS BEHAVIOR* 1 (Harlan Grant Cohen & Timothy Meyer eds., 2021).

<sup>6</sup> See generally Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

<sup>7</sup> See generally Jeffrey L. Dunoff & Mark A. Pollack, *Experimenting with International Law*, 28 EUR. J. INT'L L. 1317 (2017).

<sup>8</sup> See Paul B. Stephan, *Comparative International Law, Foreign Relations Law, and Fragmentation*, in *COMPARATIVE INTERNATIONAL LAW* 57 (Anthea Roberts et al. eds., 2018).



## II. SOCIAL SCIENCES WITHIN INTERNATIONAL LAW

The traditional, normative approach to international law is not at all antagonistic to scientism.<sup>9</sup> Instead, the normative approach seeks to build its legitimacy and relevance by a claim to normative objectivity and certainty. Rules are objective, their meanings are ascertainable, and they separate international law from both morality and politics.

Under the normative approach, the main task of international lawyers is to ascertain and clarify rules of international law in an objectively verifiable way. As international law is represented as a system of objective rules and principles, the idea of scientism deeply informs its doctrinal construction. International law is discoverable through a process of neutral scientific inquiry, and the authoritativeness of the norms depends upon the correct application of the scientific method to international law.

The scientific nature of international law is crystalized in the doctrine of its sources. The idea of scientism has been used to enhance the credibility of international law as a discipline in the eyes of politicians and theorists.<sup>10</sup> It also embodies the positivistic tradition of international law.<sup>11</sup> It is no surprise that the rise of positivism is accompanied by the corresponding infusion of scientism into international legal studies.

The normative approach is not blind to sociology, either. Rather, it has its own conceptions of sociology, power, and knowledge. Beneath the construction of the doctrine lies a profound sociological understanding of the international society.<sup>12</sup> For example, positivism reflects the political reality of the monopolistic position of the nation-state in international relations, marginalizing the role of nonstate actors in the making of international law. In recognizing the decentralized structure of international society, positivism also privileges the great powers in the lawmaking process.

A close look at the doctrine of customary international law illustrates the underlying sociology. Secondary rules on the ascertainment of customary law express the sociological reality of international society. The requirement of

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<sup>9</sup> See Anne Orford, *Scientific Reason and the Discipline of International Law*, 25 EUR. J. INT'L L. 369 (2014).

<sup>10</sup> See L. Oppenheim, *Science of International Law Its Tasks and Method*, 2 AM. J. INT'L L. 313, 323–24 (1908).

<sup>11</sup> See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 18 (1999).

<sup>12</sup> For a useful account on positivism from the lens of normative politics, see Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002).

concreteness is to render as much as possible the proposed norm in conformity with existing state practice.<sup>13</sup>

There are many telling examples in this regard. For a new rule to emerge, state practice has to be extensive and virtually uniform.<sup>14</sup> Further, the practice of the “specifically affected states” is given full weight.<sup>15</sup> In conceding to the dominant role of great powers, physical acts are weighed more heavily than verbal acts. The “persistent objector” doctrine is practically reserved for those states who can persistently object to an emerging rule, despite it being affirmed by a great majority of states—a possibility only open to a handful of great powers.<sup>16</sup>

In setting the law-making procedures, international law internalizes its perceptions of prevailing social conditions. The sociological account is implicit in the normative approach. Yet, international legal scholars have traditionally stayed silent on those normative ideals about the world. Once entering the realms of the sociological and the political, it would be a self-defeating exercise to an international law project that claims to reject politics and morality. By convention, international lawyers are trained as experts in normative jurisprudence, rather than as social or political scientists. This mindset of avoidance has had structural impacts on the works of international lawyers. It has curtailed the ambition and willingness of international lawyers to engage with external disciplines. It also causes confusion for many who are trapped in the formalistic approach and yet see the political disagreements not surmountable by legal techniques. With the rise of critical international law scholarship in the late 1980s, the objectivity claim of normative international law has decisively fallen apart.

### III. SOCIAL SCIENCE APPROACH TO INTERNATIONAL LAW

The social science approach suggested by Abebe, Chilton, and Ginsburg examines the phenomenon of international law by using conventional, empirical, and positivistic social sciences.<sup>17</sup> This external approach may be conveniently referred to as the social science approach to international law. The basic procedure

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<sup>13</sup> On the irresolvable tension between concreteness and normativity, see generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005).

<sup>14</sup> See *North Sea Continental Shelf* (FRG/Den.; FRG/Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 74 (Feb. 20).

<sup>15</sup> *Id.*

<sup>16</sup> In rediscovering the importance of the persistent objector doctrine due to the changing conditions of international lawmaking, Ted Stein claimed her work to be “an exercise in the sociology of international law.” See Ted L. Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L.J. 457, 481 (1985). A critical reading of the persistent objector doctrine is well argued by B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1, 23–25 (2018).

<sup>17</sup> See generally Abebe et al., *supra* note 1.

is to start with a research question, develop a hypothesis, then verify or falsify the hypothesis through observation and data collection. In reducing and limiting its research task to descriptive engagement without a normative commitment, the social science approach advocates a revitalization of the scientific enterprise of international law.

In a sense, the social science approach and the normative approach share a common interest in scientism and objectivity despite the profound difference between the two approaches. The social science approach replaces the normatively-committed objective rules with a new set of empirically-committed objective rules. The scientism of the social science approach also needs to be demystified.

The social science approach is premised upon the full separation between the subjective and the objective.<sup>18</sup> It further assumes the objective being real, fixed, unmalleable, and organized – capable of scientific studies without subjective intervention. This approach is epistemologically incomplete, if not completely impossible. First, no social science is completely neutral, objective, and value-free. Social sciences are as politically informed as international legal studies. The application of the social science approach to international law requires a scholar to make many subjective choices throughout the research process. In defining the research question, setting the context, identifying the variables, relating variables as cause and consequence, collecting and interpreting the data, establishing the causal link, generalizing the research outcomes, and more, one is constantly called to make subjective decisions.<sup>19</sup> Those delicate decisions are not readily accessible in the disciplinary toolboxes of social sciences or international law. Instead, one must make decisions creatively.

How contrary state practice is treated in identification of customary international law provides an illustrative example. Torture is prohibited by the 1984 U.N. Convention against Torture.<sup>20</sup> Given that the practice of torture is widely found across the world, the question immediately arises whether customary international law authorizes or prohibits torture.<sup>21</sup> The techniques employed by the traditional approach elaborate and define what counts as state practice. One answer is to exclude those practices of torture from the purview of “state

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<sup>18</sup> See BARRY HINDESS, *PHILOSOPHY AND METHODOLOGY IN THE SOCIAL SCIENCES* 138–39 (1977).

<sup>19</sup> The range of subjective selection is manifestly acknowledged in the classics on quantitative social research. See, e.g., GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

<sup>20</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

<sup>21</sup> This was a point of debate between Arthur Weisburd and Anthony D’Amato in the 1980s on whether the prohibition of torture was purely conventional by nature. See Arthur M. Weisburd, *Customary International Law: The Problem of Treaties*, 21 VAND. J. TRANSNAT’L L. 1 (1988); Anthony D’Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. TRANSNAT’L L. 459 (1988).

practice.” For the purpose of customary lawmaking, state practice is norm-generative only if it is accompanied by an *opinio juris*.<sup>22</sup> Because no state has claimed that torture is lawful under international law, the practice of torture would not be able to create a law permissible of torture.

The other technique is to define state practice by pairing actions with responses from other states.<sup>23</sup> Whenever incidents of torture are exposed, they are deplored by other states and human rights organizations. It is the acts of torture by a state together with the collective responses from other states that constitute state practice on the legality of torture under international law. Both techniques are presented as factual matters of what to observe and what counts.

Second, observations and interpretations generate the world we see. Personal preferences, beliefs, values, or research methods often determine research outcomes. In essence, social science is about constructing narratives and order. Data only receive meaning when they are theoretically exposed and interpreted. Abebe, Chilton, and Ginsburg provide an illuminating example in their article. Using basically the same data, Beth Simmons and Eric Posner drew opposite conclusions about the effectiveness of international human rights agreements.<sup>24</sup>

Another useful example could be found on the scholarly examination of the breadth of the territorial sea. According to a survey conducted by the United Nations in 1983, 18 states claimed 3 nautical miles of territorial sea, 83 states claimed 12 nautical miles, 13 states claimed 200 nautical miles, and another 19 states claimed different ranges.<sup>25</sup> The question is then how far the territorial sea reaches under customary international law.

The above claims are open to different interpretations. One interpretation could simply deny the existence of customary international law on the subject matter, as state practices diverge.<sup>26</sup> Another interpretation may suggest the continued validity of the rule of 3 miles, as this is the least disputable.<sup>27</sup> Still

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<sup>22</sup> See *North Sea Continental Shelf*, 1969 I.C.J. Rep. 3, at ¶ 77.

<sup>23</sup> See Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 754, 784 (2001).

<sup>24</sup> See Abebe et al., *supra* note 1, at 21 (discussing BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009) and ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014)).

<sup>25</sup> *The Law of the Sea Bulletin*, No. 2, vi, U.N. Doc. 83-35821 (Dec. 1983).

<sup>26</sup> Michael Byers therefore interprets the 3 nautical miles as a mistaken belief among scholars on the customary breadth of the territorial sea. See Michael Byers, *Custom, Power, and the Power of Rules - Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 173 (1995).

<sup>27</sup> See R.Y. Jennings, *General Course on Principles of Public International Law*, 121 COLLECTED COURSES HAGUE ACAD. INT'L L. 323, 379 (1967). Yet, for a rational choice explanation of the 3 nautical miles rule and its subsequent development, see Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113, 1158 (1999).

another interpretation points to the rule of 12 miles, as this rule is endorsed by the majority and also incorporates the latest development in state practice.<sup>28</sup>

All of the above interpretations stand equally. A choice can be made only by reference to policy considerations and normative commitments beyond mere factual observation. More importantly, the difference between interpretations is irresolvable within the social science approach itself as Abebe, Chilton, and Ginsburg seem to suggest.<sup>29</sup> The difference does not lie in observations, but rather in assumptions and orientations.

Third, by reducing itself to the study of what “is,” the social science approach risks consolidating and legitimizing existing social structure and order. The social science approach gives authenticity to empirical facts and data by assuming that the truth may be meaningfully extracted from the given. Yet, what is the being, what aspects of social life are real, and what is observable are all at the heart of the positivism of social sciences. Objectifying certain aspects of social life to present them as irresistible and capable of generating meaning and order has profound intellectual, social, and political implications.<sup>30</sup> Having renounced a political commitment in the first place, the social science approach is left to be fed by dominant narratives about world reality. Expressly not committing oneself to a normative project amounts to a normative commitment in its own right.

#### IV. RELATING INTERNATIONAL LAW TO SOCIAL SCIENCES

The social science approach is primarily concerned with international law’s efficacy and rationale. It focuses “on external questions like why states make international commitments, how international institutions make decisions, and whether international commitments or the decisions of international institutions produce changes in state behavior.”<sup>31</sup> The social science approach, as such, incorporates rather specific parochial concepts of both international law and social science. This reductionist approach may hinder a more dynamic and interactive discourse between international law and social science.

The social science approach suffers from three reductionist deficiencies. The first is its positivistic conception of the social science method. In limiting itself to the empirical method and external explanation, the social science approach, as proposed by Abebe, Chilton, and Ginsburg,<sup>32</sup> minimizes the contributions of

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<sup>28</sup> Those arguing for 200 nautical miles are not seen as persistent objectors to the customary rule of 12 nautical miles. See Bing Bing Jia, *The Relations Between Treaties and Custom*, 9 CHINESE J. INT’L L. 81, 89 (2010).

<sup>29</sup> See Abebe et al., *supra* note 1, at 21–22.

<sup>30</sup> For an insightful account of the ordering power of description, see Anne Orford, *In Praise of Description*, 25 LEIDEN J. INT’L L. 609 (2012).

<sup>31</sup> See Abebe et al., *supra* note 1, at 18.

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

political science, anthropology, linguistics, or history. It focuses on efficacy and causality to the exclusion of other analytic paradigms, such as structural-functionalism, hermeneutics, critical theory, and systems theory.

The second reductionist aspect is its conception of international law. The social science approach incarnates a robust positivist and statist concept of law. International law is seen as consisting of binding rules and principles whose effects are to endure test by empiricism. However, in international society, the constitutive role of international law is as relevant as its normative function. While a rule-based formalistic notion of international law still stands firm, especially in international adjudication, other concepts receive increasing acceptance.

International law is a language of empowerment that legitimizes specific claims or actions. By formulating conceptual, paradigmatic, or epistemic frameworks, it conditions our understanding of international problems and defines the available solutions. The role and relevance of international law are much richer than what the positivistic concept may embrace.

The normativity of international law may be considered in a dual agenda: authoritative in adjudication and decision-making, but also normative in terms of its political commitments. The traditional approach presents it as a system of rule-based normativity without normative projects other than international law itself. Disconnecting these two levels of normativity is artificial and leads to the practical irrelevance of international law to international life.

The third reductionist aspect is the relationship between international law and social science. The social science approach depicts these as two distinct fields which only relate to each other externally. In fact, they are mutually constitutive. It is important to appreciate the constitutive role of concepts and doctrines of international law in the design of the research project, as well as in the interpretation of the results.

Nevertheless, an enriched social science approach would provide useful insights for developing international law projects. The mechanisms of causation and attribution are powerful institutions for social redistribution.<sup>33</sup> For example, the underlying causes of poverty in the Global South are subject to different interpretations. In turn, these different interpretations point to different prescriptions. Poverty may be seen as a consequence of the corruption and failure of local governments. It may also be attributed to the lack of legal institutions for privatization, property protection, or effective markets. Additionally, it may be attributable to the structural status of countries in the Global South in the international economic system. Each of these interpretations may be equally valid and yet points to different prescriptions. Here, causation plays an important role in conditioning our understanding of what the world problem is, who shall bear

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<sup>33</sup> For an insightful exposition and critique of causal analysis applied to human rights issues, see Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

responsibilities, and where to look for possible solutions. A social science project would be useful to substantiate the normative projects of international law regarding global poverty.

A modest and self-reflective social science approach is useful, but not because it provides objective, verifiable scientific knowledge. Rather, it offers a way to understand how international legal problems may be defined, how the order of the world may be depicted, and how politics of international law may be conducted at a micro level.

I would suggest an active incorporation of the social sciences into international law. Various arguments against international legal studies as a social science can be anticipated. Philosophically, the normative system of international law cannot be subjected to Popper's falsificationist approach, falling under the criteria of science.<sup>34</sup> Conceptually, the normative approach to law—sometimes referred to as the authority paradigm—tells very little about international society.<sup>35</sup> Intellectually, the social science approach often entertains skepticism or even hostility toward the legal nature of international law, and a call for interdisciplinary engagement often means conquest in reality.<sup>36</sup> Politically, much of the existing work on the social science approach is viewed as conservative.<sup>37</sup>

Yet, it is both important and possible to relate international law to social science in a more dynamic and mutually informative manner. There are several useful ways to relate the two subjects. The first possibility is to open the normative approach by relocating its background assumptions to the foreground for discussion.<sup>38</sup> In approaching international law as a project for social reform, it is useful to openly acknowledge the sociological assumptions and political ideals that underlie the international law project. To make those assumptions explicit would do away with the false normative objectivity that has been associated with international law. Connecting legal normativity with political normativity would enable more direct engagement with foundational ideas about the world in international legal discourse. And any reflections of those assumptions would practically require sociological investigation and political engagement.

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<sup>34</sup> See KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 40–42 (1959).

<sup>35</sup> For discussion of the authority paradigm, see Geoffrey Samuel, *Is Law Really a Social Science? A View from Comparative Law*, 67 *CAMBRIDGE L.J.* 288 (2008).

<sup>36</sup> See Jan Klabbbers, *The Relative Autonomy of International Law or the Forgotten Politics of Interdisciplinarity*, 1 *J. INT'L L. & INT'L REL.* 35 (2005).

<sup>37</sup> See Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 *INT'L REL.* 3, 16 (2012).

<sup>38</sup> See DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 114 (2016).

A second way of relating is to openly examine the constitutive role of international law in social science.<sup>39</sup> International law today is a powerful institution that determines how international issues are framed and resolved. Its politics is often expressed in the politics of competing perspectives and outlooks. The empirical approach requires theoretical sensitivity in its normative assumptions, intellectual reflection about the subjective decisions made in selecting and processing data, and prudence when drawing normative conclusions from collected facts.

The third way of relating is to conduct interdisciplinary projects internal to international law. International law projects by themselves are capable of speaking to historians, political scientists, and scholars of international relations. As Jan Klabbers comments, “the best work in international law tends to be individual work that is well-informed about neighboring disciplines, and would be readable and understandable to those neighboring disciplines, and perhaps even contribute something to those disciplines, without however losing its distinctively legal character.”<sup>40</sup> Those works are read as legal works *par excellence*. This raises interesting questions about what constitutes an internal approach to international law and where to draw its disciplinary boundaries. To conduct interdisciplinary projects internal to the discipline of international law would require international lawyers to be open-minded to the social sciences, and more importantly, be able to internalize those neighboring disciplines in the landscape of legal research.

## V. CONCLUSION

What distinguishes international law from domestic law is its constitutive role for international society. International law always points to the future and is an enterprise that constantly aims to transcend the contemporary conditions of human life. International law has constantly been formulated by professionals as a project for social reform. International legal scholarship, the social science approach included, by itself is part of the international lawmaking process.

The legitimacy of international law should not take refuge in objectivity or scientism. The validity of international law may not come from an external verification through economics or sociology. A reductionistic social science approach to international law risks consolidating existing inequalities and imperialistic institutions in the name of objective science. Such an approach may also reduce international law to a set of policy options coded in administrative vocabulary. As international law constantly oscillates between faith, normativity, and theology on the one end and practice, facts, and science on the other, it is

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<sup>39</sup> Early calls for such interdisciplinary collaboration go back to the 1980s. *See, e.g.*, Christopher C. Joyner, *Crossing the Great Divide: Views of a Political Scientist Wandering in the World of International Law*, 81 PROCEEDINGS ANN. MEETING AM. SOC'Y INT'L L. 385 (1987).

<sup>40</sup> Klabbers, *supra* note 36, at 45.



important to steer it as an intellectual space for rational discourse, as well as a political space for progressive social projects.

A healthy interaction between international law and the social sciences requires enriched conceptions of both, as well as a proper perspective on their working relationship. It is important for international law to absorb a social-historical perspective and transform legal scholarship from an authority paradigm to a more socially informed and politically relevant intellectual project.

# Herding Schrödinger's Cats: The Limits of the Social Science Approach to International Law

Simon Chesterman\*

## Abstract

*The struggle to assert the legitimacy and relevance of international law is integral to its story. Among academics, that tale has seen other lawyers question whether it is “really” law, while scholars of international relations have dismissed it in a bemused footnote. Among politicians, the narrative has been one of efforts to establish international law as more than simply one foreign policy justification among others. The turn to social science offers a double remedy: rigorous methods that will earn the respect of the academy while also demonstrating the discipline’s “real world” impact. This is an elegant answer—to the wrong question. For the problems of international law cannot be solved by adopting an “external” and therefore objective or privileged position. International law’s structure and history make academics necessarily participants as well as observers. An uncritical embrace of social science methods risks losing much of what draws people to international law and what has, over the centuries, given it value. As a work in progress in which academics have a special role to play, a commitment merely to take international law “as it is” is not neutral; it is a value statement in itself.*

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## Table of Contents

I. Introduction.....	51
II. The Project of International Law .....	51
III. The View from Below .....	56
IV. About Those Cats.....	57

## I. INTRODUCTION

The subject of international law has always struggled to be taken seriously. Much of that struggle has been over its status as “law,” with H.L.A. Hart among others expressing serious reservations about such a claim.<sup>1</sup> More recently, Anthea Roberts has questioned the extent to which it can be said to be “international,” given divergences in the way it is taught and understood around the world.<sup>2</sup> Now Daniel Abebe, Adam Chilton, and Tom Ginsburg are raising an eyebrow as to whether it even deserves to be considered a “subject” in the academic sense—proposing that this would be bolstered through recognizing and expanding the social science methods described in their Essay. Such an approach will, they argue, produce research that is more “normatively restrained, empirically informed, and more skeptical”<sup>3</sup>—by which they mean “better.”

I will push back against these explicit and implicit claims in two ways.

First, analytically, their Essay and its plan of action misdiagnose the nature of international law scholarship, or a substantial part of it, by embracing the idea of an “external” and therefore objective or privileged position. Without subscribing to the maximalist claim that objectivity itself is impossible, I will argue that international law’s structure and history necessarily make academics participants as well as observers. Second, politically, a wholesale embrace of social science methods would lose much of what draws people to international law and what has, over the centuries, given it value. As a work in progress in which academics have a special role to play, a commitment merely to take international law “as it is” is not neutral; it is a value statement in itself. I will conclude by explaining the somewhat labored metaphor in my title.

## II. THE PROJECT OF INTERNATIONAL LAW

Abebe, Chilton, and Ginsburg’s argument is, at its core, about method. “For over a hundred years,” they observe, “scholars have argued that international law should be studied using a ‘scientific’ approach.”<sup>4</sup> And yet they also observe that the methods that those scholars have used have been, to put it politely, lacking in

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<sup>1</sup> H.L.A. HART, *THE CONCEPT OF LAW* 213–37 (2d ed. 2012) (concluding that international law constitutes a set of rules but not a system of law, as it lacks a basic norm providing general criteria of validity for other norms within that system).

<sup>2</sup> ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?* (2017). A distinct critique is the extent to which non-Western states participated in the development of international law and institutions. See Simon Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 *EUR. J. INT’L L.* 945 (2016).

<sup>3</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 *CHI. J. INT’L L.* 1, 23 (2021).

<sup>4</sup> *Id.* at 1.

scientific rigor. International lawyers invented their own approaches on the fly—not so much methods as sets of “assumptions and theoretical claims.”<sup>5</sup> No wonder, one might draw the conclusion, that two international lawyers routinely find three different answers to a given question. The solution proffered to solve this problem is the tried and tested methods of social science. The authors are modest in their argument but cannot hide their apparent mystification as to why this was not evident to serious researchers up to now.<sup>6</sup>

By social science methods, they mean the formulation of questions, development of hypotheses that can be tested with qualitative or quantitative data, and offering of conclusions while acknowledging underlying assumptions and uncertainty.<sup>7</sup> An important part of their critique is that this should be done in an “external” manner: “that is, an approach that examines the law from outside, seeking to explain how it came to be or what its consequences might be in the real world.”<sup>8</sup>

This is an elegant answer—to the wrong question.

Because international law is *not* like other subjects of social scientific research, for one-and-a-half reasons. The half reason, which is not a compelling one, is that international law—its study and its practice—has always had an undercurrent of idealism. I do not mean idealism in the international relations sense,<sup>9</sup> though the two are connected in that idealism in the theoretical sense underpins a strong vein of international law scholarship. Rather, I mean a more general sense of having an unrealistic belief in, or the pursuit of, perfection. International law and international lawyers have always conflated the “is” and the “ought.”<sup>10</sup> Anyone who has taught international law knows the experience of having to explain to students that “real world” suffering may not be addressed by international law remedies. The maxim “no wrong without a remedy” may be true in the courts of equity, but it holds no water in the International Court of Justice.<sup>11</sup>

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<sup>5</sup> *Id.* at 5, n.14.

<sup>6</sup> See also Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 3 (2012).

<sup>7</sup> Abebe et al., *supra* note 3, at 5.

<sup>8</sup> *Id.*

<sup>9</sup> See generally MARTIN GRIFFITHS, REALISM, IDEALISM AND INTERNATIONAL POLITICS: A REINTERPRETATION (1992).

<sup>10</sup> See, e.g., Andreas Th. Müller, *The Effectiveness-Legitimacy Conundrum in the International Law of State Formation*, in THE NORMATIVE FORCE OF THE FACTUAL: LEGAL PHILOSOPHY BETWEEN IS AND OUGHT 79 (Nicoletta Bersier Ladavac, Christoph Bezemek & Frederick Schauer eds., 2019).

<sup>11</sup> In the domestic context, see, for example, *Leo Feist v. Young*, 138 F.2d 972, 974 (7th Cir. 1943) (citing it as “an elementary maxim of equity jurisprudence”). In international law, by contrast, remedies were long neglected in the literature and the Statute of the International Court of Justice provides little guidance on their application. Ian Brownlie, *Remedies in the International Court of Justice*, in FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 557–58 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996).

As I noted, this is not a good reason, and we academics are not immune to the desire to make international law better. Indeed, it has often encouraged overstretch. To be fair, this has typically been on the progressive side—one need only think of the efforts in the early 1990s that led to the new interventionism that sought to promote human rights through righteous violence.<sup>12</sup> Two problems resulted. First, the deaths of U.S. Rangers in Somalia in 1993 showed the limits of political commitment to such projects—particularly in Africa.<sup>13</sup> Second, international lawyers tied themselves in knots to justify the 1999 Kosovo intervention when there *was* political commitment, but the authorization that would have added legality was not forthcoming.<sup>14</sup> Abebe, Chilton, and Ginsburg quote the infelicitous phrase “illegal but legitimate” to describe this phenomenon, a circumlocutory approach that sought to have its cake and bomb it too.<sup>15</sup>

Another example of idealism is the efforts through that same decade to hold businesses accountable for human rights violations. Coincidentally, my only other article in the *Chicago Journal of International Law* was on this topic, discussing among other things the manner in which activists and scholars sought to take human rights norms applicable to states and extend them to corporations also—essentially through sheer force of will.<sup>16</sup> When John Ruggie criticized the “doctrinal excesses” and “exaggerated legal claims” of such writers,<sup>17</sup> he was accused of attempting to “derail the standard-setting process and bow to the corporate refusal to accept any standards except voluntary codes.”<sup>18</sup>

This may sound like special pleading for international law, and, to some extent, it is. But the better reason for distinguishing international law from other subjects of social scientific research is that academics have always been participants rather than mere observers in our field. This is partly because our subject matter is incomplete; there are lacunae.<sup>19</sup> Indeed, it is sometimes said that

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<sup>12</sup> See generally THE NEW INTERVENTIONISM 1991–1994: UNITED NATIONS EXPERIENCE IN CAMBODIA, FORMER YUGOSLAVIA AND SOMALIA (James Mayall ed., 1996).

<sup>13</sup> See, e.g., Thomas G. Weiss, *Overcoming the Somalia Syndrome—“Operation Rekindle Hope?”*, 1 GLOB. GOVERNANCE 171 (1995).

<sup>14</sup> See SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 211–18 (2001) and sources there cited.

<sup>15</sup> INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, THE KOSOVO REPORT 4 (2000), <https://perma.cc/35FG-5XG4>.

<sup>16</sup> Simon Chesterman, *Lawyers, Guns, and Money: The Governance of Business Activities in Conflict Zones*, 11 CHI. J. INT’L L. 321, 327 (2011).

<sup>17</sup> John Gerard Ruggie, Special Representative, Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, UN Doc. E/CN.4/2006/97 (Feb. 22, 2006), ¶ 59.

<sup>18</sup> David Weissbrodt, *International Standard-Setting on the Human Rights Responsibilities of Business*, 26 BERKELEY J. INT’L L. 373, 390 (2008).

<sup>19</sup> See, e.g., Prosper Weil, “*The Court Cannot Conclude Definitively . . .*” Non Liqueur Revisited, 36 COLUM. J. TRANSNAT’L L. 109 (1998).

the relationship between international law and law is similar to that between Swiss cheese and regular cheese—similar in substance, but a lot more holes.

More seriously, international law is very unlike domestic law in two ways. Structurally, domestic law can be thought of as having a vertical relationship between sovereign and subject; international law operates—at least theoretically—in a realm where states exist in a horizontal plane of sovereign equality.<sup>20</sup> As a result, a great many substantive international legal questions are left without conclusive answers. Is humanitarian intervention permissible? What is the legal status of Taiwan, of Kosovo, of Palestine? The International Court of Justice (ICJ), tasked with giving answers, often dodges them. When asked for an advisory opinion on the secession of Kosovo from Serbia, for example, it neatly answered a different and far less controversial question.<sup>21</sup> Even when the ICJ does give answers, they may be contradictory. Within the space of three years, for example, it concluded that Serbia both was<sup>22</sup> and was not<sup>23</sup> the successor state to the Socialist Federal Republic of Yugoslavia for the purposes of ICJ Jurisdiction.

Nature and the academy abhor a vacuum, so academics fill this uncertainty. There is, as we know, a normative basis for this. The ICJ Statute itself lists as a subsidiary source of law “the teachings of the most highly qualified publicists of the various nations.”<sup>24</sup> From Grotius’s battle of the books to modern lawfare,<sup>25</sup> international law has always provided scope for academics to be advocates as well as analysts.

The position articulated here is an unashamedly *internal* view of the discipline. Abebe, Chilton, and Ginsburg allow for this, noting that internal scholarship has played a “particularly prominent”—*surprisingly* prominent, they seem to mean—role.<sup>26</sup> But their call to abandon labels and to avoid “committing oneself to any

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<sup>20</sup> See generally Simon Chesterman, *An International Rule of Law?*, 56 AM. J. COMP. L. 331 (2008).

<sup>21</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, 2010 I.C.J. Rep. 403 (July 22). Instead of addressing the matter of Kosovo’s asserted independence, the Court chose to focus on the legal significance of its *declaration* of independence, concluding that international law has no prohibitions on such declarations—and leaving unanswered the question of whether the declaration had any legal effect.

<sup>22</sup> Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. and Herz. v. Serb. and Montenegro), Judgment, 2007 I.C.J. Rep. 43 (Feb. 26).

<sup>23</sup> Legality of the Use of Force (Serb. and Montenegro v. U.K.), Judgment, 2004 I.C.J. Rep. 1307 (Dec. 15).

<sup>24</sup> Statute of the International Court of Justice, June 26, 1945, 33 U.N.T.S. 933 art. 38(1)(d). And just as ninety percent of faculty members generally regard themselves as “above average” teachers, few international law professors would put themselves outside the group of “most highly qualified publicists.” See K. Patricia Cross, *Not Can, But Will College Teaching Be Improved?*, 17 NEW DIRECTIONS HIGHER EDUC. 1, 1 (1977).

<sup>25</sup> ORDE F. KITTRIE, *LAWFARE: LAW AS A WEAPON OF WAR* (2016).

<sup>26</sup> Abebe et al., *supra* note 3, at 17.

assumptions, theories, or philosophies beyond those required of any other social science researcher<sup>27</sup> presumes the ability to be a truly *external* observer. Some postmodernists and poststructuralists have made the strong claim that this is impossible in any circumstance.<sup>28</sup> Here, I will confine myself to the more modest claim that, in the context of international law, the role that academics have played, and continue to play, in constructing the discourse makes that dispassionate and disinterested claim dubious.

Abebe, Chilton, and Ginsburg are, of course, aware of all this. Indeed, one of the two key influences on international law scholarship that they highlight is the impact of “real-world problems” on the work done by academics. What I think they underestimate is the converse: the impact of academia itself on the real world of international law.

This is not to say that the influence of academics has been uniformly positive. It is sometimes naïve, often misguided, and too frequently patronizing or colonial in its approach to helping “the other.”<sup>29</sup> Sometimes, as at the ICJ,<sup>30</sup> the contradictions are laid bare: those who supported unilateral humanitarian intervention in Kosovo in 1999, for example, struggled to oppose intervention in Iraq a few years later—and bristled when Russia invoked the same arguments more recently in Crimea.<sup>31</sup> Perhaps that is why humanitarian intervention has always been more popular among academics than states.<sup>32</sup>

Yet, it is hard to deny that academics in international law have had and continue to have an impact on their subject that is qualitatively different from other fields of social science. Human rights, international humanitarian law, the very word “genocide,”<sup>33</sup> the one true faith of global administrative law<sup>34</sup>—all are examples of the observer turning participant. All are attributable to the work of academics not just documenting but creating the path of international law.

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<sup>27</sup> *Id.* at 6.

<sup>28</sup> See, e.g., COLIN DAVIS, *AFTER POSTSTRUCTURALISM: READING, STORIES, THEORY* (2003).

<sup>29</sup> See, e.g., MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960* (2001); ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005).

<sup>30</sup> See *supra* notes 22–23.

<sup>31</sup> JUAN FRANCISCO ESCUDERO ESPINOSA, *SELF-DETERMINATION AND HUMANITARIAN SECESSION IN INTERNATIONAL LAW OF A GLOBALIZED WORLD: KOSOVO V. CRIMEA 1* (2017).

<sup>32</sup> See Simon Chesterman, “*Leading from Behind*”: *The Responsibility to Protect, the Obama Doctrine, and Humanitarian Intervention After Libya*, 25 *ETHICS & INT’L AFF.* 279–85 (2011).

<sup>33</sup> WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIMES OF CRIMES 25* (2000).

<sup>34</sup> Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *L. & CONTEMP. PROBS.* 15 (2005).



### III. THE VIEW FROM BELOW

A second reason to push back against this social science manifesto is that, in addition to being analytically questionable, it is normatively undesirable. Politically, the project of international law remains unfinished.

If Oppenheim had been successful in his call for international lawyers to embrace a scientific method a century ago, few of the advances mentioned in the previous section would have happened. Oppenheim acknowledged, of course, that international law was a work in progress, that it was necessary for writers, “and in especial the authors of treatises, . . . to take the place of the judges and have to pronounce whether there is an established custom or not, whether there is a usage only in contradistinction to a custom, whether a recognized usage has now ripened into a custom, and the like.”<sup>35</sup> But there were limits: “the international jurist must not walk in the clouds; he [sic] must remain on the ground of what is realizable and tangible. It is better for international law to remain stationary than to fall in the hands of the impetuous and hot-headed reformer.”<sup>36</sup>

Abebe, Chilton, and Ginsburg are aware of this as well; they give feminism and Third World approaches to international law an entire paragraph each.<sup>37</sup> They might respond that these are simply different projects: I am writing from an unashamedly “internal” angle; their approach is “external.” But the permeability of these borders is important.

The social scientist, Abebe, Chilton, and Ginsburg argue, is “engaged in a positivist enterprise of trying to describe the world as it is, rather than how it should be.”<sup>38</sup> Taking international law “as it is” is a normative position, however—and in a way different from the maximalist claim that that is true of everything in the world. The reason is that the international law academic—more, I would argue, than perhaps any other discipline—has the potential to affect the subject matter of his or her study. We are not scientists merely observing the phenomena around us. When U.S. Chief Justice John Roberts claimed in his confirmation hearings that his job was merely “to call balls and strikes,”<sup>39</sup> knowing pundits rolled their eyes. No ICJ judge would be foolish enough to make such a sporting analogy. Or if they did, they would at least concede that their role might well be to call balls and strikes—after they have negotiated where the strike zone was going to be on that particular day.

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<sup>35</sup> L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT'L L. 313, 315 (1908).

<sup>36</sup> *Id.* at 318.

<sup>37</sup> Abebe et al., *supra* note 3, at 13–14.

<sup>38</sup> *Id.* at 19.

<sup>39</sup> *I Come Before the Committee with No Agenda. I Have No Platform*, N.Y. TIMES (Sept. 13, 2005), <https://perma.cc/L6EL-C5KX>.

Assuming or stipulating a measure of objectivity does not dispense with partiality and partisanship; it merely masks it. That does not mean that the impact of the academic—or the judge—need be nefarious. It does not even mean that they will have an impact at all. But they can, and sometimes they will. Being open about that impact and responsibility does not guarantee that the project of international law will be a liberating one. Hopefully, however, it reduces the likelihood that international law will be frozen in time, limiting thereby the voices that can be heard and the emancipatory projects that remain unfinished.

#### IV. ABOUT THOSE CATS

Which brings me, finally, to the labored double metaphor of my title.

“Herding cats” is, of course, the adage that points to the difficulty—some would say the futility—of controlling or organizing entities that are inherently uncontrollable.<sup>40</sup> States are, manifestly, not cats. But, like cats, their respect for authority is episodic at best; when they do not get their way, they may hiss, spit, or draw their claws. Various international relations theorists have drawn on this analogy to describe what Hedley Bull termed the “anarchical society.”<sup>41</sup>

Schrödinger, in turn, is a reference to the famous thought experiment in which a cat—somehow having been herded into a box—can be both alive *and* dead, due to its fate being tied to a random subatomic event. Only when the box is opened will the cat’s fate be revealed or resolved.<sup>42</sup> It should be stressed that Erwin Schrödinger intended this as a joke to demonstrate the absurdity of quantum dynamics in the 1930s. Nonetheless, it has come to be taken more seriously as illustrating that some phenomena only exist in any meaningful sense when they are observed.

In the same way, the status of many international legal questions—more so, I would argue, than most phenomena, including human phenomena—remain ambiguous until they are studied. Indeed, some would argue that they can remain ambiguous. The late, great Tom Franck, writing on the question of humanitarian intervention, once observed that sometimes such conduct is lawful, sometimes it isn’t, “and sometimes it both is and isn’t.”<sup>43</sup> I happen to disagree with Tom about

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<sup>40</sup> Cf. HERDING CATS: MULTIPARTY MEDIATION IN A COMPLEX WORLD (Chester A. Crocker, Fen Osler Hampson & Pamela R. Aall eds., 1999).

<sup>41</sup> HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (4th ed. 2012).

<sup>42</sup> John D. Trimmer, *The Present Situation in Quantum Mechanics: A Translation of Schrödinger's "Cat Paradox" Paper*, 124 PROC. AM. PHIL. SOC'Y 323 (1980).

<sup>43</sup> Thomas M. Franck, *Interpretation and Change in the Law of Humanitarian Intervention*, in HUMANITARIAN INTERVENTION: ETHICAL, LEGAL AND POLITICAL DILEMMAS 204, 204 (J.L. Holzgrefe & Robert O. Keohane eds., 2003).

that one,<sup>44</sup> but his point about legal indeterminacy—the lacunae of which I spoke earlier<sup>45</sup>—runs through much of modern international law.

This, then, is the more serious criticism of the turn to empiricism in international legal scholarship, exemplified by this symposium: that it risks reducing some of the most interesting questions to yes and no answers, or to problems of coding. The Lead Essay essentially concedes this, with the example of ongoing debates over the effectiveness of international human rights agreements.<sup>46</sup> Despite using “similar data,” different conclusions are reached—though there is said to be agreement that “social science should be the way that debate is resolved.”<sup>47</sup> As those methods become more sophisticated and opaque—as we move from regression analyses to machine learning and artificial intelligence—we are beginning to see the limits of such approaches, at least in relation to inherently contested areas of life, like law in general and international law in particular.<sup>48</sup> Such approaches are useful and effective when “facts [can be] ascertained”<sup>49</sup> and when it is possible to maintain an aversion to “normative commitments.”<sup>50</sup> But if one concedes that, for most of the most interesting questions in international law, facts are contested and determining norms is half the game—if one concedes that the cat could be either alive *or* dead *or* somewhere in between—then social science methods alone may not be the answer.

To their credit, Abebe, Chilton, and Ginsburg do not claim theirs is the best or the only valid approach to researching international law. Their aim is to “build bridges” between the practice of international law, legal academy, and social science departments. Without wanting to wholly align myself with the “critical” school as discussed in their article, an *uncritical* acceptance of these methods risks building a bridge to nowhere.

To end where I began, the subject of international law itself has always been ambivalent about its own status. I struggle to think of a discipline that has spent so much time and ink agonizing over the very words that should define it. The debate we are having is therefore as familiar as it is healthy. Moving forward, I fully expect to see more work taking up Abebe, Chilton, and Ginsburg’s invitation to bring a social science approach to the study of international law.

And I, for one, look forward to fighting against it.

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<sup>44</sup> CHESTERMAN, *supra* note 14.

<sup>45</sup> See Weil, *supra* note 19.

<sup>46</sup> See, e.g., BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009); ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW (2014).

<sup>47</sup> Abebe et al., *supra* note 3, at 21.

<sup>48</sup> See SIMON CHESTERMAN, WE, THE ROBOTS?: REGULATING ARTIFICIAL INTELLIGENCE AND THE LIMITS OF THE LAW (2021).

<sup>49</sup> Abebe et al., *supra* note 3, at 20.

<sup>50</sup> *Id.*

# China and Comparative International Law: Between Social Science and Critique

Matthew S. Erie\*

## Abstract

*This Essay brings Abebe, Chilton, and Ginsburg's Lead Essay into conversation with the literature on comparative international law to ask whether the social scientific approach to international law is "international." In particular, this Essay takes the case of scholarship on international law in China to examine why or why not particular methodological and theoretical perspectives on international law may gain traction in certain jurisdictions' legal academies. There are a number of linguistic, pedagogic, institutional, and, ultimately, political reasons why the Chinese scholarship that uses social science to understand international law is still nascent. At the same time, critical approaches to international law in the Chinese literature are ascendant. This Essay explains these divergent trends through a sociology of knowledge lens and offers provisional thoughts about future trajectories for the study of international law in a period during which China's influence on the international system will most likely grow.*

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## Table of Contents

I. Introduction.....	61
II. A Thumbnail History of Chinese International Law Scholarship .....	63
A. Real-World Problems.....	63
B. Trends in the Academy .....	64
III. Probing the Double Firewall.....	68
IV. Conclusion.....	70

## I. INTRODUCTION

Is the social scientific approach to international law “international?” This Essay brings some of the findings of Abebe, Chilton, and Ginsburg’s *The Social Science Approach to International Law* into conversation with the literature on “comparative international law.”<sup>1</sup> Specifically, I do so through the case of China, a country poised to shape international law and global governance,<sup>2</sup> to inquire whether the social science approach has gained traction in the Chinese legal academy. The short answer is “not yet.” The longer answer, and particularly, *why* there may not be a parallel “social scientific” turn in Chinese scholarship on international law, however, opens up a number of important questions about the relationship between international law, academic knowledge production, and ascendant non-democratic states, that may shed light on possible future trajectories of international law and its study.

A few caveats: first, this Essay is not directed toward making normative claims about the social scientific turn in international legal scholarship; rather, it is an exercise in comparison between perspectives on international law. Second, due to space constraints, this Essay is not a literature review; I merely flag major trends which will hopefully mark out new terrain that can be further explored through subsequent empirical, contextual, and historiographical studies. Third, my focus is on the scholarship of mainland China (i.e., the People’s Republic of China or PRC) and not that of Hong Kong, Taiwan, or the Chinese diaspora.

To help frame this Essay and its orientation, I open with an exchange between the Party-State and the Chinese legal academy, a relationship that lies at the heart of understanding why and how Chinese scholarship on international law assumes the forms it does. In 2017, Chinese Communist Party (CCP) General Secretary and President of the PRC Xi Jinping made a high-profile visit to the China University of Political Science and Law (CUPL) on its sixty-fifth anniversary.<sup>3</sup> He met with senior legal academics and made a speech during which he exhorted the students to contribute to building “global rule of law” (*shijie fazhi*).<sup>4</sup> Reciprocally, Professor Huang Jin, Vice Dean of CUPL, has proposed that

<sup>1</sup> See generally Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 BROOK. J. INT’L L. 385, 387 (2011); ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); ANTHEA ROBERTS ET AL., COMPARATIVE INTERNATIONAL LAW (2018).

<sup>2</sup> See, e.g., He Zhipeng (何志鹏), *Guojifa de Zhongguo lilun (国际法的中国理论)* [A Chinese Theory of International Law] (2017).

<sup>3</sup> Zhongyang xinwen gongzhonghao (中央新闻公众号) [Central Television Public No.], Xi Jinping wusi qianxi kaocha Zhongguo Zhengfa Daxue hua qingchun tan chuxin jiang fazhi (习近平五四前夕考察中国政法大学) [Xi Jinping Visited China University of Political Science and Law on the Eve of the May Fourth Movement to Discuss Youth, Aspiration, and Rule of Law], XINLANG CAIJING (新浪财经) [SINA FINANCE] (May 3, 2017), <https://perma.cc/93VN-QSQK>.

<sup>4</sup> Zhongyang xinwen gongzhonghao (中央新闻公众号) [Central Television Public No.], *supra* note 3.

international law be elevated to a “first-level academic discipline” (*yiji xueke*) in China, effectively calling for a greater standing of international law scholars in the Chinese academy.<sup>5</sup> Professor Huang is also one of the main advocates of Xi Jinping Thought as applied to international law.<sup>6</sup>

The picture that emerges from this exchange is that the Party-State and international law scholars mutually access each other for their own benefit. The former obtains expert commentary which is aligned with its political and geostrategic aims. The latter earns access to data and government funding. This relationship of mutual access is not unique to China and may be found in more muted forms in the United States and elsewhere.<sup>7</sup> Further, it is important to note that not all Chinese legal academics speak with the same voice, and there is a diversity of views and intellectual debates.<sup>8</sup>

Nonetheless, Chinese legal scholars operate within a certain set of parameters largely shaped by the Party-State. As a result of this restriction and other factors, the social scientific approach has not earned a following in Chinese international law studies; however, where the Chinese legal scholarship has been very active is in producing critical views of international law. Critical orientations hold that international law is a product of Western states and mostly hegemonic; as part of China’s global expansion, it is the task of international law scholars to articulate new rules in line with China’s interests.

In this Essay, I use, broadly, a sociology of knowledge lens to explain why there has (or has not) been cross-fertilization between the Anglophone and Sinophone scholarship regarding certain approaches to international law. My focus is not just to draw attention to the absence of a given approach, but to also underscore which approaches are flourishing in Chinese legal scholarship. The structure of this Essay mirrors that of Abebe, Chilton, and Ginsburg’s Essay and proceeds with, first, a thumbnail history of China and international law scholarship, including a concern with practical issues and how international law scholarship reflects trends in the academy. As part of these trends, I highlight critical approaches to international law. I then explain the divergence between the

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<sup>5</sup> Huang Jin (黄进), *Ruhe jiaqiang waifazhi rencai peiyang* (如何加强涉外法治人才培养) [How to Strengthen the Training of Personal for Foreign-Related Law], *ZHONGGUO LÜSHI WANG* (中国律师网) [CHINA LAWYERS NET] (Nov. 22, 2019), <https://perma.cc/5EFJ-HDCD>.

<sup>6</sup> Li Weihong (李伟红) et al., *Zhongguo wei guojifa de chuangxin fazhan zuochu zhongyao gongxian* (中国为国际法的创新发展作出重要贡献) [China Has Made Important Contributions to the Innovation and Development of International Law] *RENMIN RIBAO* (人民日报) [PEOPLE’S DAILY] (Apr. 17, 2019), <https://perma.cc/Z8FL-SQ5Q> (quoting Professor Huang as saying Xi Jinping’s concept of “a community with a shared future for mankind” is a “new contribution to global governance and the international rule of law”).

<sup>7</sup> *See generally* David W. Kennedy, *A New Stream of International Law Scholarship*, 7 *WIS. INT’L L. J.* 1 (1988).

<sup>8</sup> *See generally* SAMULI SEPPÄNEN, *IDEOLOGICAL CONFLICT AND THE RULE OF LAW IN CONTEMPORARY CHINA: USEFUL PARADOXES* (2016).

relative nascence of social scientific approaches and critical ones and offer concluding thoughts about future directions.

## II. A THUMBNAIL HISTORY OF CHINESE INTERNATIONAL LAW SCHOLARSHIP

One of the foundational insights of comparative international law scholarship is that scholars in any given country may have particular ways of conceptualizing international law given that country's historical position in the international system.<sup>9</sup> The social scientific approach to international law appears to have a particular provenance, specifically, that of European and American legal scholars during the long twentieth-century, a period during which those same powers effectively built the modern international legal order. Abebe, Chilton, and Ginsburg begin their Essay with Lassa Oppenheim's *The Science of International Law: Its Tasks and Methods*, which the German jurist published in 1908, calling for a scientific approach to international law.<sup>10</sup> The contemporaneous scholarship in China shows a different picture.

### A. Real-World Problems

In 1908, the Qing dynasty was in decline and collapsed three years later. Despite or because of the political and economic tumult, this period witnessed the genesis of international law scholarship in China.<sup>11</sup> It was China's rough entry into the international law system through the "unequal treaties" signed with the United Kingdom and other states that accelerated its study of international law.<sup>12</sup> The kinds of real-world problems Chinese jurists faced were existential (e.g., foreign extraterritoriality, sovereign integrity, regime survival, economic modernization, etc.), and the result was that core ideas of international law entered Chinese lexicon.<sup>13</sup> Shen Jiaben, the Head of the Bureau of the Revision of Qing Law, was one of these early architects for constructing a new legal order in China, one commensurate with that of states beyond China.<sup>14</sup> Charged with systematizing Qing law and translating foreign law, Shen, it should be noted, advocated not

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<sup>9</sup> See ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL?, *supra* note 1, at 7.

<sup>10</sup> Lassa Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT'L. L. 313, 313–14 (1908).

<sup>11</sup> Suzanne Ogden, *Sovereignty and International Law: The Perspective of the People's Republic of China*, 7 NYU J. INT'L L. & POL. 1, 3–6 (1974).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> Matthew S. Erie, *Custom in the Archive: The Birth of Modern Chinese Law at the End of Empire*, in EMPIRE AND THE SOCIAL SCIENCES: GLOBAL HISTORIES OF KNOWLEDGE 93, 100 (Jeremy Adelman ed., 2019).



science as the method for studying international law, but rather classical Chinese textual analysis (*kaojin*).<sup>15</sup>

Following nearly half a century of relative isolationism, it was not until the 1970s that modern China, the PRC, began integrating into the international legal order. The PRC joined the United Nations in 1971, began signing bilateral investment treaties with other states, and acceded to the World Trade Organization in 2001.<sup>16</sup> In the early 2000s, China, while still the major capital importer in the world, made a shift to becoming one of the largest capital exporters globally, a transformation that has raised a host of international law issues. These include private international law issues in the course of Chinese companies conduct of cross-border business, sovereign immunity for Chinese state-owned enterprises, the resolution of commercial and state-investor disputes, maritime and territorial conflicts, scrutiny of China's human rights record, and so on. These issues can be roughly grouped into three major categories of interests: economic (i.e., international business), security (e.g., territorial integrity), and world opinion (i.e., naming and shaming). Xi Jinping has called for the growth of international legal studies in China to confront these challenges.<sup>17</sup>

## B. Trends in the Academy

The Chinese academy operates in a certain relationship to the Party-State, one in which the nexus between power and knowledge is regnant. From the 1980s on, there has been increasing intellectual exchange between Chinese scholars and their foreign colleagues. Since roughly 2013 when Xi Jinping assumed leadership of the CCP, there has been a blowback against so-called “Western values,” including such legal principles as judicial independence and liberal rule of law.<sup>18</sup> Whereas there is a plurality of views within the Chinese legal academy, such views are ring-fenced by the lack of academic freedom in the country. The study of international law is no exception; scholarship must be “useful” to the Party-State to garner state patronage, which is a prerequisite for funding, publishing, and policy impact.

At a general level, mainstream Chinese legal scholarship has oscillated between two poles: Marxist legal theory and civil law doctrinalism. Marxist legal

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<sup>15</sup> *Id.* at 101.

<sup>16</sup> Jacques deLisle, *China's Approach to International Law: A Historical Perspective*, 94 PROC. OF THE ANN. MEETING (AM. SOC'Y OF INT'L L.) 267, 272–75 (2000); Jerome A. Cohen, *Law and Power in China's International Relations*, 52 N.Y.U. J. INT'L L. & POL. 124, 125–29 (2019).

<sup>17</sup> Jun Mai, *Xi Jinping Says China Has a Legal Problem: Finding the Lawyers to Defend Its Interests Abroad*, S. CHINA MORNING POST (Mar. 1, 2021), <https://perma.cc/AM6S-T5B3>.

<sup>18</sup> Zhou Qiang (周强), Yao ganyu xiang xifang cuowu sichao lingjian (要敢于向西方错误思潮亮剑) [Dare to Bear a Bright Sword Against the Errant Thoughts of the West], ZHONGGUO XINWEN WANG (中国新闻网) [CHINA NEWS NET] (Jan. 14, 2017), <https://perma.cc/567R-LJE6>.

theory has undergone its own shifts, from extremist strains in the violent 1960s (“all law is bourgeois law”) to more nuanced materialist analyses in the 1980s and 1990s as China began economic liberalization. For Chinese scholars, Marxist theory was a “social scientific” mode of analysis, applying basic principles (i.e., productive “base” as determinative of the “superstructure” law) to build legal institutions. Textbooks and teaching materials in PRC law schools have emphasized such approaches.<sup>19</sup> Starting in the 1990s, Chinese law professors began pushing back on Marxist legal theory and started integrating more civil law positivism into their research and teaching.<sup>20</sup> During this period, more Chinese scholars studied abroad in Europe and turned to statutory analysis akin to what John Henry Merryman and Rogelio Pérez-Perdomo called “legal science.”<sup>21</sup> Chinese legal scholarship shared affinities with Hans Kelsen’s *Pure Theory of Law*—that is, contrary to the Marxist view, law was divorced from such extra-legal forces as politics. The depoliticization of legal scholarship was equally a conscious decision to, as much as possible, sidestep the fraught knowledge-power relationship. Since Xi has been in power, the pendulum has swung back toward Marxist theory.<sup>22</sup>

The above is a generalization only, but these two oscillating points have left little room for other approaches to law, including those of the contemporary social sciences (i.e., sociology, anthropology, political science, non-Marxist economics, etc.). Yet, there have been strands of social scientific thought that have permeated the Chinese legal academy as applied to domestic law, in particular, jurisprudence (*falixue*), criminal procedure, and civil procedure.<sup>23</sup> Professor Bai Jianjun of Peking University was an early outlier, building datasets and using statistical methods to

<sup>19</sup> See, e.g., Falixue Bianxuezu (法理学编学组) [Jurisprudence Editorial Group], *Makesizhuyi lilun yanjiu he jianshe gongcheng zhongdian jiaocai* (马克思主义理论研究何建设工程重点教材) [Key Teaching Materials for Marxist Legal Theory Research and the Construction Project [of Building a Marxist Society]] (2012).

<sup>20</sup> Lei Lei (雷磊), *Fajiaoyixue yu fazhi: fajiaoyixue de falixue yiyi* (法教义学与法治：法教义学的治理意义) [Legal Doctrinalism and Rule of Law: The Governance Significance of Legal Doctrinalism], 40 *FAXUE YANJIU* (法学研究) [JURISPRUDENCE RESEARCH] 58 (2018); Jiao Baoqian (焦宝乾) *Fajiaoyixue zai Zhongguo: Yige xueshu shi de gailan* (法教义学在中国：一个学术史的概览) [Legal Doctrinalism in China: An Academic History Overview], 3 *FAZHI YANJIU* (法治研究) [RULE OF LAW RESEARCH] 48 (2016).

<sup>21</sup> JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 61–67 (4th ed. 2019).

<sup>22</sup> See, e.g., Jiang Shigong (强世功), *Dangzhang yu xianfa: Duoyuan yiti fazhi gongheguo de jiangou* (党章与宪法：多元一体法治共和国的建构) [Party Constitution and State Constitution: Constructing the Republic through Diversity-in-Unity Rule by Law], 4 *WENHUA ZONGHENG* (文化纵横) [CULTURAL TRAVERSE] 18 (2015).

<sup>23</sup> See Sida Liu & Zhihou Wang, *The Fall and Rise of Law and Social Science in China*, 11 *ANN. REV. L. SOC. SCI.* 373 (2015) (providing a history of social scientific approaches to domestic law in China).

test hypotheses since the early 1990s.<sup>24</sup> Today, a number of scholars apply “law and society” approaches, including Professors Zhu Suli, Zhu Jingwen, Ji Weidong, Zhao Xudong, Wang Qiliang, and many others. There has been some institutional support in the form of academic journals, for example, *Law and Social Sciences* (*Falü he Shehuikexue*) and academic research groups like the Law and Social Science Research Center (*Falü yu shehui kexue keyanjiu zhongxin*) at Renmin University, the Interdisciplinary Legal Studies Academy (*Jiaocha faxue xueyuan*) at the China–EU School of Law at CUPL, and the China Institute for Socio-Legal Studies (*Zhongguofa yu shehui yanjiuyuan*) at Shanghai Jiaotong University’s Koguan Law School.

Strikingly, however, these approaches have largely not influenced the study of international law in China. One distinction to note is that, traditionally, scholars who focus on public international law and those who specialize in private international law operate in their own spheres of activity, with limited interaction. So, while it is important to distinguish between the two branches of international law, neither has been particularly receptive to the social sciences, although there has been more engagement with empirical legal studies on the side of private international law scholars as they tend to have more interaction with non-Chinese scholars. A number of Chinese legal scholars have lamented the “theoretical impoverishment” of Chinese international law scholarship.<sup>25</sup> These scholars have bemoaned the traditional focus on normative interpretation and logical reasoning of international law rules without grasping the fundamental nature of international law and its multi-faceted effects in the international system. Of the “methods” identified by Professors Steven Ratner and Anne-Marie Slaughter in their 1999 piece *Appraising the Methods of International Law: A Prospectus for Readers*,<sup>26</sup> only some have taken root in Chinese soil. The New Haven School,<sup>27</sup> critical legal studies,<sup>28</sup>

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<sup>24</sup> Bai Jianjun (白建军), *Cong Zhongguo fazui lü shuju kan zui yin, zuixing yu xingfa de guanxi* (从中国犯罪率数据看罪因、罪行与刑罚的关系) [The Relationship among Criminal Charges, Crime, and Penalties: A Perspective Based on China’s Crime Rate Statistics] 2 *ZHONGGUO SHEHUI KEXUE* (中国社会科学) [SOCIAL SCIENCES IN CHINA] 144 (2010) (using multiple databases, including a longitudinal database of nation-wide crime rates in China from 1988–2007).

<sup>25</sup> Jun Zhao (俊赵), *Xueke jiaocha shijiao xia guojifa yanjiu* (学科交叉视角下的国际法研究) [International Law Research from the Interdisciplinary Perspective], *GUANGMING RIBAO* (光明日报) [BRIGHT DAILY] (July 9, 2017), <https://perma.cc/53VA-SJBL> (bemoaning Chinese international law scholarship’s *lilun pinkunhua* (theoretical impoverishment)); see also Li Ming (李鸣), *Guojifa de xingzhi ji zuoyong: Pipan guojifa de fansi* (国际法的形式及作用：批判国际法的反思) [The Form and Function of International Law: A Reappraisal of Critical International Law], 3 *ZHONGWAI FAXUE* (中外法学) [SINO-FOREIGN LEGAL STUDIES] 801, 817 (2020).

<sup>26</sup> See Abebe et al., *The Social Science Approach to International Law*, 22 *CHI. J. INT’L L.* 1, 3 (citing Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 *AM. J. INT’L L.* 291 (1999)).

<sup>27</sup> Wang Guiguo, *The New Haven School of Legal Theory from the Perspective of Traditional Chinese Culture*, 20 *ASIA PAC. L. REV.* 211, 212 (2012).

<sup>28</sup> See, e.g., Li, *supra* note 25.

and Third World Approaches to International Law<sup>29</sup> have their adherents in China but have mainly not entered the academic mainstream. Law and economics, however, has gained much more traction.<sup>30</sup> The determining factor in the relative success of such “methods”<sup>31</sup> seems to be the ability of the pioneers of these approaches to steer the scholarship toward the developmental aims of the Party-State.

Social scientific approaches have gained some measure of currency in the policy areas identified above: economic, security, and world opinion interests.<sup>32</sup> There are a number of notable examples. Perhaps the most amount of empirical work has been done on issues that touch on China’s economic interests; for instance, research has been conducted on investment law, including the legal risks in Chinese enterprises’ outbound investment strategies,<sup>33</sup> and the enforcement of foreign judgments in PRC courts.<sup>34</sup> In the category of security interests, there have been a number of studies on arbitration under the United Nations Convention on the Law of the Sea (UNCLOS).<sup>35</sup> As to world opinion, Chinese scholars have made particular efforts in the area of human rights law.<sup>36</sup> So while there have been some advancements made in introducing social scientific approaches to international law, compared to the English-language literature, the methodological

<sup>29</sup> See, e.g., Li Hongfeng (李洪峰), *Lun guojifa disanshijie fangfa de pipanxing* (论国际法第三世界方法的批判性) [Discussion of TWAAIL], 65 SHEHUI KEXUEJIA (社会科学家) [SOCIAL SCIENTIST] 88 (2011).

<sup>30</sup> See, e.g., CHINA UNIVERSITY OF POLITICAL SCIENCE AND LAW, SCHOOL OF LAW AND ECONOMICS (Fa yu jingji yanjiuyuan), <https://perma.cc/BD2F-9QA8>.

<sup>31</sup> See Abebe et al., *supra* note 26, at 3 (citing Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 3 (2012) (noting that the “methods” are really mainly theoretical and analytical projects and not methods in the social scientific sense)).

<sup>32</sup> See *supra* Section II.A.

<sup>33</sup> See, e.g., Wang Xiaofeng (王晓峰) & Wang Linbin (王林彬), *Zhongguo zai zhongya zhijie touzi suo mianlin de falü jiqi fengxian tantao – yi Hasakesitan gongheguo wei li* (中国在中亚直接投资所面临的法律及其风险探讨—以哈萨克斯坦共和国为例) [Discussion of the Laws and Risks Faced by Chinese Direct Investment in Central Asia: Taking the Republic of Kazakhstan as an Example], 85 JIANGXI CAIJING DAXUE XUEBAO (江西财经大学学报) [JOURNAL OF JIANGXI UNIVERSITY OF FINANCE & ECONOMICS] 113 (2013).

<sup>34</sup> See, e.g., He Qisheng (何其生), *Guoji shangshi zhongcai sifa shencha zhong de gonggong zhengce* (国际商事仲裁司法审查中的公共政策) [Public Policy in Judicial Review of International Commercial Arbitration], 7 ZHONGGUO SHEHUI KEXUE (中国社会科学) [CHINA SOCIAL SCIENCE] 143 (2014).

<sup>35</sup> See, e.g., GAO JIANJUN (高健军), *Lianheguo haiyangfa gongyue xiang xia zhongcai chengxu guize yanjiu* (联合国海洋法公约：向下仲裁程序规则研究) [RESEARCH ON ARBITRATION PROCEDURAL RULES UNDER THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA] (2020).

<sup>36</sup> See, e.g., Zhao Shukun (赵树坤) & Mao Kui (毛奎), *Zhongguo renquan yanjiu de zhutixing juexing yu xingsi: 1978–2018* (中国人权研究的主体性觉醒与省思: 1978–2018) [The Realization of the Centrality of Chinese Human Rights Research: 1978–2018], 1 HUADONG ZHENGFA DAXUE XUEBAO (华东政法大学学报) [EAST NORMAL POLITICS AND LAW UNIVERSITY JOURNAL] 103, 103 (2019) (calling for greater use of social scientific approaches to studying human rights).

rigor of Chinese empirical studies of international law may be less widespread and more diluted.

Abebe, Chilton, and Ginsburg juxtapose social scientific approaches to international law with critical ones. While this distinction may be less clear in practice, Chinese scholarship on international law has certainly gravitated toward the critical. A number of scholars and jurists have produced works that assume a strongly normative position regarding the origins, framework, and operation of international law.<sup>37</sup> While it is difficult to generalize about this diverse body of scholarship, the authors share, to varying degrees, the view that aspects of international law are created by Western liberal states and are hegemonic. Many of these works seek to counter such Western-led (and primarily U.S.-driven) hegemony by greater influence from China. These works may dovetail with Marxism, critical legal studies, or TWAIL schools, but they more often rely on certain culturalist assumptions about “China” (the Chinese state, Chinese culture, “the Chinese people,” and/or Chinese civilization). “China” stands for a presence in international law that promotes non-intervention, is consensual and harmonious, is friendly to the interests of developing countries, and prefers such methods of dispute resolution as mediation over litigation. The critical approach does not, for the most part, employ empirical methods, and so there is a divergence between the critical and social scientific views in the Chinese scholarship.

### III. PROBING THE DOUBLE FIREWALL

One way to understand this divergence is with reference to the notion of what could be called the “double firewall” that exists in Chinese legal scholarship. The double firewall refers to, on the one hand, the barrier between the English-language and Chinese-language literature (the “external firewall”) and, on the other hand, that between the domestic law scholars and international law scholars within China (the “internal firewall”), which itself could be further complicated by the partial siloing between private international law and public international law scholars. The double firewall operates to filter out certain approaches to law and to allow in others that are legitimate in the eyes of the academic censors. The

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<sup>37</sup> See, e.g., WANG TIEYE (王铁崖), *Guojifa Yinlun (国际法引论)* [INTRODUCTION TO INTERNATIONAL LAW] 272–73 (1998); XUE HANQIN, *CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW* 147–58 (2012); Bing Bing Jia, *A Preliminary Study of the Title to Huangyan Island (Scarborough Reef/Shoal)*, 45 OCEAN DEV. & INT’L L. 360 (2014); GUIGUO WANG, *INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE* (2015); Liu Jingdong (刘敬东) & Wang Lulu (王路路), “Yidaiyilu” *changyi chuangzhi guojifa de lujing yanjiu* (“一带一路”倡议创制国际法的路径研究) [Research on the Route for the Belt and Road Initiative’s Creation of International Law], 6 XUESHU LUNTAN (学术论坛) [ACADEMIC DISCUSSION] 13 (2018).

double firewall can best be explained through a kind of sociology of knowledge in regard to academic institutions and practices in China.

Starting with the internal firewall, there are pedagogical, political, and institutional factors that have militated against the growth of international law studies in the PRC. Pedagogically, compared to domestic legal studies, it is clear that the study of international law is relatively embryonic in China. Given that academic knowledge production in China is, generally, rather conservative in terms of its analytical, methodological, and canonical reference points, it is not surprising that there is some path dependency in the thinking of Chinese legal scholars, and that this traditionalism may be more pronounced in a field that has not had time to experiment, diverge, and debate.

Politically, Chinese legal scholars have sought to align their research with the goals of the Party-State and have done so mainly through doctrinal analyses. Despite some vague nods to the value of interdisciplinary research, the social sciences have, for the most part, largely not (yet) been validated by the authorities.<sup>38</sup> It may seem surprising, then, that scholars of domestic law have been more successful in integrating economic, sociological, and anthropological perspectives into their legal research. However, the U.S. legal academy, too, shows greater openness toward social scientific interdisciplinarity on domestic issues than on international ones, which could perhaps be explained by the incentives for international law scholars to publish research that conforms to the way in which international law organizations—organizations the scholars may want to join—conceive of legal problems and research.<sup>39</sup> Of course, in the PRC, the stakes are much higher for Chinese legal scholars to conform. The U.S. government does not silence scholars for their political views, an occurrence which is not uncommon in the PRC.<sup>40</sup>

There are also institutional factors that may hamper the development of diverse approaches to international law in China. The promotion and performance review system for Chinese legal scholars may encourage certain types of scholarship over others. There are opportunity costs associated with spending years to pursue a postgraduate degree in a social science discipline and to collect and analyze data. The job market, university administrative processes, and the broader discipline may not value such labors, especially in the field of international law where the field is so much smaller than domestic law.

Turning to the external firewall, there are, again, linguistic, institutional, and political reasons that prevent diverse approaches to international law from entering the Chinese legal academy, whereas the Party-State patronage may result

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<sup>38</sup> See Zhao, *supra* note 25.

<sup>39</sup> I thank Professor Eric Posner for this suggestion.

<sup>40</sup> SCHOLARS AT RISK, OBSTACLES TO EXCELLENCE: ACADEMIC FREEDOM & CHINA'S QUEST FOR WORLD-CLASS UNIVERSITIES 16 (2019).

in encouraging critical approaches to represent Chinese views. Under Xi's leadership, the Chinese academy has taken a nativist turn that has strained intellectual exchange across the external firewall. So, for example, whereas previously Chinese legal scholars could publish in English language journals and law reviews, recently the Ministry of Education has disfavored such publication outlets. This has emboldened PRC university administrators to double down on Chinese language publications, thus strengthening the external firewall.<sup>41</sup> Conversely, the nativist Trump administration spread anti-Chinese sentiment in the U.S. in the wake of the Covid-19 pandemic; consequently, there has been a decline in interest in as well as funding for intellectual exchanges with China in US universities.<sup>42</sup> For these reasons, the small spaces afforded to certain approaches to international law (e.g., social scientific ones) have seemingly shrunk, whereas critical approaches are experiencing a kind of surge.

#### IV. CONCLUSION

Extending the insights of the comparative international law literature, it seems that contemporary trends toward nationalism and protectionism in the international system also shape the study of international law by scholars differently situated within that system. Despite the grim picture afforded by the Chinese double firewall, and the various hurdles it poses, there is cause for hope. A new generation of Chinese students are studying abroad and obtaining post-graduate degrees in social sciences and the law. Against conformist tides and various forms of pressure, these scholars are bringing these methods and theories back to China and combining them with insights from the Chinese legal scholarship to create new epistemic communities, some of which will thrive and create transnational links. As China increasingly looks to shape international law, the emergent field of social scientific approaches to international law in China will be one touchstone for understanding what those forms may look like.

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<sup>41</sup> Zhonghua renmin gongheguo jiaoyubu (中华人民共和国教育部) [Ministry of Education of the PRC], "Guanyu pochu gaoxiao zhexue shehui kexue yanjiu pingjia zhong 'wei lunwen' buliang daoxiang de ruogan yijian" de tongzhi (《关于破除高校哲学社会科学研究评价中“唯论文”不良导向的若干意见》的通知) [Notice on "Several Opinions on Eliminating the Bad 'Thesis-Only' Trend in the Evaluation of Philosophy and Social Science Research in Universities"] (Dec. 10, 2020) (stating, "In the pursuit of international publication, we must not deliberately minimize and vilify China and undermine national sovereignty, security, and development interests.").

<sup>42</sup> Frank Wu, *Attacking Chinese on Our Campuses Only Hurts America*, INSIDEHIGHERED (July 15, 2019), <https://perma.cc/BAY2-VFDN>.

# Studying Race in International Law Scholarship Using a Social Science Approach

James Thuo Gathii\*

## Abstract

*This Essay takes up Abebe, Chilton, and Ginsburg's invitation to use a social science approach to establish or ascertain some facts about international law scholarship in the United States. The specific research question that this Essay seeks to answer is to what extent scholarship has addressed international law's historical and continuing complicity in producing racial inequality and hierarchy, including slavery, as well as the subjugation and domination of the peoples of the First Nations. To answer this question, this Essay uses the content published in the American Journal of International Law (AJIL) from when it was first published in 1907 to May 2021. It also uses the content published in its sister publication AJIL Unbound from when it was first published in 2014 to May 2021. The most significant finding of this Essay is that only 64, or 1.25%, of 5,109 AJIL documents substantially engaged with race in the body of their texts. In AJIL Unbound, only 11, or 1.94%, of the 568 documents substantially engaged with race in the bodies of their text.*

*To account for the extremely low number of documents substantially engaging with race in the pages of the leading international law journal, I advance four hypotheses. First, that this absence is a reflection of the conscious exclusion of African Americans in the American Society of International Law in the first six decades of its existence, as the 2020 Richardson Report found. Second, it is the result of the stringent scrutiny race scholarship in international law has faced in AJIL and AJIL Unbound. Third, that the big or defining debates about international law in the United States have focused on issues other than race, and fourth that color-blindness has been the default view of American international law scholarship as represented in the journal.*

*Ultimately, the point of this Essay is threefold. First, to show that the social science approach that Abebe, Chilton, and Ginsburg advance can be useful to answer questions that*

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*critical scholars like myself are interested in. Second, that when this social science approach is applied to answer questions like the one pursued in this Essay the distinction between the neutrality of the scientific methodology of this social scientific approach, on the one hand, and the normativity of critical approaches that Abebe, Chilton, and Ginsburg argue characterizes other approaches, on the other, falls apart. Third, this Essay shows that there is still ample scope for more international law scholarship on race that needs to be taken up not only by scholars of color but by all scholars of international law.*

## Table of Contents

I. Introduction.....	73
II. <i>AJIL</i> Content-Analysis Methodology and Results.....	75
III. Explaining the Results .....	91
A. Hypothesis One: Conscious Exclusion of African Americans Until Recently .....	93
B. Hypothesis Two: Exclusion of Critical Scholarship Including that Relating to Race.....	96
C. Hypothesis Three: The Big or Defining Debates About International Law in the United States Have Focused on Issues Other than Race .....	100
D. Hypothesis Four: Color-Blindness Has Been the Default Mode of International Legal Scholarship .....	104
IV. Conclusion.....	104

## I. INTRODUCTION

This Essay sets out to determine to what extent scholarship has addressed international law's historical and continuing complicity in producing racial inequality and hierarchy, including slavery, as well as the subjugation and domination of the peoples of the First Nations. To answer this question, this Essay uses the content published in the *American Journal of International Law* (*AJIL*) from its inception in 1907 through 2021, as well as in *AJIL Unbound*, its online companion, from its first publication in 2014 through 2021.<sup>1</sup> I want to make it clear from the onset that my research question is very narrow. I am interested only in establishing whether scholarship that probes the racist underpinnings of international law, as well as the racial hierarchies upon which international law was constructed, has been published in *AJIL* and *AJIL Unbound*. In doing so, I am excluding from the scope of this paper the ways in which *AJIL* was itself a site of racialized discourses such as “civilization” and “humanity.”<sup>2</sup> Other scholars have begun to examine *AJIL*'s complicity in the construction and perpetuation of racially exclusionary discourses such as “civilization” and “humanity.” Benjamin Allen Coates reminds us, very early in its founding, *AJIL* justified spreading U.S. hegemony not merely through the notion of “civilizing savages,” but rather that of civilizing “the world as a whole”<sup>3</sup> in the progressive era commitment and faith in the progress of civilization “whether conceived of in terms of Christianity, natural or social science, governance, or commerce.”<sup>4</sup> In fact, international law was critical to justifying the U.S.'s annexation of the Philippines and Puerto Rico, the establishment of a protectorate over Cuba, and the takeover of Panama to build a canal.<sup>5</sup> It is against this backdrop of the end of the Spanish-American War and the emerging empire acquired by the United States that *AJIL* came into existence.<sup>6</sup> Benjamin Allen Coates therefore argues that *AJIL* Board members of the early twentieth century were “not isolated idealists spouting naive bromides from the sidelines. Well-connected, well-respected, and well-compensated, they

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<sup>1</sup> *AJIL* was first published in 1907, whereas *AJIL Unbound* was first published in 2014.

<sup>2</sup> See, e.g., Christiane Wilke, *Reconsecrating the Temple of Justice: Invocations of Civilization and Humanity in the Nuremberg Justice Case*, 24 CAN. J.L. & SOC'Y 181 (2009).

<sup>3</sup> BENJAMIN ALLEN COATES, *LEGALIST EMPIRE: INTERNATIONAL LAW AND AMERICAN FOREIGN RELATIONS IN THE EARLY TWENTIETH CENTURY* 83 (2016).

<sup>4</sup> *Id.* at 43.

<sup>5</sup> *Id.* at 1.

<sup>6</sup> Carl Landauer, *The Ambivalence of Power: Launching the American Journal of International Law in an Era of Empire and Globalization*, 20 LEIDEN J. INT'L L. 325, 328 (2007).

formed an integral part of the foreign policy establishment that built and policed an expanding empire.”<sup>7</sup>

To emphasize, I am interested in whether *AJIL* and *AJIL Unbound* have published scholarship that critically engages with the racist and imperial structures of international law that justified slavery, colonialism, and empire. I am also interested in examining *AJIL*'s role in constructing and perpetuating racially exclusionary discourses.<sup>8</sup> To use Mohsen al Attar's extensive comments on an earlier version of this Essay, I am interested in establishing whether the American international legal academy has been complicit “in collective acts of epistemic injustice.”<sup>9</sup> In particular, has *AJIL* and *AJIL Unbound* silenced and/or excluded critical approaches to international law, especially those influenced by Critical Race Theory or Third World Approaches to International Law (TWAAIL), in the pages of the leading international law journal in the United States?<sup>10</sup>

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<sup>7</sup> COATES, *supra* note 3, at 3. Coates concludes that lawyers were therefore “ideological actors as much as technical advisers.” *Id.* at 180. See D.J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20, 62 (2006) (“American international lawyers, speaking through *AJIL*, have advanced U.S. policy initiatives, doctrines and positions even while vehemently disagreeing with some. Aside from these specific situations, these writers have tended (although by no means uniformly...) to believe that the project of international law is a worthwhile one that holds promise for world order.”).

<sup>8</sup> See, e.g., Wilke, *supra* note 2, at 181. In this article, Wilke shows that “the 1918–1947 volumes of the *American Journal of International Law (AJIL)*, published by the American Society of International Law, reveal that the concept of civilization was frequently used in the period following the end of World War I, declined in popularity at the end of the 1920s, and experienced a remarkable renaissance in the decade between 1938 and 1947.” *Id.* at 187. The premise in the article is that the “standard of civilization” that was “dominant in late-nineteenth- and early-twentieth century international law . . . [was] an expression of the idea that international law is a body of norms for civilized states only.” *Id.* at 186. For another analysis of how imperialism was redefined as civilization, see Mohammad Shahabuddin, *The ‘Standard of Civilization’ in International Law: Intellectual Perspectives from Pre-War Japan*, 32 LEIDEN J. INT'L L. 13 (2019); ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW 67, 84–86 (2004) (noting that independent non-European states like Japan could be brought into the realm of international law if they met the “requirements of the standard of civilization of, and being officially recognized by, European states, as proper members of the family of nations” and discussing how these non-European societies were required to meet the standard of civilization). This standard of civilization shifted in the nineteenth century. In the first half of the nineteenth century, the criteria included Christianity. In the second half, it was predicated on “European culture and institutions—in particular, the ability to furnish Europeans with legal, economic, and later, political institutions to which they had become accustomed.” Rose Parfitt, *Empire des Nègres Blancs: The Hybridity of International Personality and the Abyssinia Crisis of 1935-36*, 24 LEIDEN J. INT'L L. 849, 858 (2011).

<sup>9</sup> Mohsen al Attar, *Subverting Racism in / Through International Law Scholarship*, OPINIO JURIS (Mar. 3, 2021), <https://perma.cc/M9KT-N3Q9>; see also Mohsen al Attar, “I Can’t Breathe”: *Confronting the Racism of International Law*, AFRONOMICSLAW (Oct. 2, 2020), <https://perma.cc/6HAK-GLQB>.

<sup>10</sup> Further, al Attar argues that “[n]on-Eurocentric perspectives enjoy lesser status, unless they are measured against a European benchmark and preferably by a white scholar. Despite international law’s brutal history and generations of Critical Race Theory, race receives minimal uptake among

The results of my empirical analysis showed that only 64, or 1.25%, of 5,109 *AJIL* documents substantially engaged with race in the body of their texts. In *AJIL Unbound*, only 11, or 1.94%, of the 568 documents substantially engaged with race in the bodies of their text.

To explain the extremely little content published in *AJIL* and *AJIL Unbound* over 100 years addressing international law's historical and continuing complicity in producing racial inequality and hierarchy, including slavery, as well as the subjugation and domination of the peoples of the First Nations, this Essay advances four hypotheses. First, this absence is a reflection of the conscious exclusion of African Americans in the American Society of International Law in the first six decades of its existence, as the 2020 Richardson Report found.<sup>11</sup> Second, this gap is the result of the stringent scrutiny international law scholarship addressing international law's historical and continuing complicity in producing racial inequality and hierarchy has faced in *AJIL* and *AJIL Unbound*. Third, the big or defining debates about international law in the United States have focused on issues other than race. And fourth, color-blindness has been the default view of American international law scholarship as represented in the journal.

This Essay proceeds as follows. In Section II, I outline the methodology I followed in gathering the data. The third section of the Essay is my ongoing effort to account for the paucity of scholarship centering race in *AJIL* and *AJIL Unbound*.

## II. *AJIL* CONTENT-ANALYSIS METHODOLOGY AND RESULTS

In order to determine an answer to my question—whether scholarship that probes the racist and imperial underpinnings of international law, as well as the racial hierarchies upon which international law was constructed, has been published in *AJIL* and *AJIL Unbound*—my methodology was as follows. I began by establishing whether there was such content in *AJIL* and *AJIL Unbound*. To do so, I searched the content of *AJIL* and *AJIL Unbound* using HeinOnline's Law Journal Library.<sup>12</sup> Although *AJIL* and *AJIL Unbound* documents can be accessed

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international lawyers. Last, many non-racialised scholars fail to appreciate how their approach toward racialised academics places us at an unfair disadvantage." al Attar, *Subverting Racism in / Through International Law Scholarship*, *supra* note 9.

<sup>11</sup> AM. SOC'Y INT'L L., THE RICHARDSON REPORT, FINAL REPORT FROM THE ASIL AD HOC COMMITTEE INVESTIGATING POSSIBLE EXCLUSION OR DISCOURAGEMENT OF MINORITY MEMBERSHIP OR PARTICIPATION BY THE SOCIETY DURING ITS FIRST SIX DECADES (2020) [hereinafter THE RICHARDSON REPORT]. This report was drafted by an ad hoc committee appointed pursuant to American Society of International Law Executive Council Resolution of 4th April 2018. Its mandate was to investigate possible exclusion or discouragement of minority membership or participation in the Society during its first six decades. The report was unanimously adopted by the ASIL Executive Council in its meeting on April 2, 2020.

<sup>12</sup> HeinOnline's Law Journal Library is available to subscribers through the HeinOnline platform. A description of the content is available at <https://perma.cc/Y2GH-LP8S>.

from the Cambridge Core site,<sup>13</sup> HeinOnline served as a much better tool for this study for at least two reasons. First, unlike Cambridge Core, HeinOnline makes it possible to simultaneously search *AJIL* and *AJIL Unbound*. Second, since Cambridge Core represents the main portal for subscriptions and sales of these two publications, using a third-party content site seemed to me more likely to provide an objective count of the content.

To determine whether the content published in *AJIL* and *AJIL Unbound* has probed the racist and imperial underpinnings of international law, I undertook the following steps. First, I conducted an Advanced Search in the HeinOnline Law Journal Library using the search string “rac\* OR anti-racis\* OR antiracis\*” and limiting my results to documents in *AJIL* and *AJIL Unbound*. This search was designed to retrieve all documents in *AJIL* and *AJIL Unbound* that contained any forms of the word “race,” or any of the words “antiracist,” “antiracism,” “anti-racist,” or “anti-racism.”<sup>14</sup> I then restricted these search results to the following *AJIL* and *AJIL Unbound* section types: Articles, Comments, Notes, Reviews, and Editorials.<sup>15</sup> *AJIL* content that is purely informational, such as Tables of Contents and Legislation, was omitted.<sup>16</sup> Thus, the relevant content for my inquiry numbered 1,535 documents in *AJIL* and 121 in *AJIL Unbound*, and the total number of documents for the study sample was 1,656.

Next, I examined each of these 1,656 documents individually to determine which ones substantially probed the racist and imperial underpinnings of international law, as well as the racial hierarchies upon which international law was constructed.<sup>17</sup> By substantial engagement with race, I am referring to articles that critically examine race (rather than say, states) as a unit of analysis to account for the role racial hierarchy and domination have played and plays in shaping and

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<sup>13</sup> See *American Journal of International Law*, CAMBRIDGE CORE, <https://perma.cc/5ANB-SDPU>; *AJIL Unbound*, CAMBRIDGE CORE, <https://perma.cc/92S4-Z553>.

<sup>14</sup> I restrict my analysis to race, rather than to terms such as imperialism and colonialism because my central inquiry relates to establishing if there has been blindness to race and its central role in shaping international law and justifying other regimes of subordinating non-white peoples including slavery and colonialism in the scholarship published in *AJIL* and *AJIL Unbound*.

<sup>15</sup> “Articles” includes “Lead Articles,” “Notes” includes “Contemporary Practice of the United States Relating to International Law,” “Comments” includes “Editorial Comments,” and “Reviews” includes “Book Reviews.”

<sup>16</sup> The *AJIL* and *AJIL Unbound* content omitted in my analysis, such as Miscellaneous items, Tables of Contents, and Legislation, does not usually include commentary and is included in *AJIL* primarily for informational purposes. The content was excluded here since it did not provide analysis that would contribute to establishing the answer to my primary query in this Article—namely, whether the content published in *AJIL* and *AJIL Unbound* has probed the racist underpinnings of international law, as well as the racial hierarchies upon which international law was constructed.

<sup>17</sup> Because there is a two-year embargo on the full text of the *AJIL* in HeinOnline, the full texts of the most recent documents included in the set were examined in Westlaw.

organizing ideas and institutions of global order including slavery, colonialism, and empire.

To comprehensively assess which of the documents engaged in a substantial analysis of the racist and imperial underpinnings of international law, I also identified documents that (a) mentioned “race” as understood to refer to ethnicity, identity, color or national or ethnic origin; (b) referred to “race” in a boilerplate/statutory/general language form or merely in a list, i.e., these documents used “race” without referring to race, color, or national or ethnic origin; (c) used “race” in a quotation, citation, or footnote; (d) used “race” sporadically or in a one-off manner, i.e., “race” was mentioned only very occasionally, and it was not the primary focus of analysis; and (e) included “race” in the titles or subtitles of the documents.

To continue the analysis, I determined the total number of *AJIL* and *AJIL Unbound* documents in HeinOnline by conducting an Advanced Search in the Law Journal Library using “\*” as the search term and restricting the search to *AJIL* and *AJIL Unbound*. I then limited the search results to the same section types included in the relevant sample set as described above, which yielded a total of 5,677 documents. For *AJIL*, the search produced a total of 5,109 documents. For *AJIL Unbound*, there was a total of 568 documents.<sup>18</sup> With this data in hand, as well as the results of my earlier *AJIL* and *AJIL Unbound* content analysis, I was able to address my research question head on.

The data unequivocally shows that *AJIL* and *AJIL Unbound* have not frequently engaged with race. This is clearly illustrated by the finding that only 64, or 1.25%, of 5,109 *AJIL* documents substantially engaged with race in the body of their texts. Furthermore, of the 5,109 total documents in *AJIL*, 1,004, or 19.65%, incorporated the word “race.” Of those 1,004 documents, 489 of them, or 9.57% of all 5,109 documents, used “race” in a boilerplate, statutory, general, or list-embedded context. Moreover, 515, or 10.08%, of the 5,109 documents did not use “race” in a boilerplate, statutory, general, or list-embedded context. Finally, only 5, or 0.10%, of the 5,109 documents had “race” in their title.

Similarly, in *AJIL Unbound*, only 11, or 1.94%, of the 568 documents substantially engaged with race in the bodies of their text. Moreover, of the 568 documents published in *AJIL Unbound*, 60, or 10.56%, incorporated the word “race.” Of those 60 documents, 30 of them, or 5.28% of all 568 documents, used “race” in a boilerplate, statutory, general, or list-embedded context. Finally, only 2, or 0.35%, of the 568 documents had “race” in their title.

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<sup>18</sup> When “\*” is used as a search term without limiting the results to certain section types, then 7,535 results appear for *AJIL*, and 571 for *AJIL Unbound*. However, to ensure a proper comparison with the documents individually reviewed, these baseline totals were limited to Articles, Comments, Notes, Reviews, and Editorials. Thus, for the purposes of this analysis, there were 5,109 total documents in *AJIL*, and 568 documents in *AJIL Unbound*.

These results are presented in more detail in the following data tables (Tables 1, 2, and 3) and related charts (Charts 1 and 2). Appendix 1 lists all the *AJIL* documents that mentioned “race” in the bodies of their text, and Appendix 2 contains a full list of *AJIL Unbound* documents that mentioned “race” in their texts. In Appendix 3, Table 5 and Chart 3 analyze the documents listed in Appendices 1 and 2. Appendices are published separately on Chicago Unbound.

**Table 1: *AJIL* (1907–May 2021) & *AJIL Unbound* (2014–May 2021) Compared**

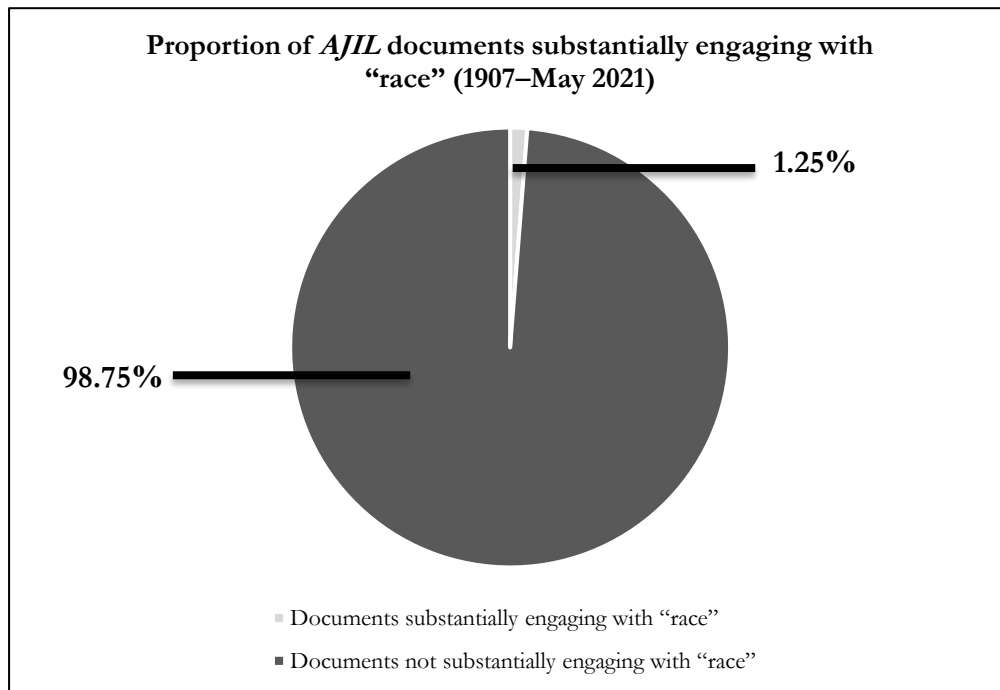
	<i>AJIL</i>	%	<i>AJIL Unbound</i>	%
Total Articles, Comments, Notes, Reviews, and Editorials	5,109	100.00	568	100.00
Documents substantially engaging with “race”	64	<b>1.25</b>	11	<b>1.94</b>
Documents that mentioned “race” as understood to refer to ethnicity, identity, color or national or ethnic origin	1,004	<b>19.65</b>	60	<b>10.56</b>
Documents using “race” in boilerplate, statutory, general, or list-embedded contexts	489	<b>9.57</b>	30	<b>5.28</b>
Documents not using “race” in boilerplate, statutory, general, or list-embedded contexts	515	<b>10.08</b>	30	<b>5.28</b>
Documents with (sub)titular reference to race	5	<b>0.10</b>	2	<b>0.35</b>



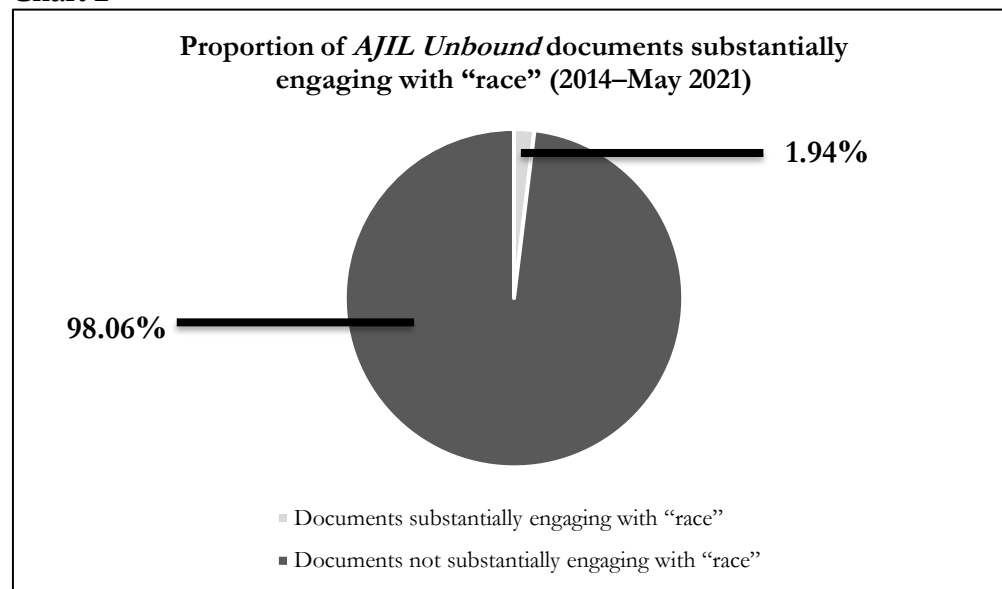
**Table 2: *AJIL* & *AJIL Unbound* Combined**

	<i>AJIL</i> & <i>AJIL Unbound</i>	%
Total Articles, Comments, Notes, Reviews, and Editorials	5,677	100.00
Documents substantially engaging with “race”	75	<b>1.32</b>
Documents that mentioned “race” as understood to refer to ethnicity, identity, color or national or ethnic origin	1,064	<b>18.74</b>
Documents using “race” in boilerplate, statutory, general, or list-embedded contexts	519	<b>9.14</b>
Documents not using “race” in boilerplate, statutory, general, or list-embedded contexts	545	<b>9.60</b>
Documents with (sub)titular reference to race	7	<b>0.12</b>

**Chart 1**



**Chart 2**



**Table 3: List of *AJIL* documents substantially engaging with “race” (1907–May 2021)**

	Title	Citation	Author(s)
1	<i>Protection of Minorities by the League of Nations</i>	17 AM. J. INT’L L. 641 (1923)	Rosting, Helmer
2	<i>Some Legal Aspects of the Japanese Question</i>	17 AM. J. INT’L L. 31 (1923)	Buell, Raymond Leslie
3	<i>The End of Dominion Status</i>	38 AM. J. INT’L L. 34 (1944)	Scott, F.R.
4	<i>Current Views of the Soviet Union of the International Organization of Security, Economic Cooperation and International Law: A Summary</i>	39 AM. J. INT’L L. 450 (1945)	Prince, Charles
5	Book Review (reviewing CAREY MCWILLIAMS, PREJUDICE: JAPANESE-AMERICANS, SYMBOL OF RACIAL INTOLERANCE (1994))	39 AM. J. INT’L L. 634 (1945)	Das, Taraknath

	Title	Citation	Author(s)
6	<i>Denazification Law and Procedure</i>	41 AM. J. INT'L L. 807 (1947)	Plischke, Elmer
7	<i>The United Nations Conference on Freedom of Information and the Movement against International Propaganda</i>	43 AM. J. INT'L L. 73 (1949)	Whitton, John B.
8	<i>An "Act for the Protection of Peace" in Bulgaria</i> (current notes)	a) 45 AM. J. INT'L L. 353 (1951); b) <i>id.</i> at 357	Nicoloff, Antoni M
9	<i>National Courts and Human Rights—The Fujii Case</i>	45 AM. J. INT'L L. 62 (1951)	Wright, Quincy
10	<i>The Trieste Settlement and Human Rights</i> (notes and comments)	49 AM. J. INT'L L. 240 (1955)	Schwelb, Egon
11	<i>International Law and Some Recent Developments in the Commonwealth</i> (editorial comments)	55 AM. J. INT'L L. 440 (1961)	Wilson, Robert R.
12	<i>The United Nations' Double Standard on Human Rights Complaints</i> (notes and comments)	60 AM. J. INT'L L. 792 (1966)	Carey, John
13	<i>Civil and Political Rights: The International Measures of Implementation</i>	62 AM. J. INT'L L. 827 (1968)	Schwelb, Egon
14	<i>Contemporary Practice of the United States Relating to International Law: South West Africa (Namibia)</i>	63 AM. J. INT'L L. 320 (1969)	Denny, Brewster C.
15	<i>Contemporary Practice of the United States Relating to International Law: Summary of Developments During 23d Session of the U.N. General Assembly</i>	63 AM. J. INT'L L. 569 (1969)	Gibson, Stephen L. ed.
16	<i>64th Annual Meeting of the American Society of</i>	64 AM. J. INT'L L. 623 (1970)	Finch, Eleanor H.

	Title	Citation	Author(s)
	<i>International Law</i> (notes and comments)		
17	<i>The International Court of Justice and the Human Rights Clauses of the Charter</i>	66 AM. J. INT'L L. 337 (1972)	Schwelb, Egon
18	<i>The 1974 Diplomatic Conference on Humanitarian Law: Some Observations</i>	69 AM. J. INT'L L. 77 (1975)	Forsythe, David P.
19	Book Review, (reviewing EDWARD WEISBAND, RESIGNATION IN PROTEST: POLITICAL AND ETHICAL CHOICES BETWEEN LOYALTY TO TEAM AND LOYALTY TO CONSCIENCE IN AMERICAN PUBLIC LIFE (1975))	71 AM. J. INT'L L. 160 (1977)	Rusk, Dean
20	<i>Constitutive Questions in the Negotiations for Namibian Independence</i>	78 AM. J. INT'L L. 76 (1984)	Richardson III, Henry J.
21	<i>The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination</i>	79 AM. J. INT'L L. 283 (1985)	Meron, Theodor
22	<i>Federalism and the International Legal Order: Recent Developments in Australia</i>	79 AM. J. INT'L L. 622 (1985)	Byrnes, Andrew & Charlesworth, Hilary
23	<i>Current Developments: First Session of the UN Committee on Economic, Social and Cultural Rights</i>	81 AM. J. INT'L L. 747 (1987)	Alson, Philip & Simma, Bruno
24	<i>The Meaning of People in the African Charter on Human and Peoples' Rights</i> (notes and comments)	82 AM. J. INT'L L. 80 (1988)	Kiwanuka, Richard N.
25	<i>Threats of Force</i>	82 AM. J. INT'L L. 239 (1988)	Sadurska, Romana

	Title	Citation	Author(s)
26	<i>Agora: Is the ASIL Policy on Divestment in Violation of International Law? Further Observations</i>	82 AM. J. INT'L L. 311 (1988)	Barrie, George N. & Szasz, Paul C.
27	<i>International Law in the Third Reich</i>	84 AM. J. INT'L L. 661 (1990)	Vagts, Detlev F.
28	<i>Feminist Approaches to International Law</i>	85 AM. J. INT'L L. 613 (1991)	Charlesworth, Hilary, Chinkin, Christine & Wright, Shelley
29	<i>The Emerging Right to Democratic Governance</i>	86 AM. J. INT'L L. 46 (1992)	Franck, Thomas M.
30	Book Review (reviewing PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES (1993))	87 AM. J. INT'L L. 680 (1993)	Hannum, Hurst
31	<i>The Gulf Crisis and African-American Interests under International Law</i>	87 AM. J. INT'L L. 42 (1993)	Richardson III, Henry J.
32	<i>Clan and Superclan: Loyalty, Identity and Community in Law and Practice</i>	90 AM. J. INT'L L. 359 (1996)	Franck, Thomas M.
33	<i>Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy</i>	92 AM. J. INT'L L. 414 (1998)	Kingsbury, Benedict
34	<i>Contemporary Practice of the United States Relating to International Law (General International and U.S. Foreign Relations Law): Interpretation of U.S. Constitution by Reference to International Law</i>	97 AM. J. INT'L L. 683 (2003)	Murphy, Sean D. ed.
35	Book Review (reviewing KAREN KNOP, DIVERSITY AND SELF-DETERMINATION IN	98 AM. J. INT'L L. 229 (2004)	Fox, Gregory H.

	Title	Citation	Author(s)
	INTERNATIONAL LAW (2002))		
36	<i>Normative Hierarchy in International Law</i>	100 AM. J. INT'L L. 291 (2006)	Shelton, Dinah
37	Book Review (reviewing IAN CLARK, INTERNATIONAL LEGITIMACY AND WORLD SOCIETY (2007))	102 AM. J. INT'L L. 926 (2008)	Davis, Benjamin G.
38	Book Review (reviewing PETER J. SPIRO, BEYOND CITIZENSHIP: AMERICAN CITIZENSHIP AFTER GLOBALIZATION (2008))	103 AM. J. INT'L L. 180 (2009)	Rodríguez, Christina M.
39	<i>Contemporary Practice of the United States Relating to International Law (International Human Rights and Humanitarian Law): United States Boycotts Durban Review Conference, Will Seek Election to Human Rights Council</i>	103 AM. J. INT'L L. 355 (2009)	Crook, John R.
40	<i>The Pillar of Glass: Human Rights in the Development Operations of the United Nations</i>	103 AM. J. INT'L L. 446 (2009)	Darrow, Mac & Arbour, Louise
41	<i>Current Developments: The 2008 Judicial Activity of the International Court of Justice</i>	103 AM. J. INT'L L. 527 (2009)	Mathias, D. Stephen
42	<i>Contemporary Practice of the United States Relating to International Law (International Human Rights and Humanitarian Law): UN Human Rights Officials Berate U.S. Human Rights Policies and Practices</i>	103 AM. J. INT'L L. 594 (2009)	Crook, John R.
43	Book Review (reviewing DANIEL MOECKLI,	103 AM. J. INT'L L. 635 (2009)	Shah, Sikander A.

	Title	Citation	Author(s)
	HUMAN RIGHTS AND NON-DISCRIMINATION IN THE 'WAR ON TERROR' (2008))		
44	Book Review (reviewing THOMAS BUERGENTHAL, A LUCKY CHILD: A MEMOIR OF SURVIVING AUSCHWITZ AS A YOUNG BOY (2010))	104 AM. J. INT'L L. 307 (2010)	Damrosch, Lori Fisler
45	Book Review (reviewing HENRY J. RICHARDSON III, THE ORIGINS OF AFRICAN-AMERICAN INTERESTS IN INTERNATIONAL LAW (2008))	104 AM. J. INT'L L. 313 (2010)	Gordon, Ruth
46	<i>Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems</i>	104 AM. J. INT'L L. 29 (2010)	van Genugten, Willem
47	Book Review (reviewing JEREMY I. LEVITT, AFRICA: MAPPING NEW BOUNDARIES IN INTERNATIONAL LAW (2008))	104 AM. J. INT'L L. 532 (2010)	Mutua, Makau
48	<i>A New International Law of Citizenship</i>	105 AM. J. INT'L L. 694 (2011)	Spiro, Peter J.
49	<i>Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)</i>	105 AM. J. INT'L L. 747 (2011)	Szewczyk, Bart M. J.
50	<i>Genocide: A Normative Account</i>	105 AM. J. INT'L L. 852 (2011)	Greenawalt, Alexander K.A.

	Title	Citation	Author(s)
51	<i>Current Developments: The 2011 Judicial Activity of the International Court of Justice</i>	106 AM. J. INT'L L. 586 (2012)	Cogan, Jacob Katz
52	Book Review (reviewing SUNDHYA PAHUJA, <i>DECOLONIZING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY</i> (2011))	107 AM. J. INT'L L. 494 (2013)	Gathii, James Thuo
53	Book Review (reviewing RYAN GOODMAN & DEREK JINKS, <i>SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW</i> (2013))	108 AM. J. INT'L L. 576 (2014)	Sloss, David
54	<i>Exploitation Creep and the Unmaking of Human Trafficking Law</i>	108 AM. J. INT'L L. 609 (2014)	Chuang, Janie A.
55	<i>The Creation of Tribunals</i>	110 AM. J. INT'L L. 173 (2016)	Matheson, Michael J. & Scheffer, David
56	<i>The 2017 Judicial Activity of the International Court of Justice</i> (notes and comments)	112 AM. J. INT'L L. 254 (2018)	Gray, Christine
57	Book Review (reviewing OONA A. HATHAWAY & SCOTT J. SHAPIRO, <i>THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD</i> (2017))	112 AM. J. INT'L L. 330 (2018)	Bradley, Anna Spain
58	<i>Human Rights in War: On the Entangled Foundations of the 1949 Geneva Conventions</i>	112 AM. J. INT'L L. 553 (2018)	van Dijk, Boyd



	Title	Citation	Author(s)
59	Book Review (reviewing DAVID L. SLOSS, THE DEATH OF TREATY SUPREMACY: AN INVISIBLE CONSTITUTIONAL CHANGE (2016))	112 AM. J. INT'L L. 779 (2018)	Stewart, David P.
60	<i>Contemporary Practice of the United States Relating to International Law (General International and U.S. Foreign Relations Law): Department of Justice Declines to Defend the Constitutionality of a Statute Criminalizing Female Genital Mutilation</i>	114 AM. J. INT'L L. 289 (2020)	Galbraith, Jean
61	<i>The Proof Is in the Process: Self-Reporting under International Human Rights Treaties</i>	114 AM. J. INT'L L. 1 (2020)	Creamer, Cosette D. & Simmons, Beth A.
62	<i>The Pandemic Paradox in International Law</i>	114 AM. J. INT'L L. 598 (2020)	Danchin, Peter G., Farrall, Jeremy, Rana, Shruti & Saunders, Imogen
63	<i>The Limits of Human Rights Limits</i> (reviewing HURST HANNUM, RESCUING HUMAN RIGHTS: A RADICALLY MODERATE APPROACH (2019))	115 AM. J. INT'L L. 154 (2021)	Richardson III, Henry J.
64	Book Review (reviewing BERTRAND G. RAMCHARAN, MODERNIZING THE UN HUMAN RIGHTS SYSTEM (2019))	115 AM. J. INT'L L. 171 (2021)	Chimni, B. S.

**Table 4: List of *AJIL Unbound* documents substantially engaging with “race” (2014–May 2021)**

S. No.	Title	Citation	Author(s)
1	<i>A Crossroads in the Fight Against Human Trafficking? Let's take the Structural Route: A Response to Janie Chuang Symposium: Janie A. Chuang, Exploitation Creep and the Unmaking of Human Trafficking Law</i>	108 <i>AJIL UNBOUND</i> 272 (2014-2015)	Bravo, Karen E.
2	<i>Why Fighting Structural Inequalities Requires Institutionalizing Difference: A Response to Nienke Grossman Symposium on Nienke Grossman, Achieving Sex-Representative International Court Benches</i>	110 <i>AJIL UNBOUND</i> 92 (2016-2017)	Torbisco-Casals, Neus
3	<i>Human Mobility and the Longue Duree: The Prehistory of Global Migration Law Symposium on Framing Global Migration Law - Part II</i>	111 <i>AJIL UNBOUND</i> 136 (2017-2018)	Bhabha, Jacqueline
4	<i>Human Rights and the Future of Being Human Symposium on the Universal Declaration of Human Rights at Seventy</i>	112 <i>AJIL UNBOUND</i> 324 (2018)	Huneus, Alexandra
5	<i>Race and Rights in the Digital Age Symposium on the Universal Declaration of Human Rights at Seventy</i>	112 <i>AJIL UNBOUND</i> 339 (2018)	Powell, Catherine
6	<i>Theorizing Emancipatory Transnational Futures of International Labor Law Symposium on Transnational Futures of International Labor Law</i>	113 <i>AJIL UNBOUND</i> 390 (2019)	Blackett, Adelle

S. No.	Title	Citation	Author(s)
7	<i>Towards Global Governance: The Inadequacies of the UN Drug Control Regime Symposium on Drug Decriminalization, Legalization, and International Law</i>	114 AJIL UNBOUND 291 (2020)	Eliason, Antonia & Howse, Robert
8	<i>Introduction to the Symposium on COVID-19, Global Mobility and International Law</i>	114 AJIL UNBOUND 312 (2020)	Achiume, E. Tendayi, Gammeltoft-Hansen, Thomas & Spijkerboer, Thomas
9	<i>Fortress Europe, Global Migration &amp; the Global Pandemic Symposium on COVID-19, Global Mobility and International Law</i>	114 AJIL UNBOUND 342 (2020)	Reynolds, John
10	<i>“To Restore the Soul of America”: How Domestic Anti-Racism Might Fuel Global Anti-Racism Symposium on the Biden Administration and the International Legal Order: Essay</i>	115 AJIL UNBOUND 63 (2021)	Lovelace, H. Timothy Jr.
11	<i>Introduction to the Symposium on the Biden Administration and the International Legal Order</i>	115 AJIL UNBOUND 40 (2021)	Shaffer, Gregory & Sloss, David L.

## III. EXPLAINING THE RESULTS

What explains the extremely low engagement with race as a theme in *AJIL* and *AJIL Unbound*? From *AJIL*'s founding in 1907 to May 2021, only 1.25% of its documents (64 out of 5,109) substantially engaged with race in the body of their text, and only 0.10% (5 out of 5,109) had race in their titles. Likewise, from *AJIL Unbound*'s establishment in 2014 to the beginning of 2021, only 1.94% of its documents (11 out of 568) substantially engaged with race in the body of their text, and only 0.35% (2 out of 568) had race in their titles. This is indicative of a silence that requires further exploration.

It is implausible and factually inaccurate to explain this silence as indicative of the irrelevance of race in international law. Bearing in mind that I use race to refer to relations of domination rather than personal prejudice, at least since the sixteenth century when Francisco de Vitoria wrote his treaties, international law has justified slavery, conquest, colonialism, commerce, and other forms of domination over non-European peoples by European peoples. As Third World Approaches to International Law (TWAAIL) and Critical Race Theory (CRT) scholars have shown, international law legitimized colonial conquest along the axes of European/non-European, colonizer/colonized, civilized/uncivilized, and modernity/tradition.<sup>19</sup> On this view:

imperial international law was constructed on the basis of White racial superiority—as rational stewards of the territories of non-Europeans—and on the basis of racist myths of indigenous savagery, primitivism, and pathology. Hence, just as slavery dehumanized Blacks as degenerate and outside the boundaries of humanity in the construction of the United States as a White racial state, European/White international law was constructed to relegate non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.<sup>20</sup>

TWAAIL scholars argue that notwithstanding international law's commitments to sovereign equality, human rights, and development, it carries within it the legacy of economic subordination and hierarchy established in prior eras of subjugation, including during slavery and colonial rule.<sup>21</sup> Consistent with this rejection of clean historical breaks in histories of international law, race continues to be a salient analytic category in international law. As Antony Anghie argues, understanding the “role of race and culture in the formation of basic international law doctrines such as sovereignty is crucial to an understanding of

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<sup>19</sup> For a leading text demonstrating this, see ANGHIE, *supra* note 8.

<sup>20</sup> James Thuo Gathii, *Writing Race and Identity in a Global Context: What CRT and TWAAIL Can Learn from Each Other*, 67 UCLA L. REV. 1610, 1613 (2021).

<sup>21</sup> See James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2021).

the singular relationship between sovereignty and the non-European world.”<sup>22</sup> In addition, to use the example of Black intellectuals, there is a strong Black internationalist tradition.<sup>23</sup> This intellectual tradition, associated in particular with anti-slavery and anti-colonialism, runs from W.E.B. DuBois, who argued the problem of the twentieth century was the color line, to contemporary colleagues like Ruth Gordon, Henry J. Richardson III, and Adrien Katherine Wing, to name a few.<sup>24</sup> In addition, in my ongoing research, I continue to uncover other African

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<sup>22</sup> ANGHIE, *supra* note 8, at 103.

<sup>23</sup> See generally KEISHA N. BLAIN ET AL., *NEW PERSPECTIVES ON THE BLACK INTELLECTUAL TRADITION* (2018).

<sup>24</sup> There is also no evidence that the quality of scholarship on race and international law is the reason that accounts for this legacy of exclusion. To make such an argument is to claim that scholarship on race is inferior or that scholars, especially scholars of color interested in producing this scholarship, are lazy and have not produced such scholarship. In fact, there is a strong Black tradition of international law. For examples of scholarship on race and international law that prove the existence of such scholarship, see Adrian Katherine Wing, *Critical Race Feminism and the International Human Rights of Women in Bosnia, Palestine and South Africa: Issues for LatCrit Theory*, 28 U. MIAMI INTER-AM. L. REV. 337 (1996); Branwen Jones, *Race in the Ontology of International Order*, 56 POL. STUD. 907 (2008); Chantal Thomas, *Causes of Inequality in the International Economic Order: Critical Race Theory and Postcolonial Development*, 9 TRANSNAT'L L. & CONTEMP. PROBLEMS 1 (1999); Ediberto Roman, *A Race Approach to International Law (RAIL): Is There Need for Yet Another Critique of International Law?*, 33 U.C. DAVIS L. REV. 1519 (2000); Ediberto Roman, *Reconstructing Self-Determination: The Role of Critical Theory in the Positivist International Law Paradigm*, 53 U. MIAMI L. REV. 943 (1999); Edwin D. Davis & Betty Punnett, *International Assignments: Is There a Role for Gender and Race in Decisions?*, 6 INT'L J. HUM. RES. MGMT. (1995); Gil Gott, *Critical Race Globalism? Global Political Economy, and the Intersections of Race, Nation and Class*, 33 U.C. DAVIS L. REV. 1503 (2000); Henry J. Richardson III, *Excluding Race Strategies from International Legal History: The Self-Executing Treaty Doctrine and the Southern Africa Tripartite Agreement*, 45 VILL. L. REV. 1091 (2000); Henry J. Richardson III, *Reverend Leon Sullivan's Principles, Race, and International Law: A Comment*, 15 TEMPLE INT'L & COMP. L.J. 55–80 (2001); Tayyab Mahmud, *International Law and the Race-Ed Colonial Encounter: Implementation, Compliance and Effectiveness: International Dimensions of Critical Race Theory*, 91 AM. SOC'Y INT'L L. PROC. 414 (1997); James Thuo Gathii, *International Law and Eurocentricity: Book Review*, 9 EUR. J. INT'L L. 184 (1998); James Wilets, *From Divergence to Convergence? A Comparative and International Law Analysis of LGBTI Rights in the Context of Race and Post-Colonialism*, 21 DUKE J. INT'L & COMP. L. 631 (2010); Jordan Paust, *Race-Based Affirmative Action and International Law*, 18 MICH. INT'L L. REV. 659 (1996); Keith Aoki, *Space Invaders: Critical Geography, The "Third World" of International Law and Critical Race Theory*, 5 VILL. L. REV. 913 (2000); Kim Beneta Vera, *From Papal Bull to Racial Rule: Indians of the Americas, Race, and the Foundations of International Law*, 42 CAL. W. INT'L L.J. 453 (2011); Makau Matua, *Critical Race Theory and International Law: The View of an Insider-Outsider*, 45 VILL. L. REV. 841 (2000); Martti Koskenneimi, *Race, Hierarchy and International Law: Lorimier's Legal Science*, 27 EUR. J. INT'L L. 415 (2016); Penelope Andrews, *Making Room for Critical Race Theory in International Law: Some Practical Pointers*, 45 VILL. L. REV. 855 (2000); Ruth Gordon, *Critical Race Theory and International Law: Convergence and Divergence*, 45 VILL. L. REV. 827 (2000); Robert Knox, *Civilizing Interventions? Race, War and International Law*, 1 CAMBRIDGE REV. INT'L AFF. (2013); Ronit Lentin, *Palestine/Israel and State Criminality: Exception, Settler Colonialism and Racialization*, 5 ST. CRIME J. 32, (2016); Sankaran Krishna, *Race, Amnesia, and the Education of International Relations*, 26 ALTERNATIVES 401 (2001); Siba Grovogui, *Come to Africa: A Hermeneutics of Race in International Law*, 26 ALTERNATIVES 425 (2001); Taylor Natsu Saito, *From Slavery and Seminoles to AIDS in South Africa: An Essay on Race and Property in International Law*, 45 VILL. L. REV. 1135 (2000); and Twila Perry, *Transracial and International Adoption: Mothers,*

American international law scholars who have also remained invisible in the casebooks, journal pages, and discussions of international law.<sup>25</sup> This includes Yusuf Naim Kly, whose monograph *International Law and the Black Minority in the U.S.* was published in 1985.<sup>26</sup> His edited book *A Popular Guide to Minority Rights* was published a decade later with the support of the European Human Rights Foundation.<sup>27</sup> These and many other examples also discount the view that African American scholars have not or are not producing international law scholarship. To be clear, I do not assume that only African Americans or that all African Americans should produce scholarship about race and international law. To make such a claim would be inaccurate.<sup>28</sup>

So what accounts for *AJIL* and *AJIL Unbound's* extremely limited publication of scholarship probing the racist underpinnings of international law, as well as the racial hierarchies upon which international law was constructed? Why is it that these two publications have had no tradition of publishing scholarship that traces international law's historical and continuing complicity in producing racial inequality and hierarchy including slavery, as well as the subjugation and domination of the peoples of the First Nations?

#### A. Hypothesis One: Conscious Exclusion of African Americans Until Recently

The 2020 Richardson Report adopted by the American Society of International Law, under whose umbrella *AJIL* is published, concluded that “during the first six decades of the existence and growth of the Society,” the Society “silently [and] effectively exclude[d] domestic persons of color and others,

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*Hierarchy, Race and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101 (1998). For books on the topic, see ALEXANDER ANIEVAS, RACE AND RACISM IN INTERNATIONAL RELATIONS: CONFRONTING THE GLOBAL COLOUR LINE (2015); GEETA CHOWDRY & SHEILA NAIR, POWER, POSTCOLONIALISM AND INTERNATIONAL RELATIONS: READING RACE, GENDER AND CLASS (2002); and Sundhya Pahuja, *Corporations, Universalism and the Domestication of Race in International Law*, in EMPIRE, RACE AND GLOBAL JUSTICE (Duncan Bell ed., 2019). For additional resources, see Jeanne M. Woods, *Introduction: Theoretical Insights from the Cutting Edge*, 104 AM. SOC'Y INT'L L. PROC. 389 (2010); *International Dimensions of Critical Race Theory*, 91 AM. SOC'Y INT'L L. PROC. 408 (1997); Henry J. Richardson III, *African Americans and International Law: For Professor Goler Teal Butcher, with Appreciation*, 37 HOWARD L.J. 217 (1994).

<sup>25</sup> In that research, I answer the following questions: whether Black scholars are cited by the most prominent scholars, and whether the work of Black scholars is not reproduced or acknowledged in leading casebooks.

<sup>26</sup> See generally YUSSUF NAIM KLY, *INTERNATIONAL LAW AND THE BLACK MINORITY IN THE U.S.* (1985).

<sup>27</sup> See generally *A POPULAR GUIDE TO MINORITY RIGHTS* (Yussuf Naim Kly ed., 1995).

<sup>28</sup> Just because a scholar is Black does not mean that they represent Black people or, for that reason, all Black people. See Olúfemi O. Táiwò, *Being-in-the-Room Privilege: Elite Capture and Epistemic Deference*, 108 THE PHILOSOPHER 61 (2020) (writing about “standpoint philosophy”).

based on their ethnicity, culture, religion or sexual orientation.”<sup>29</sup> This factual finding is consistent with evidence in other areas of scholarship where scholars have argued that decisions to restrict minorities by college chancellors and presidents have shaped the current moment in higher education.<sup>30</sup>

Abebe, Chilton, and Ginsburg also cite a letter written to the editors of *AJIL* in 1999 noting that a then recently published agenda of the methods of international law did not include any perspectives relating to the concerns of scholars of color.<sup>31</sup> In that letter, Henry J. Richardson III wrote about the exclusion as follows:

[I] was sadly disappointed that critical race theory/Latino critical legal theory (CRT/LCT) was omitted totally from that discussion, even to the absence of a single footnote. That omission crucially distorts the symposium by ignoring the emergence in the last two decades of new approaches to international law, based on determinations by people of color that in order to erase embedded systematic discrimination they must become jurisprudential producers and not merely remain jurisprudential consumers.<sup>32</sup>

Further, it was not until 2014, about 107 years after *AJIL* was founded, that an African American was first elected to sit on its Board of Editors. It can be inferred from this history of exclusion, what the report calls the silent and effective exclusion of domestic persons of color, that it is not surprising that *AJIL* has not focused extensively on tracing the relevance of race to international law.<sup>33</sup> The history of *AJIL* until 2014 (when the first African American got elected following changes in *AJIL* regulations that made this possible) indicates that the emphasis on diversifying the Board focused on dimensions, such as “countries of origin, primary affiliations . . . current geographical locations . . . the participation of women and the involvement of scholars at earlier stages in their careers, as well as through attention to scholarship at the intersection of international law with other

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<sup>29</sup> THE RICHARDSON REPORT, *supra* note 11, at 8–9.

<sup>30</sup> See, e.g., EDDIE R. COLE, THE CAMPUS COLOR LINE: COLLEGE PRESIDENTS AND THE STRUGGLE FOR BLACK FREEDOM (2020).

<sup>31</sup> See Henry J. Richardson III, *Letter to the Editor*, 94 AM. J. INT’L L. 99, 99 (2000) (expressing disappointment that perspectives of “people of color” were not represented).

<sup>32</sup> *Id.* For another recounting of this episode, see Woods, *supra* note 24.

<sup>33</sup> Lori Damrosch, *The “American” and the “International” in the American Journal of International Law*, 100 AM. J. INT’L L. 2, 14 (2006), notes that from its founding until 1944, *AJIL* did not have a nationality restriction as to membership. In 1944, the ASIL imposed a requirement that to be elected, an editor had to be American. *Id.* at 14. Damrosch also notes that the “composition of the board had seen little change in decades: more than half of the members serving in 1944 had been elected between 1910 and 1924 and some went back virtually to the founding in one capacity or another.” *Id.* at 13. The nationality requirement was removed in 1969. Notably, therefore, while editorial membership was open to non-Americans for most of *AJIL*’s history, no African American was elected until 2014. As Damrosch notes, diversity was understood as “either electing a larger proportion of members with a non-U.S. affiliation or . . . creating a separate category of foreign editors.” *Id.* at 14. Diversity, it seems, was never understood as including domestic minorities such as African Americans.

disciplines,”<sup>34</sup> but not on racial diversity and in particular of domestic racial minorities.

This exclusion of African Americans also likely accounts for the epistemic silencing of articles critical of the racist underpinnings of international law. In 1994, Richardson observed that Black “international lawyers are expected either to enter with the same policy assumptions and theoretical approaches held by white international lawyers, or over a short time to be socialized into the same experience.”<sup>35</sup> This exclusion has therefore made it difficult to generate scholarship that probes the Eurocentric and racist foundations of international law.<sup>36</sup> With regard to raising issues of race among American international lawyers, Richardson notes: “When a [B]lack lawyer threatens to show other starting points, white-shoe lawyers respond with all of the litigational opposition, bureaucratic undercutting, and subtle destruction that they throw against their worst professional colleagues.”<sup>37</sup>

This is a critical insight since African Americans and much of the Global South rose up against chattel slavery in the new world and alien, racist colonial rule “not by a critique structured by Western conceptions of freedom but by a total rejection of enslavement and racism as it was experienced.”<sup>38</sup>

A recent study in the completely different field of psychological research sought to establish how often scholarship on psychology and race was published in top-tier cognitive, developmental, and social psychology journals. It found after examining 26,000 empirical articles published from 1974 to 2018:

First, across the past five decades, psychological publications that highlight race have been rare, and although they have increased in developmental and social psychology, they have remained virtually nonexistent in cognitive psychology. Second, most publications have been edited by White editors, under which there have been significantly fewer publications that highlight race.<sup>39</sup>

In June 2021, it was disclosed that the leading medical journals in the United States, including the *Journal of the American Medical Association*, had rarely addressed

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<sup>34</sup> *Id.* at 17.

<sup>35</sup> Richardson, *African Americans and International Law: For Professor Goler Teal Butcher, with Appreciation*, supra note 24, at 221.

<sup>36</sup> As Richardson argues, including “international lawyers of color to the profession is tantamount to including non-Eurocentric and non-establishmentarian starting points, procedural emphases, policy perceptions and objectives and theoretical preferences.” *Id.* at 222.

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

<sup>38</sup> Robin D.G. Kelley, *Foreword: Why Black Marxism? Why Now* xvii, in CEDRIC J. ROBINSON, *THE MAKING OF THE BLACK RADICAL TRADITION* (1983).

<sup>39</sup> Steven O. Roberts et al., *Racial Inequality in Psychological Research: Trends of the Past and Recommendations for the Future*, 15 PERSPS. PSYCH. SCI. 1295 (2020). But see Chris C. Martin, *Equal Representation Is Inequality, and Other Fallacies: A Commentary on Roberts Et Al.*, PSYARXIV (2020), <https://psyarxiv.com/zusmd>.



issues relating to race and racism.<sup>40</sup> I cite these studies to highlight the striking parallels between my findings and those in completely different fields where the composition of the editors has been overwhelmingly white and where there have also been few publications relating to race. This absence of articles that explicitly probe whether international law has anything to do with race constitutes a colorblindness that, as I have argued elsewhere, is characteristic of how mainstream and even critical scholars avoid analyzing the racial power of law.<sup>41</sup> The absence of scholarly analysis relating to race in the premier international law journal in the United States, in my view, makes discussions of race and racial domination in international law invisible. These exclusions were also noted in the report of the 2014 Governance Reforms Committee of *AJIL*, appointed by then ASIL President Donald Francis Donovan, that noted that there was a perception that *AJIL* was “‘closed shop,’ made up of those with similar ‘mainstream, traditional’ perspectives who tend to publish and reproduce themselves, and where more ‘innovative scholarship’ is unwelcome.”<sup>42</sup> The members of that committee were: Jane Stromseth (Chair); Jose Alvarez (Ex Officio); Antony Anghie; Mahnoush Arsanjani; Christopher Borgen; Joan Donoghue; Larry Helfer; Edward Kwakwa; Natalie Reid; and Richard Steinberg. The deliberations of this committee’s report in the ASIL Executive Council, comprising members such as Jeremy Levitt and Makau Mutua, set the stage for the election of the first African American editor in 2014. When the first African American was elected to the *AJIL* Board, the Executive Council initially rejected the slate because it did not include a woman. The *AJIL* Editorial Board re-did the election to conform the guidance from the Executive Council.<sup>43</sup>

## B. Hypothesis Two: Exclusion of Critical Scholarship Including that Relating to Race

While noting that Marxist scholarship on international law has not been accepted in mainstream academic circles, Bhupinder S. Chimni, a leading TWAAIL

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<sup>40</sup> Apoorva Mandavilli, *Medical Journals Blind to Racism as Health Crisis, Critics Say*, N.Y. TIMES (June 2, 2021), <https://perma.cc/VK26-G6GD>.

<sup>41</sup> Gathii, *supra* note 20.

<sup>42</sup> REPORT OF THE AD HOC COMMITTEE ON *AJIL* GOVERNANCE (2013) (on file with author). That 2013 report noted that as “far as the Committee is aware, an African American has never served on the Journal Board of Editors; moreover, only Asian American has served on the Board. This stands in sharp contrast to the diversity of talent reflected in the Society’s growing membership.” *Id.* at 5. That report also recommended the amendment of the Lillich Guidelines for selection of articles for publication in *AJIL*. *Id.* at 6. Those guidelines, in my view, placed an insuperable barrier to diversifying the Board.

<sup>43</sup> *See* Minutes, *AJIL* Board of Editors, Extraordinary Meeting (June 19, 2014) (on file with author) (noting that the *AJIL* Board had received guidance from the Executive Council to reconsider the slate of candidates “to provide for more diversity . . . by accelerating the planned expansion of board membership so as to provide an opportunity this year for greater gender diversity”).

Marxist scholar, noted that this unacceptability is “a price that critical theories in general have to pay for contesting dominant ideas and approaches.”<sup>44</sup> He continued noting that critical approaches:

have to confront the ‘subtle censorship of academic decorum.’... the fate of other critical theories such as TWAIL, FtAIL, [Feminist Approaches to International Law], or NAIL, [New Approaches to International Law,] have only been a shade better. Indeed all critical theories are sought to be marginalized by MILS [Mainstream International Legal Scholarship]. But it is only to be expected as critical theories are ranged against the interests of dominant national and international social forces, and therefore often portrayed by the mainstream as unacceptable forms of academic dissent.<sup>45</sup>

Elsewhere, I have responded to dismissive claims that TWAIL scholarship lacks methodological clarity or that it engages in nihilist deconstruction.<sup>46</sup> These types of critiques of critical international law scholarship are not new in *AJIL*. A 1945 review in the journal of W.E.B. Du Bois’s 1945 book, *Color and Democracy: Colonies and Peace*, perhaps sums up the type of skeptical scrutiny about scholarship relating to race. P.M. Brown, of the Board of Editors, wrote about the book:

The hideous cruelties, abominable humiliations, and incredible injustices suffered by the colored race have created a bitterness that precludes an objective and fair analysis of the whole colonial problem. The author . . . has not provided a dispassionate and realistic solution . . . . The author seems to reveal a lack of realism in considering the status of the many African tribes so obviously unprepared for united political action, self-government and independence. He does not credit the colonial powers with sincerity in acknowledging their responsibilities as trustees for the education of backward peoples for full freedom and international obligations.<sup>47</sup>

Those words speak for themselves. They strongly suggest that uncovering sensitive issues of race will only sow division and that they constitute pure grievance, presumably because it is not possible to speak about race and racism

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<sup>44</sup> BHUPINDER S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 20 (2017).

<sup>45</sup> *Id.*

<sup>46</sup> James Thuo Gathii, *The Agenda of Third World Approaches to International Law (TWAIL)*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., 2019).

<sup>47</sup> P.M. Brown, *Color and Democracy: Colonies and Peace*. By W. E. Burghardt DuBois, 39 AM. J. INT’L L. 869, 869 (1945).

objectively.<sup>48</sup> In fact, Abebe, Chilton, and Ginsburg make exactly the same claim in dismissing the work of those that they call critical scholars.<sup>49</sup>

All this suggests that perhaps the proper way to research and write about international law is devoid of any emotion or reference to the racial power of law. Even more, the reviewer of the DuBois book held the views that the colored peoples of the colonies are backward, itself a racist notion, and that W.E.B. DuBois failed to give credit to the colonial powers for all they were doing! That is certainly an apology for colonialism. I may be accused of anachronism here—that I am using my twenty-first century lens to judge what this reviewer meant in 1945.<sup>50</sup> I have two responses to that. First, 1945 was the height of the anticolonial and antiracist efforts against colonial rule in most of Asia and Africa, so these themes were already present in the intellectual discourse of the time.<sup>51</sup> Second, W.E.B. DuBois was one of the leading African American intellectuals of his time connecting white domination of African Americans in the United States to what he called the global color line.<sup>52</sup> So clearly, the questions of race and racial injustice were really at the center of discussion and debate in the United States and abroad. Second, the fact that not much progress to date has been made in publishing scholarship that centers examination of the relationship between international law and race seems to have followed the historical trajectory or path dependency of no consistent practice of publishing such work.

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<sup>48</sup> It is notable that it is not only in international law scholarship where a focus on race is dismissed as ideologically motivated and subjective. For example, critiques of Derald Wing Sue's important work on microaggressions dismiss them as conceptual nonsense and ignore the relevancy of race. *See, e.g.,* Scott O. Lilienfeld, *Microaggressions: Strong Claims, Inadequate Evidence*, 12 PERSPS. PSYCH. SCI. 138 (2017).

<sup>49</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1, 20 (2021) (arguing that “at the end of the day, some of the critical calls for engagement have tended to place the normative commitments above positive inquiry”). That issues relating to race are judged normatively and therefore differently, rather than objectively, is consistent with the finding that in law firms, Black associates are judged more harshly than their white counterparts by white partners. *See* ARIN N. REEVES, WRITTEN IN BLACK & WHITE: EXPLORING CONFIRMATION BIAS IN RACIALIZED PERCEPTIONS OF WRITING SKILLS (2014), <https://perma.cc/644T-JHBQ>.

<sup>50</sup> For more on anachronism and TWAIL, see Gathii, *supra* note 21. *See also* ANNE ORFORD, INTERNATIONAL LAW AND THE POLITICS OF HISTORY (2021).

<sup>51</sup> For more on this, see ADOM GETACHEW, WORLDMAKING AFTER EMPIRE: THE RISE AND FALL OF SELF-DETERMINATION (2019). Gethachew studies “the global projects of decolonization Black Anglophone anticolonial critics and nationalists spearheaded in the three decades after the end of the Second World War.” *Id.* at 2. *See also* Christopher Geveers, “Unwhitening the World”: Rethinking Race and International Law, 67 UCLA L. REV. 1652 (2021).

<sup>52</sup> On this, see JENNIFER PITTS & ADOM GETACHEW, W.E.B. DU BOIS'S INTERNATIONAL WRITINGS (forthcoming 2021).

The data I have unearthed clearly shows that the Black international tradition is underrepresented in *AJIL* and its online companion.<sup>53</sup> In my view, it also shows that the intellectual authority interests of those interested in issues of race and racism in international law, and in particular those Black international lawyers who write on these subject areas, have been ignored and therefore not valued in the leading international law journal in the United States. Perhaps this research shows the relationship between power and knowledge, a topic that Edward Said powerfully wrote about in his 1978 book, *Orientalism*.<sup>54</sup> For Said, Orientalism was a “sign of European-Atlantic power over the Orient.”<sup>55</sup> It seems mainstream approaches to international law have had a similar power of epistemically erasing the perspectives of how racialized minorities have been marginalized by international law.

Further research needs to interrogate the methods of exclusion of work relating to race as well as the scholarship of minority scholars to see if this scholarship around issues of race was prevented not just by the absence of honest racial dialogue, but also by mechanisms of exclusions such as those that pose a tradeoff between quality and diversity. Further, it would be great to know if, as an imperative to maintain the quality of *AJIL* and *AJIL Unbound*, it has been necessary to police the boundaries of what is published to prevent the quality of the journal being compromised. As I will note in the conclusion, this conversation has only just commenced within the Board of Editors of *AJIL*.

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<sup>53</sup> For more on Black traditions of international law, see James T. Gathii, *Henry J. Richardson III: The Father of Black Tradition of International Law*, 31 TEMP. INT'L & COMP. L.J. 325 (2017); Darin E.W. Johnson, *How U.S. Civil Rights Leaders' Human Rights Agenda Shaped the United Nations*, 1 HOWARD HUM. & CIV. RTS. L. REV. 33 (2017); H. Timothy Lovelace Jr., *Making the World in Atlanta's Image: The Student Nonviolent Coordinating Committee, Morris Abram, and the Legislative History of the United Nations Race Convention*, 32 L. & HIST. REV. 385 (2014); FOREIGN POLICY AND THE BLACK (INTER)NATIONAL (Charles P. Henry ed., 2000); Joyce Elaine King, *Education, Research in the Black Liberation: Return What You Learn to the People*, 86 J. NEGRO EDUC. 2 (2017).

<sup>54</sup> EDWARD SAID, *ORIENTALISM* (1978).

For if it is true that no production of knowledge in the human sciences can ever ignore or disclaim its author's involvement as a human subject in his own circumstances, then it must also be true that for a European or American studying the Orient there can be no disclaiming the maid circumstances of his actuality: that he comes up against the Orient as a European or American first, as an individual second. And to be a European or an American in such a situation is by no means an inert fact. It meant and means being aware, however dimly, that one belongs to a power with definite interests in the Orient, and more important, that one belongs to a part of the earth with a definite history of involvement in the Orient almost since the time of Homer.

*Id.* at 19. As an editor on *AJIL* for the last seven years, my personal experience has been that there has been policing of boundaries about what is valuable scholarship and what is not. Scholarship probing or critiquing international law's complicity in colonialism, slavery, and racism has, in my experience, not been regarded as a valuable type of scholarship.

<sup>55</sup> *Id.* at 14.

### C. Hypothesis Three: The Big or Defining Debates About International Law in the United States Have Focused on Issues Other than Race

The defining debates about international law in the United States, as represented in *AJIL*, have not simply focused on or zeroed in on the role and place of race in international law. That means the editors of *AJIL* focused on topics that they considered to be the most important. As a review of *AJIL*'s first century noted, the journal has a “peculiarly messianic and distinctively American, vision and thrust” traceable to its founders.<sup>56</sup> In effect, scholarship probing the role of the U.S. as an empire that mobilized race to repress non-dominant peoples in its possessions and territories, but also and most significantly in its domestic jurisdiction, has not been a particular focus of international law scholarship in the pages of *AJIL* or *AJIL Unbound*. For example, African American scholars who were particularly interested in how the minority rights system in Europe could be a useful international legal analogy for U.S. minorities did not feature in any significant way in the pages of *AJIL*.<sup>57</sup> By contrast, for European scholars who have dominated writing about the minority rights system in Europe in the interwar years, including in *AJIL*, the focus of their scholarship was mainly descriptive of that system outside the United States. That scholarship was never focused on the applicability of the minority rights system within the U.S. The inattention to applicability of the minority rights system for domestic minorities within mainstream international law circles is consistent with the view that civil rights apply to domestic minorities and human rights apply outside the United States.<sup>58</sup> This distinction between domestic and international realms has a long legacy of limiting international legal scrutiny of racial inequality and racial injustice in the United States. This exceptionalism has, in my view, been part of the silencing of how domestic minorities have sought to use international law to address their racial repression and marginalization from slavery to date.<sup>59</sup> In other words, it seems that this exceptionalism, in part, explains the absence of any critical scrutiny of issues relating to race in *AJIL* and *AJIL Unbound* to date.

In the last couple of years, a non-exhaustive list of examples of some of the big themes that have preoccupied international legal scholarship include:

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<sup>56</sup> Bederman, *supra* note 7, at 21.

<sup>57</sup> As noted above, the African American scholar Y.N. Kly published at least two books on this subject.

<sup>58</sup> That argument is made persuasively by Makau w. Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589 (1996).

<sup>59</sup> See James Thuo Gathii, Keynote Address at the 2021 *Wisconsin Journal of International Law* Symposium: Race, Racism and International Law: A Repudiation of US Exceptionalism (Apr. 8, 2021).

1. The big culture wars of *AJIL* were about the place of international law within the U.S. legal order, and in particular the debate between the modern and revisionist position about the status of customary international law as federal common law.<sup>60</sup> These debate have centered on the “constitutional dimensions of U.S. foreign affairs law” and they have straddled the history of the journal from its founding.<sup>61</sup> So American has *AJIL*’s focus been that a controversy is reported to have emerged within the governing board of ASIL about awarding Hans Kelsen the 1952 ASIL annual distinguished scholarship award because he “had not adopted a U.S. policy orientation.”<sup>62</sup>
2. Another major *AJIL* theme has been the role of the U.S. in the world. This has involved questions of war (including torture, rendition in the recent past), national security, as well as humanitarian intervention every time there is a discussion about the use of force. In David Bederman’s study of the first 100 years of *AJIL* scholarship, he noted that contributors to the journal followed a “common script of interests and attitudes” so that when the United States entered into conflict, “the journal was a loyal and obedient commentator about American war aims and objectives, as befit the communication organ of a society that was, at one and the same time, progressive and conservative on this country’s legal engagements overseas.”<sup>63</sup>
3. *AJIL* has also focused on the U.S.’s relationship with international institutions like the United Nations, the International Criminal Court, and the International Court of Justice.<sup>64</sup>
4. Another commitment in *AJIL* has been a “belief in the ultimate inevitability of a community of nations living under the rule of law.”<sup>65</sup>

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<sup>60</sup> This debate is summarized here: Ingrid B. Wuerth, *The Alien Tort Statute and Federal Common Law: A New Approach*, 85 NOTRE DAME L. REV. 101 (2010). Notably, *AJIL*’s early focus on federalism as an analogy to international law a century later anchored the revisionist position about the effect of international law within the United States. For this early *AJIL* focus on US federalism, see Carl Landauer, *supra* note 6, at 338.

<sup>61</sup> See, e.g., Bederman, *supra* note 7, at 38 (noting the historical continuation of this theme in the early Cold War period, 1947–1963). In the later Cold War period, 1964–1989, Bederman noted that “the Journal’s preeminence in U.S. constitutional law doctrine and foreign relations law remained unchallenged.” *Id.* at 43. Further, he notes that in the final years of the Cold War was a “preoccupation with virtually all aspects of the U.S. law of foreign affairs.” *Id.* at 47.

<sup>62</sup> Damrosch, *supra* note 33, at 15.

<sup>63</sup> Bederman, *supra* note 7, at 49.

<sup>64</sup> *Id.* at 47 (“[O]ne of the signal aspects of [the final years of the Cold War was] the incredible amount devoted to the role of the United Nations (especially the collective security mechanisms of the Security Council). This writing harks back to scholarship about the Hague Peace Conferences and the League in its formative years.”).

<sup>65</sup> *Id.* at 23.

5. *AJIL* has been consistently committed to international arbitration and institutions for promoting stable and predictable relations between states.<sup>66</sup>
6. Another of *AJIL*'s major points of focus has been the type of international law questions that characterize the work of the Office of the Legal Adviser in the U.S. Department of State, which is charged with providing "advice on all legal issues, domestic and international, arising in the course of the Department's work. This includes assisting Department principals and policy officers in formulating and implementing the foreign policies of the United States, and promoting the development of international law and its institutions as a fundamental element of those policies."<sup>67</sup> It is important to outline this theme at some length. Bederman's account of the first century of *AJIL* scholarship notes that in "view of the strong connection of some *AJIL* contributors to U.S. government circles, and the historical tradition of the journal as a reflection of both the progressive and conservative attitudes of ASIL, the U.S. government's views appear to have had a fair hearing in these situations."<sup>68</sup> There indeed has been a rotating door between ASIL and the Legal Advisers' office. In 2006, Lori Damrosch observed that "many of the journal's editors . . . have previously held positions in the [State] [D]epartment's Office of the Legal Adviser or other offices concerned with U.S. foreign relations."<sup>69</sup> In fact, Legal Advisers and the lawyers who serve in that office are frequently on the annual meeting program of ASIL.<sup>70</sup> Further, one of the major receptions

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<sup>66</sup> *Id.* at 23. Bederman notes that the "first seven volumes of the journal convey an overall impression of almost complete dedication to expounding the virtues and possibilities of institutions of international arbitration." *Id.* at 26; *see also* Landauer, *supra* note 6, at 337, 340 (also noting that the "particular American investment in 'assuring the peace of the world' was a commitment to the development of arbitration [that dated back to] the first International American Conference held in Washington in 1889-90 as a 'Magna Carta which abolished war and substitutes arbitration between the American Republics'"). Landauer notes that John Bassett Moore, another prominent early member of ASIL and "author of the eight-volume digest of international arbitration[,] was a paid representative of a U.S. based investment company in a case it filed against the Dominican government at a time that Moore was also a paid representative of the State Department and in that role 'steered the membership on the arbitration panel.'" Landauer, *supra* note 6, at 344. Thus concludes Landauer, "the international law advocated by US international lawyers was tied to US business interests and there were numerous actual ties between lawyers and those interests." *Id.*

<sup>67</sup> *Office of the Legal Adviser*, U.S. DEP'T OF STATE, <https://perma.cc/Z2Y7-XW6B>.

<sup>68</sup> Bederman, *supra* note 7, at 50.

<sup>69</sup> Damrosch, *supra* note 33, at 18.

<sup>70</sup> *See* Harold Koh, *Keynote Address: The Obama Administration and International Law*, 104 AM. SOC'Y INT'L L. PROC., 104, 207-08 (2010).

at the ASIL annual meeting is hosted by the Legal Adviser's office hosted for former and current staff of the Legal Adviser's office and their guests. A search of the Legal Adviser on *AJIL* indicates that the Legal Advisers' opinions feature prominently in its pages over several decades. Unsurprisingly, many *AJIL* editors have served stints in the Office of the Legal Adviser. Thus Carl Landauer remarks that "the journal's articles often seem to have been written in an antechamber of the State Department."<sup>71</sup> It is notable that *AJIL* has a long-standing relationship to the U.S. State Department. To cite Benjamin Allen Coates again, he notes in the early twentieth century there was a "large number of government officials in the ASIL's leadership [and the] State Department took out 450 subscriptions to the *AJIL* . . . and in the process improving the society's financial position."<sup>72</sup> Coates notes that James Brown Scott, who was its first Editor in Chief (1907 to 1924) and who contributed money to found it,<sup>73</sup> wrote *AJIL* editorials in its early years to make sure they did not criticize the Department of State, so that those subscriptions were not cancelled.<sup>74</sup> Indeed, ASIL's early history was closely linked with American power, as evidenced by the fact that the U.S. Secretary of War Elihu Root served as ASIL's founding

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First, I have absolutely extraordinary colleagues at the Legal Adviser's Office, which we call "L," which is surely the greatest international law firm in the world. Its numbers include many current lawyers and alumni who are sitting here in the audience, and it is a training ground for America's international lawyers. (To prove that point, could I have a show of hands of how many of you in the audience have worked in L sometime during your careers?) Our 175 lawyers are spread over 24 offices, including four extraordinary career deputies and a Counselor of International Law, nearly all of whom are members of this Society and many of whom you will find speaking on the various panels throughout this Annual Meeting program.

*Id.* In response, one commentator noted

[Harold Koh's] keynote address got a few not-buying-it questions from a couple of academics—long may you live, Benjamin Davis and Mary Ellen O'Connell—but this dissonance was washed away by the warm roar of applause at session's end. A Russian corporate lawyer chum of mine was taken aback by this mellow response to a legal justification for Bush-Cheney policies.

Chase Madar, *How Liberal Law Professors Kill*, COUNTERPUNCH (May 14, 2010), <https://perma.cc/S7XF-3UQ4>; see also MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS: THE ROLE OF INTERNATIONAL LAW AND THE STATE DEPARTMENT LEGAL ADVISER (2010) (discussing the role of the State Department Legal Adviser).

<sup>71</sup> Landauer, *supra* note 6, at 329.

<sup>72</sup> COATES, *supra* note 3, at 81–82.

<sup>73</sup> Bederman, *supra* note 7, at 22.

<sup>74</sup> COATES, *supra* note 3, at 80, 83. Notably, Landauer, *supra* note 6, at 341, notes that the pages of *AJIL* were not always "entirely copy for the United States," in a discussion of criticisms leveled against the United States for its hypocrisy of the Drago and Calvo doctrines that featured in the pages of *AJIL*. *Id.* at 341, 342.



President, three of its Vice Presidents were Supreme Court Justices, three former Secretaries of State, and a future U.S. President.<sup>75</sup> As Carl Landauer notes, the early officers of ASIL and editors of *AJIL* “were part of the interlocking directorate of the US legal and international relations establishment, and very much part of what has been identified as a new American ‘gentry’ class.”<sup>76</sup>

#### D. Hypothesis Four: Color-Blindness Has Been the Default Mode of International Legal Scholarship

Another hypothesis is that color-blindness has been the default norm in the production of international law scholarship published in *AJIL* and *AJIL Unbound*. This is consistent with the fact that the U.S. government has a long history of limiting scrutiny of its record of domestic racial inequality, racial injustice, and ongoing marginalization of women and Indigenous peoples through international law.<sup>77</sup> In effect, my findings suggest that *AJIL* and *AJIL Unbound* consciously or unconsciously raise the possibility that they reinforce the white status quo understanding of international law.<sup>78</sup>

As I have noted elsewhere recently, domestic U.S. law was constructed on assumptions that white identity embodied the ideal expression of humanity in terms of morality, progress, and civilization. Likewise, imperial international law was constructed on the basis of white racial superiority—as rational stewards of the territories of non-Europeans—and on the basis of racist myths of indigenous savagery, primitivism, and pathology. Hence, just as slavery dehumanized African Americans as degenerate and outside the boundaries of humanity in the construction of the United States as a white racial state, European and white international law was constructed to superintend over “backward” non-European peoples who were considered to live outside the bounds of humanity and therefore outside of sovereignty.<sup>79</sup>

### IV. CONCLUSION

In this Essay, I have used the social science approach to studying international law recommended by Abebe, Chilton, and Ginsburg to show the near total silence of issues of race in the pages of *AJIL* and *AJIL Unbound*. I have

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<sup>75</sup> COATES, *supra* note 3, at 67. Corroborating this is another excellent essay on *AJIL*'s founding by Carl Landauer. Landauer, *supra* note 6, at 326.

<sup>76</sup> Landauer, *supra* note 6, at 327.

<sup>77</sup> This point is the subject of another essay. Gathii, *supra* note 59.

<sup>78</sup> For the same point in another context, see BELL HOOKS, *TEACHING TO TRANSGRESS: EDUCATION AS THE PRACTICE OF FREEDOM* 12 (1994).

<sup>79</sup> Gathii, *supra* note 20.

hypothesized that the exclusion of issues of race from the pages of the leading international law journal can be accounted for along four dimensions. First, this absence reflects the conscious exclusion of African Americans in ASIL in the first six decades of its existence, as the 2020 Richardson Report found.<sup>80</sup> Second, it is the result of the stringent scrutiny that international law scholarship relating to racial subordination in international law has faced in *AJIL* and *AJIL Unbound*. Third, the big or defining debates about international law in the U.S. have focused on issues other than race. And fourth, color-blindness has been the default view of American international law scholarship as represented in the journal.

This Essay shows two things. First, that Abebe, Chilton, and Ginsburg's social science approach can be fruitfully applied to answer questions that critical international law scholars are interested in. Second, that in tracing the legacy of race in international law, as I have done in this article, Abebe, Chilton and Ginsburg's distinction between the neutrality of the scientific methodology they subscribe to, on the one hand, and the normativity of critical approaches that they argue characterizes other approaches, on the other hand, cannot be sustained. This is because the choice of the subject matter that a social science approach takes necessarily excludes other choices. Making that choice is therefore a process of inclusion as well as of exclusion. To the extent that a choice must be made, the selection itself is normative. In addition, the choice of what gets published and what does not, as this Essay has tried to show, can itself be an exclusionary process—something that cannot be normatively or ideologically neutral.

This Essay has shown that *AJIL* and its companion *AJIL Unbound* have published little on race in over 100 years. Yet, race is heavily embedded in how many rules of international law were formulated and the manner in which it is applied to date. This absence of articles relating to race reflects choices that have effectively discouraged, if not silenced, the production of scholarship on race and international law. That outcome, I contend, is not inevitable, natural, and necessary, but is perhaps rather a reflection of the choices about what types of knowledge in international law matter enough to be published in the pages of *AJIL* and *AJIL Unbound*.

So, what can be done about this exclusion of scholarship probing the role of race in *AJIL* and *AJIL Unbound*? Elsewhere, I have made the case that CRT scholars and TWAIL scholars should work together to combat the “all-too-often mainstream efforts to provincialize, define, and box critical approaches—especially when they delve into issues of race and identity—as marginal and irrelevant, rather than as significant contributions that challenge expand their respective fields.”<sup>81</sup> Already a number of recent events have been convened

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<sup>80</sup> THE RICHARDSON REPORT, *supra* note 11.

<sup>81</sup> Gathii, *supra* note 20; *see also* Tendayi Achiume & Devon W. Carbado, *Critical Race Theory Meets Third World Approaches to International Law*, 67 UCLA L. REV. 1462 (2021).

between TWAIL and CRT scholars to explore their overlapping interests, and part of that conversation is set to be published as a symposium issue of the UCLA Law Review.<sup>82</sup> This is a great start.

Within *AJIL*, on October 5, 2020, the Executive Committee of Blacks of the American Society of International Law (BASIL)<sup>83</sup> wrote to the Editors in Chief of *AJIL* in the following terms:<sup>84</sup>

[T]aking into account the progress made since 2014 when the first African Americans were elected as Editors of the American Journal of International Law, BASIL calls upon the Editors of the American Journal of International Law:

- To continue to make diversity and inclusivity a consideration, particularly of African Americans, in those selected for nomination to be *AJIL* Editors;
- To continue to make diversity and inclusivity a consideration, particularly of African Americans, among those elected to be *AJIL* Editors;
- To ensure that appointive positions at the discretion of the Editors in Chief in the Journal (such as for Section Heads, Associate Managing Editors, committee chairs, and other leadership positions) reflect the diversity of ASIL's membership and in particular of African Americans and critical race scholars;
- To in particular ensure that the appointment of Associate Managing Editors include African Americans since this has become an informal pipeline for election to become Editors and yet no African Americans have served in this role;
- To ensure an open, more transparent application process for Associate Managing Editors (comparable to ASIL's approach to openly advertising leadership positions) —e.g., advertised through historically-Black law schools, the National Bar Association, BASIL, and other appropriate institutions that may provide a gateway for African American and other underrepresented lawyers who specialize in international law;

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<sup>82</sup> For example, Justin Desautels-Stein, James Anaya, and Tendayi Achiume organized the “International Law and Racial Justice” workshop at the University of Colorado, Boulder, School of Law in August 2018. Another symposium in March 2019 titled “Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations” and a workshop immediately thereafter titled “Race, Empire and International Law Workshop,” co-sponsored by UCLA School of Law’s Promise Institute for Human Rights and Critical Race Studies Program, were held under the guidance of Tendayi Achiume and Asli Bali. Following those events, in January 2020, the UCLA Law Review Symposium, entitled “Transnational Legal Discourse on Race and Empire,” was held. For the introduction to that symposium, see Tendayi Achiume and Asli Bali, *Race and Empire: Legal Theory Within, Through and Across National Borders* 67 *UCLA L. REV.* 1386 (2021).

<sup>83</sup> Established under the ASIL Honorary Presidency of Judge Gabrielle Kirk McDonald, BASIL’s goals include (1) increasing the number and influence of Blacks within ASIL, and (2) strengthening and affirming the role of Black international lawyers, jurists, and academics in the United States. *See* Letter from BASIL Exec. Comm. to the *AJIL* Co-Editors in Chief (Oct. 5, 2020) [hereinafter *BASIL Letter*] (on file with author).

<sup>84</sup> *See id.*

- To avoid the types of word-of-mouth (and “old boy’s network”) hiring approaches that have been found illegal under U.S. civil rights law, as such hiring processes served to exclude, rather than open up the pipeline of opportunity;
- To in particular ensure that the appointment of the Nomination Committee for the election of new Editors is inclusive and diverse and, to the extent possible, especially when African American editors are finalizing their terms of office or when they have decided not to seek re-election, that African American Editors are part of the Nominating Committee;
- To continue to add to rather than to reduce the number of African Americans on the Board of Editors to avoid the legacy of exclusion of African Americans in the Board of Editors; and
- To continue maintaining African American nominees eligible for election put forward by the Nominating Committee but not elected for consideration in subsequent elections.<sup>85</sup>

An ad hoc committee on Diversity in *AJIL* was convened in late 2020 with a mandate to look into “how *AJIL* should promote racial and other forms of diversity in the process for nominations, elections to the Board, and selection of section heads and editorial positions on Unbound.”<sup>86</sup> Although BASIL’s letter noted that “we would be delighted to see articles on the types of issues raised by critical race theorists in *AJIL* that have so far not featured in the pages of the Journal,” issues of content were excluded from the remit of the ad hoc committee on diversity.<sup>87</sup> After several months of intensive consultations, the ad hoc committee report to the full *AJIL* Board in March 2021. The report made eight recommendations:

**Recommendation (1): Diversity Statement.** Replace the Lillich Guidelines with a Diversity Statement that can be used to guide or question future decisions:

Sample language: The *American Journal of International Law* is committed to being the preeminent publication on international law in the United States. Toward that end, the *Journal* will select highly qualified individuals, who have diverse backgrounds and perspectives (along multiple dimensions), to participate in decisionmaking on the Board of Editors and in other management or editorial positions. This commitment to diversity is not only in the service of excellence but also consistent with fundamental non-discrimination norms in the field of international law.

Send this Diversity Statement to nominees for election to the Board, with the statement on active service, in order to establish expectations for Board membership.

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<sup>85</sup> *Id.* at 2–3.

<sup>86</sup> Email from *AJIL* Editors in Chief (Dec. 3, 2020) (on file with author).

<sup>87</sup> BASIL Letter, *supra* note 83, at 3.

**Recommendation (2): Cultivate Diverse Talent.** Work with relevant ASIL groups and programs (*e.g.*, BASIL, WILIG, MILIG, and “new voices”) to provide mentorship and advice to interested scholars who are of color (especially African American) or are not cisgender men. Include a diverse range of article reviewers when going outside the Board, as one way to identify possible future candidates for the Board.

**Recommendation (3): Transparency in Nomination and Selection Criteria.** Publicize information about the criteria for being nominated or selected to the Board or to other management or editorial positions, so that qualified candidates who are not well networked can more easily put themselves forward.

**Recommendation (4): Open the Processes for Selecting Section Heads and Editorial Positions for *AJIL Unbound*.** Consider publicizing (at least to members of the Board) when these positions become available so that the pool of candidates can be expanded and diversified. Also consider involving some members of the Board in the appointment decisions.

**Recommendation (5): Nomination Committee Diversity Consideration.** Ensure that the Nomination Committee is diverse and require it, when presenting the candidates for selection to the Board, to describe the steps it took to include a slate of candidates who are diverse among many dimensions, including race (especially African Americans) and gender.

**Recommendation (6): Create an Inclusive and Equitable Environment on the Board.** Provide more opportunities for Board members to interact and participate in decisions relating to the Board. For example, consider using semiannual meetings to discuss strategic decisions, best practices for reviewing manuscripts, or opportunities for future engagement and involvement. In addition, encourage Board members to present their own ideas for the *Journal*; avoid creating an environment (actual or perceived) in which only a small subset of Board members shape the content of the *Journal*.

**Recommendation (7): Do Not Backslide.** Given the progress that has been achieved in diversifying the Board, create the expectation that future Board Elections will build on rather than undercut this progress; perhaps use as a baseline goal the 2020-2021 composition of the Board. Encourage Board members to disclose on a voluntary basis their racial, ethnic or other forms of diversity to help the *Journal* track progress in diversifying the Board.

**Recommendation (8): Regular Diversity Review.** Institute a regular process for reviewing, perhaps every three years, the diversity on the Board and in other editorial and management positions and for recommending further action, as necessary.

**Recommendation (9): Diversity in Content.** Institute a process for considering whether and, if so, how *AJIL* should try to diversify its content such that it includes a broader range of topics and methods of analysis, including but not limited to those relating to gender, race, and ethnicity.<sup>88</sup>

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<sup>88</sup> AM. J. INT’L LAW, REPORT OF THE AJIL AD HOC DIVERSITY COMMITTEE 5–6 (2021) (on file with author).

In short, *AJIL*'s Editorial Board has instituted a process to address many of the issues raised in the BASIL letter and which, in my view, have prevented *AJIL* and *AJIL Unbound* from publishing scholarship critically analyzing the role of race in international law. That said, as important as the process is for addressing issues of content in *AJIL* and *AJIL Unbound*, the measure of success is when *AJIL* and *AJIL Unbound* regularly publish issues of race and identity as often as they publish on black letter law issues.

The foregoing nascent efforts within *AJIL*, including the election of two female African American editors and the first indigenous American as an editor,<sup>89</sup> may offer some hope that there will be momentum to dismantle the legacy of exclusion of content relating to race in the pages of the journal and in *AJIL Unbound* as well. Ultimately, more scholarship needs to probe why issues relating to slavery, race, and imperialism, which have all intimately shaped international law, have not been featured in any significant way in the pages of *AJIL* and *AJIL Unbound*. This unfortunate state of affairs has continued even as there continues to be a growing body of scholarship on these themes published in leading publishing houses as well as articles published in many other reputable journals and blogs.<sup>90</sup> In fact, it is telling that the international legal ramifications of Black Lives Matter were covered by the *European Journal of International Law*<sup>91</sup> and the blog *Just Security*,<sup>92</sup> but not by the *AJIL* or *AJIL Unbound* in any of any significant way. Hopefully, the conversations that have begun within the Editorial Board of *AJIL* and *AJIL Unbound* will address these more than century-long exclusions and silences and begin to overcome them.

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<sup>89</sup> The two African American female editors elected were Adrien Katherine Wing and Tendayi Achiume. The first scholar of indigenous descent, elected on the board on the same day, March 19, 2021, was James Anaya. See James Thuo Gathii (@JTGathii), TWITTER (Mar. 19, 2021, 3:39 PM), <https://twitter.com/JTGathii/status/1373011376420106241>.

<sup>90</sup> For a sampling of such scholarship, see the TWAAIL bibliography attached to my 2020 ASIL Grotius Lecture. James Thuo Gathii, *The Promise of International Law: A Third World View (Including a TWAAIL Bibliography 1996–2019 as an Appendix)* 114 AM. SOC'Y INT'L L. PROC. 165 (2021), <https://perma.cc/CL73-VM3F>.

<sup>91</sup> *Black Lives Matter*, EJIL: TALK!, <https://perma.cc/6HS2-KP8A>.

<sup>92</sup> Maryam Jamshidi & Emily Berman, *Embracing Diversity and Critical Perspectives in National Security Law*, JUST SECURITY (Oct. 30, 2020), <https://perma.cc/42L7-BWFX>.

## *The Limits of International Law* Fifteen Years Later

Jack Goldsmith\* & Eric A. Posner†

### **Abstract**

*The Limits of International Law* received a great deal of criticism when it was published in 2005, but it has aged well. The skeptical, social-scientific methodology that it recommended has become a normal mode of international law scholarship. And the dominant idealistic view of international law that the book criticized is today in shambles, unable to explain the turmoil in international politics. This Essay reflects on the book's reception and corrects common misperceptions of its arguments.

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## Table of Contents

I. Introduction.....	112
II. Origins .....	112
III. Limits.....	113
IV. Criticisms and Subsequent Developments in International Law Scholarship .....	116
A. Challenges to Theory .....	116
B. The Reality of International Law .....	119
C. Empirical Work.....	120
V. Skepticism and Recent History .....	122
VI. Conclusion.....	127



## I. INTRODUCTION

Our book, *The Limits of International Law*<sup>1</sup> (*Limits*), was published fifteen years ago. A lot has happened since then, both in international law scholarship, and in the world. Here we take a brief retrospective look at *Limits*, its critics, and the arc of international law scholarship and international law since its publication.

## II. ORIGINS

The collaboration that resulted in *Limits* began many years before publication, in 1998. That year we wrote *A Theory of Customary International Law*,<sup>2</sup> which we published in 1999, and (after revision) incorporated into chapter 1 of *Limits*. The late 1990s was the high-water mark of American exceptionalism and optimism about prospects for a benign international liberal order. This optimism had seeped into mainstream public international law scholarship, and especially American international law scholarship.

As *Limits* noted, that scholarship was an improbable combination of idealism and doctrinalism.<sup>3</sup> The idealism was reflected in the conviction that international law was powerful, expanding, and liberal in orientation. The doctrinalism was manifest in the traditional lawyerly practice of parsing legal “texts”—treaties, judicial decisions, government declarations, and so on—to discern legal obligations. The improbability of this combination arose from the tension between those texts, associated state practice, and the idealism. The texts tended to display either exceedingly narrow compromises hammered out by states that jealously guarded their interests, or florid rhetoric that expressed aspirations for a better future that most states plainly did not take seriously as binding commitments in the here-and-now. Meanwhile, numerous violations of international law at the time—and, more frequently, circumventions that revealed the narrowness of the actual commitments—were downplayed, explained away, or bemoaned. These were the currents of thought that we reacted to, first in the 1999 article,<sup>4</sup> then in two other journal articles,<sup>5</sup> and then in the book.<sup>6</sup>

Mainstream public international law scholarship of the time had not yet caught up with developments in scholarship in American law schools. In the

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<sup>1</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>2</sup> Eric A. Posner & Jack L. Goldsmith, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

<sup>3</sup> GOLDSMITH & POSNER, *supra* note 1, at 3.

<sup>4</sup> Posner & Goldsmith, *supra* note 2.

<sup>5</sup> Eric A. Posner & Jack L. Goldsmith, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT'L L. 639 (2000); Jack L. Goldsmith & Eric A. Posner, *Moral and Legal Rhetoric in International Relations: A Rational Choice Perspective*, 31 J. LEG. STUD. S115 (2002).

<sup>6</sup> GOLDSMITH & POSNER, *supra* note 1.

1970s, legal scholarship welcomed influences from other disciplines—including economics, history, philosophy, sociology, and psychology. By the 1990s, legal scholarship had been transformed. Most influential scholarship became firmly grounded in the methodology of the social sciences. While economics was the dominant social scientific discipline in and out of law, the transformation was broader than that. Legal scholars took from the social sciences a commitment to theory and empiricism even while they maintained their traditional normative policy orientation, which the social sciences, for the most part, had shunned.

“Theory” meant that legal scholarship connected its normative claims to a recognizable, in-principle-testable theory about how people behave. In law and economics, the theory was that people act in an instrumentally rational way, based on stable preferences and subject to a budget constraint. “Empiricism” meant that legal scholars would look beyond the law as it appears in statutes and judicial opinions and evaluate how it influences behavior. In large part, law and economics drew on the empirical results in economics. But it also claimed that its normative proposals for legal reform would have certain predicted outcomes that could be empirically validated. And “normative” meant that legal scholarship made proposals for reform or defended existing arrangements. There was a huge amount of debate about the appropriate normative criteria.<sup>7</sup> While there was not as much convergence as one might have hoped, legal scholars did make progress by being clearer about their normative assumptions and standards.

### III. LIMITS

*Limits* was a broadside against these prevailing attitudes in international law scholarship. In place of the idealism of international law scholarship, we sought to approach the topic with the more skeptical style of thinking about institutions that we associated with the social science tradition.

We were not writing on a clean slate. In the field of international trade law, law and economics ideas had already made an impact.<sup>8</sup> In political science, scholars who called themselves “rational institutionalists” (and similar things) had begun to apply economic theory to international institutions and law, albeit with a focus and approach that were somewhat foreign to the style of legal scholarship.<sup>9</sup>

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<sup>7</sup> Law and economics mostly used efficiency as its chief normative criterion. In recent years, scholars have become more interested in distributional equity as well. In other areas of law, various other normative criteria drawn from political and moral philosophy were common. See Zachary Liscow, *Redistribution for Realists* (Yale L. Sch., Working Paper, Feb. 24, 2021), <https://perma.cc/FU4Z-KDDC>.

<sup>8</sup> See, e.g., Alan O. Sykes, *Regulatory Protectionism and the Law of International Trade*, 66 U. CHI. L. REV. 1 (1999).

<sup>9</sup> See, e.g., Duncan Snidal, *Coordination Versus Prisoners’ Dilemma: Implications for International Cooperation and Regimes*, 79 AM. POL. SCI. REV. 923, (1985); Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter, *Introduction: Legalization and World Politics*, 54 INT’L. ORG. 385 (2000).

Other methodologies in international relations theory were also beginning to influence international law scholarship.<sup>10</sup> And some international law professors had begun to think about ways that law and economics could be imported into international law.<sup>11</sup> Little of this work focused on big-picture theoretical questions about how public international law operated. And little of it focused on the incentive-compatibility issue—the issue of how states’ incentives might affect their compliance with international law, and hence their design of international law. Much of the brouhaha about *Limits* resulted from our placement of this question—which recalled the tradition of realism in international relations—at the center of the study of public international law.

For theory, *Limits* drew on economics and game theory. While there was nothing particularly sophisticated about our approach, we could not simply draw on standard law and economics, which was mostly applied to domestic law, because of a distinctive feature of international law—namely, decentralized enforcement. Because one cannot assume a relatively neutral and reliable central enforcer of international law, as one can for domestic law, the incentives of enforcers (states) to comply with, as well as make, international law must be accounted for. That is why we used the theory of repeated games. The requirement that international law be “incentive-compatible”—that is, consistent with the interests of states—puts a significant limit on what international law could accomplish, compared to domestic law, where centuries of institutional development made possible laws and regulations that could advance broader conceptions of the public good.<sup>12</sup>

The central claim in *Limits* was that international law—treaties and customs—emerges from and is sustained by states acting rationally to maximize their interests given their perception of the interests of other states and the distribution of state power. This was a self-consciously reductive claim based on reductive assumptions. The goal was to see how much of macro behavior related to international law could be explained not on the basis of the field’s standard assumptions about a tendency toward law compliance, but rather on the basis of simple assumptions about state interests and rudimentary tools of game theory.

In the introduction to *Limits* we discussed some of our simplifying assumptions. While acknowledging that a rational choice theory of international law could, in theory, be built based on assessments of the interests of citizens or

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<sup>10</sup> See, e.g., Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT’L L. 367 (1998).

<sup>11</sup> See, e.g., Jeffrey L. Dunoff & Joel P. Trachtman, *Economic Analysis of International Law*, 24 YALE J. INT’L L. 1 (1999); Alan O. Sykes, *The Economics of Public International Law*, (John M. Olin Program in L. and Econ., Working Paper No. 216, 2004).

<sup>12</sup> See Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

domestic institutions, we chose the state as the unit of analysis primarily because that is the unit upon which most of international law operates. In doing so, we followed mainstream practice in economics and political science, which treated states—as well as other collective entities, like corporations, households, political parties, and government agencies—as individual agents for purposes of analysis. We also acknowledged that a state’s interest—in this context, its preferences over international outcomes—was often difficult to discern or contested. Our theory assumed that a state’s interest was reflected in the preferences of its leaders. This assumption “is a simplification and is far from perfect,” we noted, but we embraced it nonetheless “because a state’s political leadership, influenced by numerous inputs, determines state actions related to international law.”<sup>13</sup>

*Limits* was agnostic about the content of a state’s interest with one important exception: we formally excluded a preference for complying with international law. We did not claim that leaders and their citizens lack a preference for complying with international law. We noted that this was “an empirical question that we do not purport to resolve in this book.”<sup>14</sup> We excluded this preference primarily for methodological reasons. One was that we were exploring how robust a theory of international law one could develop without relying on this prevailing dogma. Second, as we noted, it “[i]s unenlightening to explain international law compliance in terms of a preference for complying with international law,” which tells one “nothing interesting about when and why states act consistently with international law and provides no basis for understanding variation in, and violation of, international law.”<sup>15</sup>

On these assumptions, we crafted a theory that sought to explain the behaviors associated with international law. Here is the theory in a nutshell:

International law refers to equilibrium outcomes in games of cooperation and coordination among rational, self-interested states. In some cases, these outcomes emerge in a decentralized way as states act in reciprocal fashion in order to obtain mutual gains. “Customary international law” is the term used to refer to the resulting rules of behavior. Because decentralized norms are often ambiguous, states also either codify customary international law in treaties or draft treaties to address novel problems that customary international law does not address. International law can be, and often is, effective and stable because once cooperation begins, it is in the rational self-interest of states to maintain it. But international law can be, and often is, violated, as the relative power of states changes, the preferences of states change, and new problems arise. Often violations are avoided as states anticipate them and renegotiate their obligations; at other times, they occur, sometimes on massive scale. International law may be normatively desirable for the simple reason that it facilitates mutual gains across states. But it need

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<sup>13</sup> GOLDSMITH & POSNER, *supra* note 1, at 6.

<sup>14</sup> *Id.* at 10.

<sup>15</sup> *Id.*

not be: states frequently act in predatory fashion, and can use international law to entrench normatively undesirable outcomes.<sup>16</sup>

Parts I and II of *Limits* applied this framework to various rules of customary international law and various treaty and related regimes. We made several general claims, including: bilateral cooperation was more robust than multilateral cooperation; seeming multilateral cooperation in multilateral treaty organizations was best understood as a combination of coordination and pairwise cooperation; customary international law is more fragile than treaties; and ratification procedures can facilitate cooperation. We did our best to use qualitative empirical evidence to support our theoretical claims, or to show how they could be supported.

With respect to normative issues, we imported the efficiency criterion of law and economics while expressing skepticism toward the traditional normative commitments of mainstream international law scholarship. We took seriously the diversity of populations (and thus interests) across states rather than assume that deep down, everyone is an American liberal or a European social democrat. We also made two normative claims extraneous to law and economics: first, that states have no moral obligation to comply with international law contrary to their interests; and second, that the cosmopolitan claim that states have a duty to craft international law on the basis of global rather than state welfare was incompatible with cosmopolitans' commitment to liberal democracy, which is designed to serve the interests of its citizens and almost always produces a self-interested (that is, nationalist) foreign policy.<sup>17</sup>

#### IV. CRITICISMS AND SUBSEQUENT DEVELOPMENTS IN INTERNATIONAL LAW SCHOLARSHIP

In the fifteen years since its publication, *Limits* has been widely discussed and loudly criticized. During the same period, international law scholarship changed quite a lot—in the direction of the commitments made in *Limits*. Here we focus on three major criticisms of *Limits* that relate to the changes in scholarship during the period.

##### A. Challenges to Theory

We noted at the outset of *Limits* that “[o]ur approach falls closer to the political science international relations tradition, and in particular to [rational choice] institutionalism, than to the mainstream international law scholarship tradition.”<sup>18</sup> Indeed, political scientists and economists were unperturbed by the

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<sup>16</sup> See *id.* at 4.

<sup>17</sup> See *id.* at 185–224.

<sup>18</sup> GOLDSMITH & POSNER, *supra* note 1, at 16.

claims in the book. Lacking any interest in controversies among international lawyers, they saw little that was bothersome.<sup>19</sup>

But most legal scholars viewed the book with hostility as a radical and unhelpful departure from prior scholarship, and as flawed on many grounds.<sup>20</sup> Some of our critics didn't like the rational choice framework of *Limits* and dismissed it out of hand.<sup>21</sup> Others accepted the framework, at least for purposes of argument, but criticized our application of it. Some claimed that the state was the wrong or incomplete unit of analysis.<sup>22</sup> Others stated that more complicated models would produce different and better explanations.<sup>23</sup> Yet others said that that our concept of state interest was too narrow, or too reductive, or too flexible.<sup>24</sup> Some argued that we used an impoverished notion of reputation in our models.<sup>25</sup> Many did not like our argument that states lacked a moral obligation to comply with international law or to take cosmopolitan action.<sup>26</sup>

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<sup>19</sup> See, e.g., Stacie Goddard, Book Review, 120 POL. SCI. Q. 710, 711 (2005) (“[A]lthough political scientists may be sympathetic to the study, most will find the argument of limited added utility.”); cf. G. John Ikenberry, Book Review, 84 FOREIGN AFF. 150 (2005) (“This elegantly argued book . . . has the virtues and liabilities of all simple rationalist theories.”); Todd Sandler, *Treaties: Strategic Considerations*, 2008 U. ILL. L. REV. 155, 156 (2008) (“extend[ing] and modify[ing]” the “interesting and useful approach” to international law in *Limits*).

<sup>20</sup> There were exceptions. See, e.g., Kenneth Anderson, *Remarks by an Idealist on the Realism of the Limits of International Law*, 34 GA. J. INT'L & COMP. L. 253 (2006); David Gray, *Rule-Skepticism, “Strategy,” and the Limits of International Law*, 46 VA. J. INT'L L. 563 (2006).

<sup>21</sup> See, e.g., MARY ELLEN O'CONNELL, *THE POWER & PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY & PRACTICE OF ENFORCEMENT* (2008).

<sup>22</sup> See, e.g., Balakrishnan Rajagopal, Book Review, 19 ETHICS & INT'L AFF. 106 (2005); David Sloss, *Do International Norms Influence State Behavior?*, 38 GEO. WASH. INT'L L. REV. 159, 207 (2006); Kal Raustiala, *Refining The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423, 430–34 (2006); Peter J. Spiro, *A Negative Proof of International Law*, 34 GA. J. INT'L & COMP. L. 454 (2006).

<sup>23</sup> See, e.g., ANDREA BIANCHI, *INTERNATIONAL LAW THEORIES: AN INQUIRY INTO DIFFERENT WAYS OF THINKING* 274–75 (2017); Andreas L. Paulus, *Potential and Limits of the Economic Analysis of International Law: A View from Public International Law*, 165 J. INST. & THEORETICAL ECON. 170, 176 (2009); Anne van Aaken, *To Do Away with International Law? Some Limits to ‘The Limits of International Law,’* 17 EUR. J. INT'L L. 289, 291 (2006).

<sup>24</sup> See, e.g., Paulus, *supra* note 23, at 172; David Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 339 (2006); Sloss, *supra* note 22; Edward T. Swaine, *Restoring (And Risking) Interest in International Law*, 100 AM. J. INT'L L. 259 (2006); Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1406 (2006); Paul Berman, *Review Essay: Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. 1265 (2006).

<sup>25</sup> See, e.g., Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006).

<sup>26</sup> See, e.g., Allen Buchanan, *Democracy and the Commitment to International Law*, 34 GA. J. INT'L & COMP. L. 305, 309 (2006).

We anticipated these criticisms in the book,<sup>27</sup> and addressed them further in a subsequent essay.<sup>28</sup> Many of the criticisms were reasonable; others were misplaced. A lot of criticisms were generic attacks on the methodology of social science. We won't reiterate these points here, except to make two general comments.

First, our models were self-consciously reductive and simplifying about the influences on state behavior related to international law. The aim was to try to understand how much of international law can be explained in a rigorous way based on the centuries-old view that states act on the international stage on the basis of what the state or its leaders see as what is best for the state. Any theory must trade off the accuracy of its assumptions in order to achieve possible explanation. This is standard social science. Many social science-influenced theories since *Limits* have made these tradeoffs in different ways. None, we think, offer as powerful an account of how international law works with such simple premises. But it is hard to compare different theoretical frameworks with different theoretical and empirical focuses.

Second, international law has now definitively taken the social science turn. As we noted in 2006, *Limits* was at the broadest level different from the vast majority of international law theory that preceded it along six dimensions: (1) it made its assumptions explicit; (2) it addressed the limitations and criticisms of its assumptions; (3) it separated out positive from normative analysis; (4) it framed its claims as testable hypotheses; (5) it addressed alternate hypotheses and made an effort to weigh the evidence; and (6) it chose its case studies and other evidence carefully.<sup>29</sup> We “welcomed” the criticisms of *Limits* from within the social science paradigm because we believed they portended improved “standards of analysis” in international law scholarship. “If international law scholarship generally . . . comes to embrace the standards of methodological and empirical care that the critics demand of *Limits*,” we wrote, “the discipline would be significantly improved.”<sup>30</sup> This, in a nutshell, is what happened in the field in the intervening fifteen years.

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<sup>27</sup> GOLDSMITH & POSNER, *supra* note 1, at 23–44.

<sup>28</sup> Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463 (2006).

<sup>29</sup> *Id.* at 466.

<sup>30</sup> *Id.*

## B. The Reality of International Law

A major criticism of *Limits* was its supposed claim (or implication) that international law didn't matter, was irrelevant, or didn't exist.<sup>31</sup> Many people argued that the theory in *Limits* was incompatible with the existence of so much international law, and with the state's use of international law in international relations.<sup>32</sup>

It is true that the book has a self-consciously skeptical tone about international law (more about which below), and this is likely what misled or angered some readers. But the book is not skeptical about international law in the sense of arguing that it is a fiction or unimportant, as some realists in the political science tradition claim,<sup>33</sup> or that international law is not "law," as some philosophers have argued.<sup>34</sup> We were (and are) not realists as that term is commonly understood by political scientists in international relations theory, who believe that international law has no or little importance—though some influential realists, like Hans Morgenthau, did take international law seriously—largely because their focus has been on broad questions of international structure and stability rather than how states cooperate over trade, migration, and related matters. The book's second sentence described the claim that international law is not "really" law as "misleading."<sup>35</sup> *Limits* is skeptical about the claims made by international law scholars about international law, not about international law itself. Above all, as noted, the book is skeptical about the methodological value of an assumption that states experience "compliance pull."<sup>36</sup>

Yet *Limits* asserted a robust role for international law, and for international law negotiations, in fostering international coordination and cooperation (and in avoiding losses from a lack of available coordination or cooperation).<sup>37</sup> The terms of a treaty, or of a rule of customary international law, matter quite a lot to whether and how coordination and cooperation are achieved. The book sought to show through theoretical argument and case studies how the behaviors associated with

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<sup>31</sup> See, e.g., JOEL P. TRACHTMAN, *THE ECONOMIC STRUCTURE OF INTERNATIONAL LAW* 117 (2008); JOHN F. MURPHY, *THE EVOLVING DIMENSIONS OF INTERNATIONAL LAW: HARD CHOICES FOR THE WORLD COMMUNITY* 3 (2010); Berman, *supra* note 24.

<sup>32</sup> See, e.g., Daniel Bodansky, *International Law in Black and White*, 34 GA. J. INT'L & COMP. L. 285, 287 (2006); Raustiala, *supra* note 22, at 429; Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1 (2012).

<sup>33</sup> See generally John J. Mearsheimer, *The False Promise of International Institution*, 19 INT'L SEC. 5 (1995).

<sup>34</sup> See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 260 (1832).

<sup>35</sup> GOLDSMITH & POSNER, *supra* note 1, at 3.

<sup>36</sup> *Id.* at 13.

<sup>37</sup> We emphasized that it did not follow that "international law is irrelevant or unimportant or in some sense unreal," and indeed that international law "can play an important role in helping states achieve mutually beneficial outcomes." *Id.*



international law (including state behaviors consistent with international law) could be explained based on simple premises that did not require reliance on non-instrumental factors. And while we did take an instrumental approach to the question of compliance, and thus accounted for when international law violations took place, especially with respect to ambitious multilateral treaties, these arguments would be meaningless if our thesis had been that international law is a fiction.

We were not surprised by the sharp reaction to our rational choice approach because it flew so sharply in the face of the standard orientation of the field at the time. But we were surprised that some of the early critics questioned whether the non-instrumental accounts of international law that we targeted even warranted a response, and that none of them—or later critics—gave these non-instrumental accounts a robust defense.<sup>38</sup> We speculated at the time that “a major generational change is underway” in which younger scholars (then) of international law had witnessed the power of political science and economics to bring “fruitful insights to international relations,” and had begun to pay “greater attention to the social science virtues: methodological self-consciousness, empiricism, and theoretical rigor.”<sup>39</sup>

And this is what has happened since. A trend that was picking up steam before *Limits* was conceived, and that we drew on in part, is now the dominant approach in international law scholarship. There has been a huge outpouring of international law scholarship grounded in economics and game theory,<sup>40</sup> and in other disciplines as well, including sociology and psychology.<sup>41</sup> But the most remarkable transformation has come in the application of serious empirical analysis of international law.

### C. Empirical Work

*Limits* was mainly a theoretical and methodological book, but it backed its claims with some case studies as well as some quantitative work in economics and political science relating to trade and human rights. The case studies on customary

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<sup>38</sup> See Goldsmith & Posner, *supra* note 28, at 464.

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2007); EUGENE KONTOROVICH & FRANCESCO PARISI, *ECONOMIC ANALYSIS OF INTERNATIONAL LAW* (2016); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* (2006); ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* (2013).

<sup>41</sup> See, e.g., Tomer Brode, *Behavioral International Law*, 163 U. PA. L. REV. 1099 (2015); Ryan Goodman & Derek Jink, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

international law attracted criticism,<sup>42</sup> and the published studies that we drew on were vulnerable to various methodological challenges.

Since we wrote our book, there has been an explosion of quantitative empirical work on international law. In part this has resulted from the accumulation of publicly available data sets made possible by the internet and other technological developments and by the development of software and other tools that have made it easier to analyze this data. Relatedly, PhDs in the social sciences have increasingly moved toward empirical methods because the intellectual payoffs seem high. These developments have had a large impact on social science scholarship, and that impact has spilled over into international law scholarship.

In 2017, Gregory Shaffer and Tom Ginsburg wrote a 47-page paper describing those developments.<sup>43</sup> One can now find empirical work on compliance and related aspects of international law in a variety of subfields, including human rights, international trade, bilateral investment treaties, migration, use of force, customary international law, international courts, and international non-judicial organizations.<sup>44</sup> This work has benefited from collaborations between political scientists like Beth Simmons and Erik Voeten and law professors.<sup>45</sup> In recent years, law professors with empirical training have made contributions on their own. Thanks to this empirical work, the role of international law in international relations is clearer than it used to be. The work has gone beyond the earlier issue of compliance and shed light on how international institutions work, how states design treaties, and much else.<sup>46</sup>

This empirical work has focused on discrete treaties or international law regimes and has not tested general theories of international law—a difficult task,

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<sup>42</sup> See, e.g., Golove, *supra* note 24.

<sup>43</sup> Shaffer & Ginsburg, *supra* note 32, at 1.

<sup>44</sup> See, e.g., Vera Shikhelman, *Geography, Politics and Culture in the United Nations Human Rights Committee*, 28 EUR. J. INT'L L. 845 (2017); Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration* (George Mason L. and Econ. Research Paper No. 21-01, 2020); Cree Jones, *Do Legal Remedies Promote Investment? New Evidence from a Natural Experiment in the Investment Treaty Network* (Univ. of Chicago PhD Dissertation 2017); Cree Jones & Weijia Rao, *Sticky BITs*, 61 HARV. INT'L L.J. 357 (2020); Adam S. Chilton & Eric A. Posner, *Why Countries Sign Bilateral Labor Agreements*, 47 J. LEGAL STUD. 545 (2018); Anu Bradford, Adam Chilton, Katerina Linos & Alexander Weaver, *The Global Dominance of European Competition Law Over American Antitrust Law*, 16 J. EMPIRICAL LEGAL STUD. 731 (2019); Adam Chilton & Katerina Linos, *Preferences and Compliance with International Law*, THEORETICAL INQUIRIES L. (forthcoming); Adam S. Chilton & Mila Versteeg, *International Law, Constitutional Law, and Public Support for Torture*, 3 RSCH. & POL. 1 (2016).

<sup>45</sup> See Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389 (2014); Cosette D. Creamer & Beth A. Simmons, *The Proof Is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM. J. INT'L L. 1 (2020).

<sup>46</sup> See generally Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1 (2021).

to be sure. And in general, theorizing about international law has waned in the last decade or so. This decline in theory followed and reflected trends elsewhere in law and economics, and economics proper, as the incremental intellectual gains from further refining existing theories diminished and empirical questions became more interesting and pressing.

## V. SKEPTICISM AND RECENT HISTORY

We think that sharp reaction to *Limits* mainly resulted from its commitment to understanding international law as a function of national interest and the distribution of power. While the critics who claimed that we argued that international law does not exist were wrong, they no doubt picked up on a strong skeptical subtext about international law and international law scholarship. That subtext includes skepticism about:

1. The extent to which the norms of international law persist when nations' interests or relative power changes;
2. The strength of international law, or the capacity of decentralized enforcement to constrain states, especially powerful states;
3. The robustness of multilateral cooperation via international law, as opposed to bilateral treaty-making, and relatedly, the capacity of international law to resolve major collective action problems as opposed to bilateral disputes like border disagreements;
4. The neutrality and effectiveness of international organizations;
5. The reality of sovereign equality;
6. The normative importance of international law in the abstract, as opposed to specific international legal regimes which, we argued, must be evaluated on a case-by-case basis;
7. The Whig-style progressive histories of international law, and especially human rights law, which assumed that international law inevitably expands and improves;
8. The claim that international law is necessary for international cooperation; and
9. The claim (more common among American academics than foreign academics) that the U.S. plays an essential role in advancing international law.

This skepticism contrasted sharply with the dominant view of international law at the time, which, as we noted earlier, saw international law as approximating or approaching a domestic legal system in advanced countries.<sup>47</sup> That view saw

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<sup>47</sup> There were some skeptics even then. See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW* (2001). But this vein of

international law as increasingly universal (rather than bilateral), robust (rather than fragile), taken for granted (rather than open to question), constitutionally grounded (rather than subject to renegotiation), and teleological (rather than a reflection of temporary political arrangements in the international plane). The fifteen years since *Limits* was published have borne out our skepticism.

In fact, international law moves in cycles, with periods of enthusiasm and advance followed by periods of decay and retrenchment. A gradual but real development in international law and institutions in the second half of the nineteenth century, and the early twentieth century, collapsed with World War I. The League of Nations was followed by fascism and World War II. Another burst of international law-making saw the creation of the United Nations, the seeds of the human rights treaty regime, and the development of security, economic, and financial institutions mainly in the West, but gave way to the Cold War. The post-Cold War enthusiasm for international law has now collapsed as well. This collapse can be traced through a series of crises that began twenty years ago and that are now wearisomely familiar: the 9/11 terrorist attacks, which flowered into an ongoing conflict between the West and Al Qaeda and other violent Islamic organizations, and a war in Afghanistan that has not yet ended; the Iraq War that began in 2003, that has also not really ended, but rather has extended in various ways to Syria and Iran; the financial crises that began in 2008; the ensuing global recession; the European debt crisis that reached its peak in 2010 and 2011; the Arab Spring and its collapse from 2010 to 2012; a refugee crisis in Europe that began around 2015; the Brexit referendum, which threw the European Union into turmoil in 2016; and the global pandemic and recession of 2020. These crises accompanied and contributed to deepening popular unhappiness with globalization and international governance, which in turn generated domestic political upheavals as nationalist, nativist, and populist movements made inroads on popular opinion. These movements took place both in entrenched liberal democracies like the U.S., the U.K., France, Germany, the Netherlands, and Italy, as well as in developing countries, like China, India, Brazil, and the Philippines, where the commitment to liberal democracy is shakier or non-existent.

Meanwhile, the American-led international order has faced challenges from a rising China and a newly aggressive Russia. Under the leadership of Xi Jinping, China has suppressed democracy in Hong Kong, ratcheted up pressure on Taiwan and in the South China Sea, increased domestic repression, committed horrific abuses—against more than one million Uighurs in particular—and used its economic might to expand its influence in East and Central Asia, Europe, and Africa through the Belt and Road infrastructure initiative. Russia under Vladimir

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literature was less skeptical about the efficacy of international law than the possibility that it has unintended negative consequences, or that it reflects the interests and obsessions of elites, a theme subsequently taken up by SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2012).

Putin has also increased domestic repression and put pressure on its neighboring countries by going to war in Georgia and Ukraine and using covert operations to interfere with elections and government operations in the U.S. and other countries.

These upheavals have had an impact on international law. The U.S. under Trump upended the World Trade Organization (WTO) by gutting the appellate body and sparking a global trade war.<sup>48</sup> It remains unclear which of these moves violate the WTO and which simply exploit its loopholes, but either way, the weakness of the regime has been revealed. Also revealed is the extent to which powerful nations will retreat from global trade rules that no longer serve their interests. It is noteworthy in this regard that the Biden administration has accepted the Trump administration's basic critique of global trade rules and has announced that it will take a "different" approach to "free trade agreements" that will focus sharply on the interests of "American job[s]" and the "interests of all American workers."<sup>49</sup>

Whether conceived in terms of violations of international human rights treaties or the ostensible customary international law of human rights, the last fifteen years have witnessed a similarly broad retreat in respect for human rights. The supposedly developing international law right to democracy that was touted in the 1990s and early 2000s has been replaced since 2006 with fifteen straight years of decline in democratic freedoms.<sup>50</sup> According to Freedom House, countries experiencing deterioration in democracy in 2020 "outnumbered those with improvements by the largest margin recorded since the negative trend began in 2006." Freedom House concludes that "the long democratic recession is deepening."<sup>51</sup>

The U.N. Charter's injunction to states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state" has also taken a beating.<sup>52</sup> To take only the most obvious examples: Russia invaded Georgia, annexed Crimea, and committed a number of assassinations in the West. China ceaselessly threatens Taiwan and asserts its territorial will in the South China Sea (in part through ignoring a ruling

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<sup>48</sup> Keith Johnson, *How Trump May Finally Kill the WTO*, FOREIGN POL'Y (Dec. 9, 2019).

<sup>49</sup> Antony J. Blinken, Secretary of State, U.S. Dep't of State, A Foreign Policy for the American People (Mar. 3, 2021), <https://perma.cc/DLH3-C4WH>; *see also* Jake Sullivan (@jakejsullivan), TWITTER (Dec. 30, 2020, 1:40 PM), <https://twitter.com/jakejsullivan/status/1344352624385126400?s=20>.

<sup>50</sup> *See* SARAH REPUCCI & AMY SLIPOWITZ, FREEDOM IN THE WORLD 2021: DEMOCRACY UNDER SIEGE (2021).

<sup>51</sup> *Id.*

<sup>52</sup> U.N. Charter art. 2, ¶ 4.

by a tribunal constituted under the Law of the Sea treaty).<sup>53</sup> The territorial integrity and political independence of many Middle Eastern nations—most notably Yemen and Syria—are regularly violated. Other examples include the great power fight for control of the U.N.-sanctioned destruction of Libya, the war between Ethiopia and the Tigray Region, and clashes between Armenia and Azerbaijan over the disputed region of Nagorno-Karabakh. There have been many other cross-border conflicts in the last fifteen years. And perhaps most significantly, the U.S. has so broadly expanded the “self-defense” exception to the prohibition on the use of force in the last fifteen years that it now swallows the “rule.”<sup>54</sup>

*Limits* did not predict these developments. But it did provide tools for understanding them. The book warned that international law that depended on the collective action of numerous states was fragile and devoted two chapters to explaining that the international trade and human rights systems were vulnerable for this reason. It also argued that when particular rules of international law stop reflecting the interests of powerful states—either as a result of shifts in power across states, or changing perceptions of national interest—violations will occur, and the law itself will change. That seems to be happening as China and Russia reassert their security interests, China gains power through economic growth, opponents of international economic cooperation obtain influence in various states, and governments rethink the value and limitations of human rights and free trade commitments in response to internal religious, security, and economic pressures.

Mainstream public international law scholarship from the 1990s, which was oriented toward explaining the growth and spread of international law, is not in a strong position to explain its contraction. Many international law scholars have blamed the backlash against international law on populism. There is certainly evidence for this view—and for the view that the neo-liberal elements of international law contributed to this backlash. In many notable cases, a state’s refusal to comply with a legal norm can be traced to the demands of a domestic populist movement.<sup>55</sup> But the question is what to make of this evidence. For traditional public international law scholars, the temptation is to see the backlash as the result of a temporary eruption of irrationality. Populism is not just normal politics but collective self-delusion that has no lasting effect. Or, at best, as political tactics—mere rhetoric—that will have no effect over the long term.<sup>56</sup> On

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<sup>53</sup> Tom Phillips, *Beijing Rejects Tribunal’s Ruling in South China Sea Case*, THE GUARDIAN (July 12, 2016), <https://perma.cc/GR7F-BQZ9>.

<sup>54</sup> See Jack Goldsmith & Matthew Waxman, *The Legal Legacy of Light-Footprint Warfare*, 39 WASH. Q. 7 (2016).

<sup>55</sup> See Eric Voeten, *Populism and Backlashes Against International Courts*, 18 PERSP. POL. 407 (2020).

<sup>56</sup> See generally Heike Krieger, *Populist Governments and International Law*, 30 EUR. J. INT’L L. 971 (2019).

this view, the solution is to preserve valuable international institutions while riding out the wave of populism until it crests.<sup>57</sup>

By contrast, the view of *Limits* was that we should expect international law to change and even regress as power relations and the interests of states change. States' interests, of course, must be determined through domestic political institutions, and populism characteristically arises when a substantial group of people believe that those institutions disregard their values and interests. That is what has happened as people in many western countries have lost confidence in their governments as a result of economic stagnation and other perceived political failures—including failures associated with international institutions like the WTO. Their distrust of their own governments and elites carries over to international institutions and elites as well. On this view, the backlash against international law is rational even if unfortunate.<sup>58</sup>

We do not mean to suggest, and do not believe, that all of international law is in decline. A huge amount of (mostly unstudied, mostly bilateral) international law continues to foster cooperation and coordination in normal ways. Our point is that one cannot understand the massive changes in and non-compliance with major international law instruments alongside this persistent lower-level cooperation through the lens of traditional public international law scholarship.

Another trend in the last fifteen years that *Limits* provides the tools to understand is the notable decline in the use of binding international instruments and a rise in the use of “non-binding” political commitments to foster international cooperation. This is true for large-scale, ambitious international efforts, such as the Iran deal and components of the Paris Agreements, and for less ambitious forms of regulatory cooperation. Political commitments are a puzzle for traditional international law scholarship because they lack the fairy dust of “legal obligation” that supposedly induces compliance. But they are not a puzzle for *Limits*. Indeed, the book began its explanation of binding international agreements with an explanation of why states used non-binding political commitments so often and how they succeed.<sup>59</sup>

The basic answer is that non-legal agreements can set the terms for (and thus help achieve) self-enforcing coordination of cooperation among nations without ratification and legal obligation. For us, the puzzle was not how are political commitments possible, but rather: “If states can cooperate using nonlegal instruments, why do they ever enter into treaties governed by international law?”<sup>60</sup>

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<sup>57</sup> See, e.g., Anne Orford, *International Law and the Populist Moment: A Comment on Martti Koskenniemi's Enchanted by the Tools? International Law and Enlightenment*, 35 AM. U. INT'L L. REV. 427 (2020).

<sup>58</sup> See generally HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* (2018).

<sup>59</sup> GOLDSMITH & POSNER, *supra* note 1, at 90–91.

<sup>60</sup> *Id.* at 82.

We outlined three possibilities: (1) domestic ratification processes that attend binding agreements convey important information about state preferences for the agreement; (2) binding agreements implicate certain interpretive default rules; and (3) binding agreements by convention signal a more serious commitment than nonlegal agreements. We doubt that these three explanations are exhaustive. The point is that any theory of international law must explain how cooperation via non-binding instruments works and must have an account of what, if anything, legalization adds.

## VI. CONCLUSION

International law scholarship, even more than international law, seems to be at a turning point. The field appears to be bifurcating. One branch has fallen back on traditional doctrinal scholarship, still cosmopolitan and liberal/progressive, but with a chastened tone. The other branch is devoted to quantitative empiricism and is beginning to inform questions of treaty design. Old habits die hard, but we put our money on the second branch producing more wisdom than the first.



# A Matter of Personal Choice

Bing Bing Jia\*

## Abstract

*This short Essay is a comment on the Lead Essay of the Symposium. It seeks to make two points from personal observation. First, an approach for study, research, and practice in international law depends on the purpose the work of an international lawyer seeks to serve. Second, in terms of methodology, the social science approach overlaps to some degree with other approaches. The proposition drawn from the two points is that an approach, being individualistic in nature, is a matter of personal choice, unsuitable for general consumption.*

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## Table of Contents

I. Introduction.....	130
II. Approach Is Purpose Determined .....	132
III. The Positivist Purpose Viewed Internally.....	133
IV. Approach Evolves with Experience .....	134
V. Relations Between the Social Science and the Positivist Approaches.....	134
VI. Conclusion: A Matter of Personal Choice .....	135

## I. INTRODUCTION

The social science approach to international law, as described in the main essay by Abebe, Chilton, and Ginsburg (Lead Essay), is at once ambitious and modest.<sup>1</sup> It is ambitious as it can account for a number of publications that have earned awards at the annual conferences of the American Society of International Law since 1990.<sup>2</sup> In the Lead Essay, the social science approach is held up as a way to study and research international law that apparently displaces two assumptions<sup>3</sup> shared by Oppenheim and the contributors to the *American Journal of International Law* Symposium of 1999.<sup>4</sup> It is modest because the social science approach is one of the several known approaches for study and research in international law; thus, the Lead Essay does not claim to propose a new approach.<sup>5</sup> Moreover, upon closer inspection, the basic methods representative of that approach seem to be familiar to international lawyers,<sup>6</sup> even if these lawyers may not have embraced the methods fully.

Not to survey and evaluate again the existing approaches in international legal scholarship, which have been summarized admirably in both the Lead Essay<sup>7</sup> and the conclusion to the Symposium of 1999,<sup>8</sup> the present author would immediately make clear at the beginning of this short Essay that his approach is close to Oppenheim's positivist approach,<sup>9</sup> drawing where appropriate on the

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<sup>1</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHL. J. INT'L L. 1 (2021).

<sup>2</sup> *See id.* at 3 n.13.

<sup>3</sup> *Id.* at 4–5. The two assumptions are (1) the shared omission that international law should be conventional social science, and (2) the shared conception that international legal scholarship is focused on studying the substantive obligations of international law.

<sup>4</sup> *See* Symposium On Method in International Law, 93 AM. J. INT'L L. 291 (1999) [hereinafter Symposium of 1999] for the contributions and the conclusion. *See generally* Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999).

<sup>5</sup> Abebe et al., *supra* note 1, at 7 (“Our goal is thus not to identify new trends. . . [I]nstead, it is to more fully describe and justify this social science approach than prior efforts.”).

<sup>6</sup> *See id.* at 14–15. It appears that the terms “approach” and “method” are used interchangeably in the Lead Essay, as well as in the Symposium of 1999. There may be a fine distinction between these two terms, in that the former captures the main feature of the usual way in which a lawyer deal with the discipline or issues of international law, whereas the latter seems to signify the actual steps undertaken by the lawyer in such dealings. Whether the distinction is correct is open to further consideration.

<sup>7</sup> *See id.* at 7–15.

<sup>8</sup> *See generally* Steven R. Ratner & Anne-Marie Slaughter, *The Method Is the Message*, 93 AM. J. INT'L L. 410 (1999).

<sup>9</sup> In this author's view, Oppenheim's list of seven tasks for international lawyers still rings largely true today. *See* L. Oppenheim, *The Science of International Law: Its Tasks and Method*, 2 AM. J. INT'L L. 313,

present author's experience with others. International law, in short, is a profession that combines the academic and practical sides. Given past efforts by eminent lawyers,<sup>10</sup> there is no need to defend the positivist approach in this Essay. Indeed, it would be unusual if a positivist lawyer queried whether international law exists as law.

In light of the Lead Essay, two comments will be given. The points which they seek to address are first sketched out at this juncture.

First, a debate about approaches to a discipline is generally interesting, but the approach definitive of international lawyers, academic or practicing, depends on the purpose their work aims to serve. They learn the ropes by way of study, research, teaching, publication, legal drafting, advocacy, and litigation. Their approaches are formed over a lifetime, driven by the purpose of their work.

Second, existing methods, or at least those of some international lawyers, may not differ much in nature from those employed by the social science approach as advocated in the Lead Essay. The suitability of methods for the study and research of international law perhaps depends on the identity of the intended audiences, such as students, professors, government lawyers, independent counsel, arbitrators, and judges. As different audiences have different expectations of this discipline, the presumption is that the motley collection of methods can coexist and inform each other.

The proposition to be established in this Essay is that personal approaches,<sup>11</sup> however defined, may not be suitable for general consumption.<sup>12</sup> An approach is personal when it is formed through the amalgamation of education, training, work, and all other life experiences. It is impossible to replicate, let alone replicate with a level of success matching that of those who created the approach. Besides, personal approaches affect not only the way international law is studied and researched, but also the way the law is practiced. As such, personal approaches do

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314 (1908). It remains a remarkable list, considering that he wrote it at a time when there was no permanent international court in the world. No guidance, therefore, could be derived by him from a standing court's statute that conveniently set out a list of sources of international law. Article 38 of the Statutes for the Permanent Court of International Law and the International Court of Justice provides the contours of a basic approach to international law as applied by judicial institutions. It pushes the positivist approach to the forefront of the discipline. In comparison with other approaches, Oppenheim's remains the one that reflects most closely that basic approach of Article 38. *See* Statute of the I.C.J. art. 38 ¶ 1, June 26, 1945, 59 Stat. 1031.

<sup>10</sup> *See* Bruno Simma & Andreas L. Paulus, *The Responsibilities of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 306–08 (1999).

<sup>11</sup> These are personal in that they are created and employed by individual writers and have subsequently achieved a degree of general recognition in terms of uniqueness or distinction among peers or the individual writers' followers.

<sup>12</sup> *See* Marti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AM. J. INT'L L. 351, 352 (1999) (“[T]he conventions of academic analysis about ‘method’ would inevitably fail to articulate its reality.”).

not fall neatly under a single label, such as positivism or critical legal studies, because they grow and change with personal experiences.<sup>13</sup>

## II. APPROACH IS PURPOSE-DETERMINED

The point of the first comment is that approach is determined by purpose, pursued, and perfected throughout a career to which there is a firm commitment. Such a purpose supplies the motivation to study and work in this field. Consequently, this Essay is more relevant to established lawyers than to students—even though this author teaches students his approach with a clear aim that they consider careers in light of that approach, but without any pressure to adopt it.

If the purpose is to study, analyze, or critique international law as a discipline, the issue of viability of this system of law, which consists in questions of efficacy and compliance, would be high on the list of research questions. Many approaches, including the social science approach, have attempted to provide an answer and, while doing so, reveal their own external views of international law both as an academic discipline and as a legal order.<sup>14</sup> There is not, and there need not be, a consensus regarding which existing approach is better for this (external) purpose.

If the purpose is, however, to be qualified one day to enter practice in this field, the approach would be the one chiefly employed by lawyers and legal advisors. Here, a solid knowledge about state practice and caselaw is essential but not exclusive of other sources, which has been the hallmark of influential international law textbooks in the past.<sup>15</sup> This characteristic aligns largely with the positivist approach. For a practice-minded lawyer, law is for settling and preventing disputes, although innumerable issues accompanying the interpretation and application of law for that purpose can also be intellectually challenging and often require study and research. Some of those issues may indeed require in-depth theoretical studies, and most can become points for arguments in disputes between states. In this type of situation, intellectual challenges will have to be balanced by the practical consideration of the client's wishes.

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<sup>13</sup> There might be some truth to the assumption that the approaches displayed during the Symposium of 1999 have all grown out of the positivism first championed by Oppenheim and subsequently reflected in the Statutes of the Permanent Court of International Justice and the International Court of Justice. The diversion from positivism, as it were, began to appear when external views emerged in legal scholarship.

<sup>14</sup> See Abebe et al., *supra* note 1, at 13–15. On the internal and external views, see *id.* at 5 (citing H.L.A. HART, *THE CONCEPT OF LAW* (1961)).

<sup>15</sup> See, e.g., 1 L. OPPENHEIM, *INTERNATIONAL LAW* (H. Lauterpacht ed., 8th ed. 1955); 2 L. OPPENHEIM, *INTERNATIONAL LAW* (H. Lauterpacht ed., 7th ed. 1952).

As a personal choice, the present author prefers the latter to the former as the purpose that defines his own approach to international law. This must be qualified by saying that his choice has been consequent upon personal circumstances, and that he has no intention to assert it as a general approach. Moreover, that approach has gradually come to reflect elements of both purposes mentioned above. In spite of that convergence, the purpose with practice looming large in the background clearly has a greater influence. Ultimately, even the purpose of study, research, and teaching is supposed to assist in the realization of the grand design of international law as a tool to order international relations and settle interstate disputes. That settling disputes and keeping order can be a purpose for studying and researching in this discipline may not be surprising given that the international relations of today's world are still dominated by the international relations of nation-states, as they were a century ago. This domination is even more conspicuous in times of global crisis. While it is recognized that, from a doctrinal perspective, different approaches provide interesting and often contrasting insights into the nature of this discipline, interest of that kind per se is not likely to sustain itself for so long that it leads to persistent efforts in applying a particular approach, unless the object of that interest, international law, is also useful as a living system of law. On that account, international law cannot exist as a pure science, insulated from the real events that are its lifeblood.

### III. THE POSITIVIST PURPOSE VIEWED INTERNALLY

The purpose of keeping order and settling disputes primarily among states distinguishes international law from municipal law. The constant comparison between municipal and international law often hinges upon the relative utility of these two bodies of law with respect to similar problems. That may be the cause for the rivalry, if any, between them.<sup>16</sup> But progressive dualism considers this an unlikely scenario, for each operates for its own purpose and within its own context without necessarily encroaching upon the purpose the other seeks to uphold.<sup>17</sup>

Taking an internal view of the discipline of international law, the positivist can, in the course of study or practice, analyze and apply substantive and procedural rules of international law covering diverse areas of interests, like climate change, the law of the sea, territorial changes, state responsibility, international trade practices, international institutions, international human rights, and so forth. A study carried out in this broad way is obviously expansive in scope, where the existence of a discipline can be quantitatively discerned and qualitatively recognized. Moreover, the expansiveness of the subject of international law is

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<sup>16</sup> See 2 HERSCH LAUTERPACHT, *INTERNATIONAL LAW (COLLECTED PAPERS)* 510–18, 548–49 (1975).

<sup>17</sup> See Gerald Fitzmaurice, *The General Principles of International Law*, 92 *RECUEIL DES COURS* 5, 68, 71, 79 (1957).

equally palpable to practitioners, as testified to by, among others, the numerous intergovernmental organizations that build up practices in a great variety of areas of specialty.<sup>18</sup>

#### IV. APPROACH EVOLVES WITH EXPERIENCE

The point of my second comment is the following. A personal approach is akin to a personal habit, formed in the course of personal development. It would be wrong to see it as fixed after the defining work comes out or the approach has become a habit. As it evolves with experience, the approach cannot, a priori, discriminate among the existing approaches or methodologies; rather, it will be likely to absorb elements of the approaches or methodologies along the way, as required by the circumstances of current work.

Some years back, the present author began to work in the area of international criminal law, when he came upon a case in which the policy-oriented approach had played a decisive role because customary law was silent with respect to a particular legal issue arising in the case. The positivistic instinct might be to pronounce a *non liquet*; whereas, in the proceedings, no judge was willing to do that, for the personal freedom and individual responsibility of a defendant, as well as the credibility of the judicial institution, were on the line. The majority finding was reached through a combination of the positivist methodology and a healthy dose of policy considerations.<sup>19</sup> As a consequence, the personal approach of the present author was changed in a way that he never anticipated, and the change, albeit in a limited sense, was wrought by the circumstances of that particular case. But this recourse to another approach was only possible when the purpose of the work demanded an answer.

#### V. RELATIONS BETWEEN THE SOCIAL SCIENCE AND THE POSITIVIST APPROACHES

Labels, such as the ones used in the heading, are used for the sake of convenience only. They may conveniently describe the principal characteristics of approaches without signifying the comparative worth of a particular approach. It is conceivable that there are lawyers who do not care much about the suitable label under which they may characterize themselves.

The social science approach, as described in the Lead Essay,<sup>20</sup> is not different from the positivist approach in terms of two methods: first, the setting of a

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<sup>18</sup> See Martti Koskenniemi, *International Law in the World of Ideas*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 47, 57 (James Crawford & Martti Koskenniemi, eds., 2012).

<sup>19</sup> See Bing Bing Jia, *International Case Law in the Development of International Law*, 382 RECUEIL DES COURS 175, 322–25 (2015).

<sup>20</sup> See Abebe et al., *supra* note 1, at 5–6.

research question; and second, the empirical way to test a hypothesis developed from the research question. This may be demonstrated by an example in which a government relies on the right of passage through international straits to justify continuing use of a waterway bordered by another state.<sup>21</sup>

The positivist starts by focusing on an issue or research question, like whether a legal right of passage applies in that particular waterway. No empirical research is necessary for claiming the right, which is generally recognized in Part III of the United Nations Convention on the Law of the Sea of 1982.<sup>22</sup> However, an empirical study would be required to test the hypothesis that the waterway in question has been used as an international strait, including an assessment of the volume of international shipping plying the waterway over a period of time. Here, a problem arises in whether the social science approach will pursue the same research question. Perhaps that approach is more likely to focus on the question of why the coastal state had allowed international shipping to use the waterway for a period of time in the past and discontinued it prior to the emergence of the dispute. But the positivist will be less concerned with that question than with the legal consequences of the discontinuance of the status quo ante.

In short, methodologically, it may not be easy or necessary to draw a bright line between the two approaches. The difference between them probably lies in the different research questions posed from the perspectives of international law and social science,<sup>23</sup> for lawyers and social scientists are interested in different aspects of a situation.

## VI. CONCLUSION: A MATTER OF PERSONAL CHOICE

The starting point for this Essay is the purpose a lawyer seeks to attain through studying and working in international law. It is not necessary that lawyers always treat the discipline as if they were engaged in practice. To combine study and research with practice is, however, an approach that may serve both academic and practical purposes. Such an approach can be enriched by borrowing from other approaches where appropriate. While it may be unscientific to conclude that an approach to this discipline is individualistic, that realist view at least leaves the field open to all past, present, and future approaches, so that no lawyers feel constrained in pursuit of the purpose they seek to attain in this discipline.

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<sup>21</sup> See Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukr. v. Russ.), No. 2017-06, Written Observations and Submissions of Ukraine on Jurisdiction, Perm. Ct. Arb., ¶¶ 9, 78 (Nov. 27, 2018).

<sup>22</sup> U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

<sup>23</sup> This author is aware of the fact that the 1999 Symposium posed a single question of substantive law to all contributors and wonders what might be the answer given by a social scientist.



# Measuring the Art of International Law

Mary Ellen O'Connell\*

## Abstract

*Social science methodology is a useful adjunct to law, but it cannot replace the humanist ideas that constitute law. Scholars developed social science at the end of the nineteenth century and were soon using it to measure and assess material facts associated with far older intellectual disciplines like law. They have been able to confirm facts about such issues as the origins and impact of law. These studies rely, however, on a humanist definition of the object of the study. Humanist methods reveal that law is the result of transcendent concepts developed through natural law method. By the early twenty-first century, due to interest in social science and other factors, knowledge of humanism, especially around natural law, began to fade. This development has implications for the social science method, which relies on accurate characterization of law. More significantly, without knowledge of humanism, the reasons to respect and comply with law are fading. It is in the interest of social scientists and society in general to revive the humanism on which international law and all law depend. Law is simply more art than science.*

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## Table of Contents

I. Introduction.....	138
II. The Constitution of Law Through Humanism .....	139
III. The Limits of Social Science Without Humanism.....	142
IV. Conclusion.....	145

## I. INTRODUCTION

The social science method offers an important tool in advancing the power and purpose of international law. The argument in favor of social science presented by Abebe, Chilton, and Ginsburg in their Lead Essay is confirmed here, but their points are also placed in a broader context.<sup>1</sup> While social science can play a useful role, that role is ultimately limited and non-essential. The social science method can provide information about the impact of law on human behavior as well as facts about the origins of law.<sup>2</sup> Social science does not explain what law is or what law should exist as a normative matter. The answers to these questions require humanistic and even transcendent approaches. Law is an ideational construct. It is the result of the human reasoning process. It does not exist in the natural, material world open to scientific study.<sup>3</sup> Ideas impact behavior, and behavior can be investigated using the qualitative and quantitative methods of social science. Ideas themselves are formed and changed through non-material processes. The social science approach cannot measure these aspects of law, which are more artistic and humanistic than materialistic or scientific.

This Essay begins by defining law and its humanistic character. It then discusses the problem of declining knowledge of humanism in legal analysis, particularly regarding natural law theory. This decline has left the understanding of law impoverished and correlates with the evident decline in respect for international law and law in general.<sup>4</sup> The Essay then turns to the social science method, confirming its usefulness but adding the important caveat that the approach is only as reliable as the assumptions and data used to reach its conclusions. If the characterization of law is inaccurate, the social scientific results will be flawed. The social science approach depends on the humanistic understanding of law. Humanism does not depend on social science.

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<sup>1</sup> See Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT'L L. 1 (2021).

<sup>2</sup> Abebe, Chilton, and Ginsburg focus on the second of these social science contributions. *See id.* at 4 n.11–12 and accompanying text.

<sup>3</sup> *See id.* at 3 n.4–8 and accompanying text.

<sup>4</sup> Considerable evidence exists of declining respect for law. *See, e.g.*, Christopher Ingraham, *GOP Leaders' Embrace of Trump's Refusal to Concede Fits Pattern of Rising Authoritarianism, Data Shows*, WASH. POST (Nov. 12, 2020), <https://perma.cc/LHY2-2HXY>.

## II. THE CONSTITUTION OF LAW THROUGH HUMANISM

Law is “the concrete expression of transcendent norms.”<sup>5</sup> Law is not science.<sup>6</sup> Law is not even social science.<sup>7</sup> It is a feature of social life and thus open to study by social scientists, but law per se is best categorized with the human pursuits associated with the humanities—art, music, literature, religion, theology, and philosophy. These are all areas of intellectual endeavor invented by people. So is law. The discernment of transcendent norms occurs through the human reasoning process incorporating non-material sources of knowledge. Social scientists and humanists alike tell us that law is a “social phenomenon,” a “complex, intricate aspect of human culture” but, like religion, is also a “normative social practice” for guiding human behavior, giving rise “to reasons for action.”<sup>8</sup> Law is one of the “normative domains,” a field of intellectual endeavor that depends for its intelligibility on other normative domains.<sup>9</sup>

Social science, by contrast, is “any branch of academic study or science that deals with human behavior in its social and cultural aspects. Usually included within the social sciences are cultural (or social) anthropology, sociology, psychology, political science, and economics.”<sup>10</sup> Abebe, Chilton, and Ginsburg focus on a narrower understanding of social science because of their interest in particular methods of data analysis.<sup>11</sup> They recognize that social science methods vary but argue that they have certain features in common, including “defining

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<sup>5</sup> Charles J. Reid, Jr., *Foreword* to JOHN MAXCY ZANE, *THE STORY OF LAW*, at 5 (Charles J. Reid, Jr. ed., Liberty Fund 1998) (1927); *see also* Andrei Marmor & Alexander Sarch, *The Nature of Law*, in STAN. ENCYCLOPEDIA OF PHIL. (Edward N. Zalta ed., 2019), <https://perma.cc/4UNG-HR45>.

<sup>6</sup> Modern science emerged in the eighteenth century and as it did, some legal scholars attempted to characterize law among the subjects of scientific study. They did so by dismissing non-material aspects of law. For an account of this attempt, *see generally* HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983). By the early twentieth century, some scholars believed the effort had succeeded. William Rainey Harper, the founding dean who opened the University of Chicago Law School in 1902, held that “education in law ‘implies a scientific knowledge of law and of legal and juristic methods.’” *History of the Law School*, U. CHI. L. SCH., <https://perma.cc/4VPV-Q4K5>. In international law, as Abebe, Chilton, and Ginsburg point out, Lassa Oppenheim was an adamant proponent of international law as science. *See generally* L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 AM. J. INT’L L. 313 (1908), cited in the Lead Essay. But Oppenheim was already behind the times as legal scholars were abandoning the “hard” sciences for the new “social” sciences by the early twentieth century. *See* MARY ELLEN O’CONNELL, *THE ART OF LAW IN THE INTERNATIONAL COMMUNITY* 20–33 (2019).

<sup>7</sup> Abebe, Chilton, and Ginsburg title Part III of their Lead Essay, “International Law as Social Science.” Abebe et al., *supra* note 1, at 15. *But see infra* notes 7–15 and accompanying text.

<sup>8</sup> Marmor & Sarch, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> *Social Science*, ENCYCLOPEDIA BRITANNICA, <https://perma.cc/5527-ZLWE>.

<sup>11</sup> Carl Landauer, Remarks at the 2021 *CJIL* Symposium (Feb. 26, 2021) (discussing the narrowness of Abebe, Chilton, and Ginsburg’s definition of social science) (recording available on the University of Chicago Law School website).

research questions, developing hypotheses, using data to test those hypotheses, etc.”<sup>12</sup>

Humanistic approaches focus on ideas and non-material sources of knowledge, not data. The social science approach is newer, dating from the early twentieth century. Ancient fields like history and law that long pre-date social science began adding social science methodology to existing humanist approaches in the late nineteenth and early twentieth centuries.<sup>13</sup> Legal historians using social science methods were joined by sociologists and anthropologists in investigating the origins of law in this same period. The early twentieth century scholar of law and sociology, Roscoe Pound, identified law’s origins in humanity’s search for harmonious social order. He found that law offered “a body of rules by which controversies [are] adjusted peaceably.”<sup>14</sup> John Maxcy Zane, a late member of the first generation of legal historians to adopt social science,<sup>15</sup> found evidence of law’s origins with “primordial men” and their “social instinct . . . that every member of the community must not be guilty of conduct . . . that . . . would endanger the social existence.”<sup>16</sup> Zane found violence perpetrated by individual against individual or tribe against tribe as the primary danger to society.<sup>17</sup> It is a danger that law is uniquely suited to counter.

With the development of kinship groups and families, the hierarchical authority commanded by fathers, and later, by priests, allowed them to impose order. From there, Henry Sumner Maine famously saw a development in the law from status to contract—in other words, from hierarchy to equality.<sup>18</sup> Like Maine, Zane wrote of the early adoption of the general legal principle of equality as the

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<sup>12</sup> Abebe et al., *supra* note 1, at 7. The methods listed are “the use of large-N observational data, text analysis, survey experiments, field experiments, and qualitative field research.” *Id.* (footnotes omitted).

<sup>13</sup> See David Landes & Charles Tilly, *History as Social Science*, SSRC (1971), <https://perma.cc/2AM8-37FD>.

<sup>14</sup> Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 199 (1914).

<sup>15</sup> Reid, *supra* note 5.

<sup>16</sup> ZANE, *supra* note 5, at 27–30.

<sup>17</sup> See *id.* Zane found the earliest “raw material” of law as  
fundamental physical factors, the raw human animal, the social community, the deep-seated, ingrained social instincts, the gradually expanding factors of civilization, the matriarchal family, the fixed domestic relations, the patriarchal family, the invention of a weapon, the expanding social type of mind, the development of the fighting instinct, the deep-seated acquisitive instinct for gathering and holding property, all modified by the slowly developing moral ideas of right and justice . . . .

*Id.* at 44.

<sup>18</sup> HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (Beacon Press 1963) (1861).

very basis of social justice.<sup>19</sup> This type of social science research continues. Anthropologist of law Fernanda Pirie, for example, has shown in her scholarship that law is not dependent on the existence of government.<sup>20</sup> It is dependent on the existence of a society or community and the natural inclination for peace. Pirie concludes on the basis of factual evidence that international law is undoubtedly law.<sup>21</sup>

Anthropologists and other social scientists have plainly contributed to legal knowledge. Their starting place is the concept of law created through the humanist idea of natural law. Natural law theory reveals that law's transcendent norms take concrete expression most often in the form of positive law, formed by consent confirmable with material evidence.<sup>22</sup> The rest of law does not rely on material evidence. It involves the legal theorist, judge, or law-maker observing the natural world, using their reasoning capacity while remaining open to inspiration about the conclusions to draw in the reasoning process.<sup>23</sup> It is well known that Hugo Grotius, considered the father of modern international law, was a natural law scholar in the Scholastic tradition of Thomas Aquinas.<sup>24</sup> Aquinas, Grotius, and other Scholastics looked for inspiration in reasoning about the natural world from scripture, divine revelation, and the beauty of the natural world.<sup>25</sup> Using theology, they identified legal norms. With the suppression of theology in public intellectual discourse in the West by the early twentieth century, knowledge of natural law ideas that constitute law began to fade.<sup>26</sup>

Law is dependent on these ideas, and they continue in the form of tradition.<sup>27</sup> The crisis of law and democracy of the 2020s is traceable, however, to the fading tradition of respect for the rule of law originally built on humanistic thought. Education in these ideas of the selflessness of natural law is increasingly replaced by the economic concept of self-interest. Law is based on the principle of equality, which requires altruism and trust. These are humanist, not economic, principles

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<sup>19</sup> See *id.* at 39.

<sup>20</sup> See generally FERNANDA PIRIE, *THE ANTHROPOLOGY OF LAW* (2013).

<sup>21</sup> See *id.* at 206–15.

<sup>22</sup> See Mary Ellen O'Connell & Caleb Day, *Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms*, in *THE OXFORD HANDBOOK ON THE SOURCES OF INTERNATIONAL LAW* 562, 578 (Samantha Besson & Jean d'Aspremont eds., 2017).

<sup>23</sup> See *id.* at 566–68.

<sup>24</sup> See STEPHEN NEFF, *JUSTICE AMONG NATIONS: A HISTORY OF INTERNATIONAL LAW* 146–66 (2014).

<sup>25</sup> See THOMAS AQUINAS, *SUMMA THEOLOGICA*, pts. I–II, questions 90–108 (Fathers of the Eng. Dominican Province, trans., Complete Eng. ed. 1948) (1485). On Hugo Grotius's view of natural law, see Jon Miller, *Hugo Grotius*, in *STAN. ENCYCLOPEDIA OF PHIL.*, *supra* note 5, pt. 3, <https://perma.cc/7VDA-AD6A>. See also Marmor & Sarch, *supra* note 5.

<sup>26</sup> O'CONNELL, *supra* note 6, at 4–6, 20–23.

<sup>27</sup> See TOM R. TYLER, *WHY PEOPLE OBEY LAW* 177–78 (revised ed. 2006); see also Mark Greenberg, *The Moral Impact Theory of Law*, 123 *YALE L.J.* 1288, 1288 (2014).

for which the humanities are needed. In place of contested theologies, secular fields of philosophy and other arts disciplines are available to update the insights of past centuries to explain the law and its transcendent norms.<sup>28</sup>

### III. THE LIMITS OF SOCIAL SCIENCE WITHOUT HUMANISM

The disappearance of humanist ideas of law in legal scholarship is significant for legal education because these ideas explain what is needed for the rule of law to succeed. Humanist ideas are also significant for the social science approach to law. This Section provides a brief illustration of how the quality of social scientific contributions depends on the social scientist's understanding of the object of their study. *The Internationalists* is a book written by law professors, in which they present social science data on the declining incidence of sovereign state acquisition of territory through the use of military force.<sup>29</sup> The authors claim that the decline is traceable to the 1928 Treaty on the Renunciation of War, also known as the Kellogg-Briand Pact.<sup>30</sup>

The authors assert: "Before 1928, every state accepted . . . [that war] wasn't a departure from civilized politics; it *was* civilized politics."<sup>31</sup> They then hypothesize that the treaty "outlawing" war had a significant impact on behavior and set out to prove this by graphing territorial acquisition through military force around the date 1928. The authors take their facts as to territorial conquest from the Correlates of War (COW) dataset<sup>32</sup> and conclude their graph shows that "[c]onquest, once common, has nearly disappeared. Even more unexpected, the switch point is that now familiar year when the world came together to outlaw war, 1928."<sup>33</sup> In footnotes, the authors point to the need to "correct" errors in the dataset and to adapt data around the issue of what entities qualify, presumably under international law, as sovereign states. They also acknowledge that other social scientists conclude the "switch point" occurred in 1945, not 1928. Nearly all work on the decline of conquest "treats 1945 as the relevant break point in the twentieth century."<sup>34</sup> After the bold pronouncement at the outset of the chapter about 1928, the chapter ends more modestly: The Kellogg-Briand Pact "formed the background of rules and assumptions against which the rest of the new system

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<sup>28</sup> O'CONNELL, *supra* note 6, at 26–33, 42–49.

<sup>29</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

<sup>30</sup> *See generally id.*

<sup>31</sup> *Id.* at xiv.

<sup>32</sup> *Id.* at 530 n.8.

<sup>33</sup> *Id.* at 313.

<sup>34</sup> *Id.* at 530 n.9.

[of 1945] operated.”<sup>35</sup> This is undoubtedly true, but it is also true of the ancient peremptory norm prohibiting force, which pre-dates 1928 by centuries.

The new development in 1928 was not the outlawing of war. It was the policy, being developed at the League of Nations, of refusing to recognize legal title to territory taken using unlawful force.<sup>36</sup> *The Internationalists* describes how the United States, a non-member of the League, promoted the policy of non-recognition as a way to enforce Kellogg-Briand.<sup>37</sup> The treaty itself does not require non-recognition. The 1945 United Nations Charter, the next important codified version of the prohibition on the use of force, does not do so either. The experience of World War II, however, and the rampant conquest by Japan, Germany, and Italy—after 1928—left the international community convinced of the need for a Security Council to enforce the prohibition. The Council continued the practice of calling for non-recognition, so that it crystallized as a corollary duty to the prohibition on force. U.N. members codified the corollary in the 1970 Declaration on Friendly Relations. The Declaration mandates that “[n]o territorial acquisition resulting from the threat or use of force shall be recognized as legal.”<sup>38</sup> Non-recognition is also required respecting territory held in violation of the principle of self-determination.

The prohibition on force, in contrast to the duty of non-recognition, has been a principle of international law since the modern system emerged in 1648.<sup>39</sup> The peace treaties of Westphalia, which brought a formal end to Europe’s Thirty Years’ War, incorporated the Just War Doctrine’s prohibition on force, along with an enforcement mechanism requiring all treaty signatories to join in military action against a transgressing party.<sup>40</sup> The Doctrine holds that war is prohibited except for a few just causes and, even then, only when it is necessary and can be waged

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<sup>35</sup> *Id.* at 335.

<sup>36</sup> See Anna Spain Bradley, Book Review, *The Internationalists: How A Radical Plan to Outlaw War Remade the World*, 112 AM. J. INT’L L. 330 (2018) (citing GARY GOERTZ, PAUL F. DIEHL & ALEXANDRU BALAS, *THE PUZZLE OF PEACE: THE EVOLUTION OF PEACE IN THE INTERNATIONAL SYSTEM* 108, 109 (2016)).

<sup>37</sup> See HATHAWAY & SHAPIRO, *supra* note 29, at 173–74.

<sup>38</sup> G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970).

<sup>39</sup> See generally Mary Ellen O’Connell, *Peace and War*, in *THE HANDBOOK OF THE HISTORY OF INTERNATIONAL LAW* 272 (B. Fassbender & A. Peters eds., 2012). For additional evidence that the prohibition on the use of force was certainly in existence in the nineteenth century, see Agatha Verdebout, *The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis*, 1 J. ON USE FORCE & INT’L L. 223 (2014).

<sup>40</sup> Leo Gross, *The Peace of Westphalia, 1648–1948*, in 1 *ESSAYS ON INTERNATIONAL LAW AND ORGANIZATION* 3, 7 (1984) (citing 2 DAVID JAYNE HILL, *A HISTORY OF DIPLOMACY IN THE INTERNATIONAL DEVELOPMENT OF EUROPE* 602 (1925)).



proportionately to the injury received.<sup>41</sup> The only theory of law in existence in 1648 to explain the prohibition on war or any other aspect of international law was natural law. Natural law theory recognizes that most legal rules and principles fall within the category of positive law, which requires express or implicit consent and includes two of the three primary sources of international law, treaties, and customary international law.<sup>42</sup> Legal principles and norms not based on consent are discerned through natural law methodology. These include most of the general principles of law, such as equality, fairness, good faith, necessity, and proportionality, as well as the peremptory norms or *jus cogens*, including, the prohibitions on the use of force, torture, slavery, apartheid, genocide, and widespread extra-judicial killing.<sup>43</sup>

*The Internationalists* leaves out the natural law and peremptory status of the prohibition on force. The book includes a lengthy treatment of Grotius, who used natural law methodology, but emphasizes his paid work, never completed, as a young jurist on behalf of the Dutch East India Company over his seminal published work as a mature scholar, *The Law of War and Peace*.<sup>44</sup> In *The Law of War and Peace*, Grotius makes clear that war is prohibited under the Just War Doctrine. It is not only unlawful; it is immoral.<sup>45</sup> As such, war is prohibited as *jus cogens*. Grotius was not only a jurist and diplomat, he was also a Christian theologian. He drew upon and valued the insights of other faith traditions in addition to his own. Like Aquinas before him, Grotius accepted that norms found in multiple cultures are more reliable principles of natural law discernment than those found only in one or two. The prohibition on war is such a norm. Omitting the humanist aspects of Grotian thought, *The Internationalists* depicts Grotius as a materialist proponent of “might is right.”<sup>46</sup> The authors prove this by pointing to evidence that Grotius failed to demand the return of conquered territory or property as the necessary remedy for unlawful war. Their position, however, conflates the prohibition on force with the legal consequences of violating the prohibition, such as the requirement of non-recognition.

Grotius clearly understood resorting to war to be prohibited under natural law. In an article published in 1946, Hersch Lauterpacht, who is extolled in *The Internationalists*, writes of Grotius as the quintessential proponent of right over

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<sup>41</sup> Joachim von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 AM. J. INT’L L. 665, 669 (1939).

<sup>42</sup> O’Connell & Day, *supra* note 22.

<sup>43</sup> *Id.*

<sup>44</sup> *See generally* HUGO GROTIUS, *THE LAW OF WAR AND PEACE* (Francis W. Kelsey trans., James Brown Scott ed., Oxford U. Press 1925) (1625).

<sup>45</sup> *See id.* at 21–23.

<sup>46</sup> HATHAWAY & SHAPIRO, *supra* note 29, at 24–25.

might.<sup>47</sup> Lauterpacht also explains the importance of natural law to all law, but emphasizes that for international law, with its lack of governmental institutions, knowledge of natural law is critical.<sup>48</sup> Another hero in *The Internationalists* is the legal philosopher Hans Kelsen, who wrote that the Just War Doctrine of Aquinas and Grotius was codified in the Kellogg-Briand Pact.<sup>49</sup> As *jus cogens*, the prohibition on the use of force endures with or without the doctrine of non-recognition.

The American non-recognition policy that followed the adoption of Kellogg-Briand may or may not account for the decrease in territorial conquest found in the COW dataset. That study has not been undertaken. The study that was done assumes war was first outlawed by Kellogg-Briand. Humanist knowledge of the prohibition indicates otherwise and draws into question the study's results. Designing a social science study of law requires humanistic knowledge of law as a preliminary matter. This is true whether the phenomenon is the sanctity of a common law contract promise or the imperative duty to forego war. Law is constituted through ideas. It is oriented toward social peace for the common good. It balances the seeking of self-interest with the need for selflessness. Social science can provide factual information about the origins and impacts of these ideas but not law's constitution or its normative purpose.

What this observer says about the dual approaches of the arts and social sciences to understanding humanity's past also applies to humanity's law:

[S]tudents of history as social science will always need training in all aspects of the discipline. If anything, the growing sophistication of social scientific techniques makes it all the more important for practitioners of these techniques to know and appreciate the humanistic approach to historical knowledge. We cannot afford to gain a world of numbers and models, only to lose our historical souls in the process.<sup>50</sup>

#### IV. CONCLUSION

Abebe, Chilton, and Ginsburg confirm in their Essay high levels of interest in social science approaches to law. While this bodes well for gaining information about law and society, if the trend excludes knowledge from the humanities, social scientists may produce results of questionable value. Law, the practice of law, and the study of law are more art than science. In this respect, law is closer to the study of history than economics: "If historiography is art, it cannot and must not be reduced to some kind of routine."<sup>51</sup> The reference to "routine" is to a numbers-based repeated use of the social science methods, such as survey and regression

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<sup>47</sup> See H. Lauterpacht, *The Grotian Tradition in International Law*, 23 BRIT. Y.B. INT'L L. 1, 51 (1946).

<sup>48</sup> See generally *id.*

<sup>49</sup> See HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 330 (Anders Wedberg trans., 1945).

<sup>50</sup> Landes & Tilly, *supra* note 13.

<sup>51</sup> *Id.*

analysis. Assessing numerical data related to law is useful; understanding the object of study is essential. There is another trend in international legal scholarship, one toward rediscovering humanistic knowledge. It is a trend toward scholarship with transcendent potential.<sup>52</sup>

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<sup>52</sup> See O'CONNELL, *supra* note 6, at 5 n.23.

# Comparative International Law and the Social Science Approach

Emilia Justyna Powell\*

## Abstract

*The social science approach has already contributed and continues to contribute to the study of international law. In particular, research that incorporates the social science approach has provided much insight into reality and day-to-day functioning of international law by going beyond historical and normative description and providing generalizable theories. If based on a sound theoretical framework that is subsequently tested in a rigorous scientific manner, the social science approach allows us to uncover a multiplicity of factors that commingle to shape states' preferences and actions toward international law. Combining insights provided by analysis of large-N data with qualitative methodology allows for contextualization of the general statistical patterns in the context of specific actors and specific issue areas. In particular, the social science approach elucidates the inherently comparative nature of international law by explaining the nexus between international and domestic legal traditions. In this Essay, I advocate for the use of the social science approach in the study of international law. I use the example of comparative international law—specifically, Islamic law states' views of the global order—to illustrate the benefits and insights that social science methodology can provide.*

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## Table of Contents

I. Introduction.....	149
II. Social Science Approach in Comparative International Law .....	149
III. Conclusion.....	155

## I. INTRODUCTION

The social science approach provides much insight into the dynamics, reality, and day-to-day functioning of international law. It goes beyond historical and normative description and moves toward developing generalizable theories. In particular, the social science approach elucidates the inherently comparative nature of international law by explaining the nexus between international and domestic legal traditions. In this Essay, I advocate for the use of the social science approach in the study of international law. I use the example of comparative international law—specifically, Islamic law states’ (ILS)<sup>1</sup> views of the global order—to illustrate the benefits and insights that social science methodology can provide.

## II. SOCIAL SCIENCE APPROACH IN COMPARATIVE INTERNATIONAL LAW

To be sure, there are some questions within the study of international law that do not lend themselves to the social science approach. For example, tools offered by social science are not needed—and thus, not well-suited—to describe what international law is. Yet, depending on the question asked, methods of scientific inquiry as offered by social science may indeed be very useful in furthering scholarly efforts to understand the reality of international law. A variety of questions may be gauged empirically. Is international law effective? How does international law work in different contexts? How do considerations of strategy and power politics commingle to curtail the effectiveness of international norms and organizations? Understanding, theorizing, and scientifically exploring how different states, different geographic regions, and perhaps more broadly, the various domestic legal traditions conceive of international norms and institutions constitutes a worthy scholarly effort. Ultimately, the reality of the global order and its underlying normative framework—international law—are interpreted via the

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<sup>1</sup> Following my previous work, I define an Islamic law state as

a state with an identifiable substantial segment of its legal system that is charged with obligatory implementation of Islamic law in personal, civil, commercial, or criminal law, and where Muslims constitute at least 50 percent of the population. This definition does not depend solely on the religious preferences of citizens, but rather fundamentally relies on the characteristics of the official legal system upheld by the state.

EMILIA JUSTYNA POWELL, *ISLAMIC LAW AND INTERNATIONAL LAW: PEACEFUL RESOLUTION OF DISPUTES* (2020). The ILS category includes Afghanistan, Algeria, Bangladesh, Bahrain, Brunei, Comoros, Egypt, Gambia, Indonesia, Iran, Iraq, Jordan, Kuwait, Lebanon, Libya, Malaysia, Maldives, Mauritania, Morocco, Nigeria, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Tunisia, United Arab Emirates, and Yemen. I purposefully avoid the terms “Muslim world,” or “Islamic world,” recognizing that they are simplistic and misleading in nature. *See generally* CEMIL AYDIN, *THE IDEA OF THE MUSLIM WORLD: A GLOBAL INTELLECTUAL HISTORY* (2017).

lenses of those who use it. The social science approach lends itself naturally to scholarly efforts at understanding this reality.

There are many ways in which the scope of international law is general. By design and by practice, international law constitutes a dynamic and continuously evolving legal system. Its genesis and evolution are firmly rooted in an assumption that a common, all-embracing legal framework should govern behavior of all states and other subjects of international law. Indeed, sources of international law, such as treaties, general principles of law, custom, writings of the publicists, and judicial decisions, lay out general pathways for actors' behavior. As such, international law generates expectations of relatively unified or somewhat monolithic behavioral output in terms of interstate relations. Yet in reality, states' behavior is subject to the realities of politics, state-specific strategic considerations, domestic institutions, culture, and so on. Domestic customs, laws, and norms affect how states view international law. The influence of domestic beliefs about morality, justice, and law is clearly seen throughout history, such as in the genesis and evolution of international institutions, specific legal solutions adapted as parts of the global order, and the entire body of international law.<sup>2</sup> No part of international law has been created in a legal vacuum. Instead, it bears an imprint of "the history of a divided and unjust world."<sup>3</sup> Indeed, the design of international institutions and logic and structure of international rules are directly informed and shaped by principles and norms stemming from domestic legal traditions. Judge Abdulqawi Yusuf of the International Court of Justice (ICJ) stated: "It is not a paradox to say that the universality of international law depends on diversity. Indeed, in the case of international law, universalization and globalization do not reduce diversity; they actually promote it. For international law, universalization means borrowing and adapting concepts and principles from different legal traditions."<sup>4</sup>

Issues of comparative international law—including the diffusion of international law knowledge through filters/lenses of domestic education, local norms, customs, legal traditions, and so on—frequently call for the methodology

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<sup>2</sup> See, e.g., SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, *DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS* (2011); DANA ZARTNER, *COURTS, CODES, AND CUSTOM: LEGAL TRADITION AND STATE POLICY TOWARD INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW* (2014); Dana Zartner Falstrom, *Thought Versus Action: The Influence of Legal Tradition on French and American Approaches to International Law*, 58 *ME. L. REV.* 338 (2006).

<sup>3</sup> Martti Koskenniemi, *Foreword* to ANTHEA ROBERTS, *IS INTERNATIONAL LAW INTERNATIONAL?*, at xvi (2017).

<sup>4</sup> Abdulaqawi Yusuf, *Diversity of Legal Traditions and International Law*, 2 *CAMBRIDGE J. INT'L & COMP. L.* 681, 683 (2013); POWELL, *supra* note 1, at 135.

offered by social sciences.<sup>5</sup> In an important way, comparative international law asks questions that deal with an “external” view of international law, as referenced by H.L.A. Hart, and reiterated by Abebe, Chilton, and Ginsburg.<sup>6</sup> If indeed international law is not taught, written about, understood, and thus, practiced in the same manner across the world, then we must be seeking answers to questions such as, “Why do certain states sign certain treaties and avoid others?” or “What effects do international institutions and treaties have in the various geographic regions of the world?” The social science approach provides tools that enable scholars to theorize about as well as operationalize the uniqueness and contextualized dynamics of international law. The use of large-N observational data, field experiments, and qualitative field research—tools inherent to the social science approach—allow for testing specific hypotheses stemming from theoretical frameworks in instances when questions asked call for such an approach.

In this context, it is crucial to recognize that no application of the social science approach will be useful without a sound theory. A researcher must identify a concrete research question, state it clearly, and think carefully about the theoretical framework and hypotheses. In other words, a sound way to incorporate the social science approach in the study of international law should involve testing hypotheses flowing from specific theoretical expectations in a rigorous scientific manner. Such a process can entail, for example, applying statistical techniques to large-N datasets where the models chosen simultaneously control for a host of confounding factors. Indeed, a multiplicity of factors commingle to shape states’ preferences, and, subsequently, their actions toward international law. It is not merely the substantive content of international law that informs state behavior. One should not delegitimize the impact of other influences, such as power, or cost-benefit calculations. As subjects of international law who interact with each other, states pursue their strategic interests. The social science approach allows a scholar to control for all these factors. Yet, combining insights provided by analysis of large-N data with qualitative methodology is very informative since such multi-method research design allows for contextualization

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<sup>5</sup> See, e.g., ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017); Anthea Roberts, Paul B. Stephan, Pierre-Hugues Verdier & Mila Versteeg, *Comparative International Law: Framing the Field*, 109 AM. J. INT’L L. 467 (2015); COMPARATIVE INTERNATIONAL LAW (Anthea Roberts et al. eds., 2018); POWELL, *supra* note 1; see also INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS: INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011); NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL & INTERNATIONAL LAW (Janne E. Nijman & André Nollkaemper eds., 2007); INTERPRETATION OF INTERNATIONAL LAW BY DOMESTIC COURTS: UNIFORMITY, DIVERSITY, CONVERGENCE (Helmut Philip Aust & Georg Nolte eds., 2016).

<sup>6</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHI. J. INT’L L. 1, 5 (2021) (citing H.L.A. HART, THE CONCEPT OF LAW (1961)).



of the general statistical patterns in the context of specific social environments.<sup>7</sup> As King, Keohane, and Verba write, “social science research should be both general and specific: it should tell us something about classes of events as well as about specific events at particular places.”<sup>8</sup>

In this context, therefore, it is paramount to note that one cannot reduce the concept of the social science approach merely to the usage of quantitative large-N datasets with numerous cross-sectional time-series observations. Indeed, the use of qualitative field research, case studies, or even purely theoretical approaches lie at the core of the social science approach. For instance, case studies allow us to determine whether certain states or certain geographic regions as a group are a hard case for international law and international courts.<sup>9</sup> Usually, it is the combination of both methods—qualitative and quantitative—in the context of a particular research question and a specific theoretical framework that brings out the most insights into the dynamics of international law. Undoubtedly, there are limitations to the insights that a purely quantitative data can generate. To be sure, there is a danger of overgeneralization. Additionally, statistical relationships can be misidentified. However, guided by a sound theory, statistical models can reveal many interesting patterns that may be harder to tease out via purely qualitative case studies. As Beth Simmons writes, quantification “is an effort to document the pervasiveness and seriousness of practices under examination.”<sup>10</sup> In an important way, results of such statistical analyses “provide direct evidence to prove or disprove the hypothesis.”<sup>11</sup> The social science approach embraces methodological pluralism.

Research that relies on the social science method does not purport, as a whole, to be a conclusive and uncontested statement with regard to a specific topic or issue under investigation. Largely, social sciences operate on the basis of likelihood and probabilities. This is particularly true about large-N analyses, which go beyond the context of concrete countries, specific policymakers, and so on. Also, the social science method is particularly useful in developing and testing midrange theories, and not meta-theories. Are the effects of international law

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<sup>7</sup> See generally Gregory C. Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1 (2012).

<sup>8</sup> GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH 43 (1994).

<sup>9</sup> See generally *id.*; Jason Seawright & John Gerring, *Case Selection Techniques in Case Study Research: A Menu of Qualitative and Quantitative Options*, 61 POL. RSCH. Q. 294 (2008); Emilia Justyna Powell, *Islamic Law States and the Authority of the International Court of Justice: Territorial Sovereignty and Diplomatic Immunity*, 79 L. & CONTEMP. PROBS. 209 (2016).

<sup>10</sup> BETH A. SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS 11 (2009).

<sup>11</sup> Abebe et al., *supra* note 6, at 16.

similar or dissimilar in different contexts?<sup>12</sup> These contexts are, of course, different for every study. Yet the social science approach enables us to understand specific fragments of international law through the lenses of state practice. The simultaneous use of qualitative and quantitative methodology homes in on decision-making processes that produce patterns and regularities, which are later reflected in statistical results, field experiments, survey experiments, or qualitative field research. In many ways, it is the togetherness of human experience and many individual-level decisions—those of state leaders, policymakers, practitioners of international law, etc.—that combine to generate states' preferences, and consequently choices, vis-à-vis norms of international law. The social science approach recognizes the multiplicity of factors at work that amalgamate in shaping the relationship between international law and its subjects.

I found the social science approach to be particularly useful in explaining how ILS perceive international law. The Islamic legal tradition present in ILS has its own somewhat distinctive way of conceptualizing and understanding international law. In a way, this characterization refers also to these states' perception of the global order. Of particular importance to international law is the Islamic logic and culture of justice anchored in nonconfrontational approach to dispute resolution. In many ILS, Islamic law replaces, augments, or informs secular rules in state governance and influences these countries' perceptions of the global order.<sup>13</sup> Though outlining the broad similarities and differences between international law and the Islamic legal tradition is certainly useful, one cannot ignore the reality that the ILS category is not a monolith. Therefore, not all ILS are "Islamic" in the same manner. It is certainly the case that the Islamic legal tradition and international law may diverge on some issues.<sup>14</sup> Yet, it is also the case that these two legal traditions have in common more features than it is often

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<sup>12</sup> See generally Shaffer & Ginsburg, *supra* note 7.

<sup>13</sup> See Khaled Abou El Fadl, *Conceptualizing Shari'a in the Modern State*, 56 VILL. L. REV. 803 (2012); M. CHERIF BASSIOUNI, *THE SHARI'A AND ISLAMIC CRIMINAL JUSTICE IN TIME OF WAR AND PEACE* (2014); AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* (2011); Mohammad Fadel, *International Law, Regional Developments: Islam*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (Rüdiger Wolfrum ed., 2012); see also Julie Frazer, *Exploring Legal Compatibilities and Pursuing Cultural Legitimacy: Islamic Law and the ICC*, in INTERSECTIONS OF LAW & CULTURE AT THE INTERNATIONAL CRIMINAL COURT (Julie Frazer & Brianne McGonigle Leyh eds., 2020).

<sup>14</sup> Some of the divergences concern some aspects of human rights, especially those concerning women's rights and freedom of religion. See generally Abdullahi A. An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, 23 HUM. RTS. Q. 701 (2001); Mohammad H. Fadel, *Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law*, 8 CHL J. INT'L L. 1 (2007); Najma Moosa, *Islamic State Practices in the Framework of Islamic and International Human Rights Instruments*, 12 J. ISLAMIC ST. PRAC. INT'L L. 22 (2016).

recognized.<sup>15</sup> Interestingly, in the context of international dispute resolution, some ILS readily accept the jurisdiction of international courts, while others avoid them. These patterns suggest that at the core of the relationship between Islamic law and international law is not a fundamental, irreconcilable collision of values. Consequently, while conceptualizing this relationship, it is unfitting to formulate blanket, all-encompassing statements about ILS' practices. Instead, each relationship is fundamentally context-specific. The structure of domestic laws, customs, and practices is unique within each Islamic law state. This reality holds true not only across space, but also across time. Secular and religious laws merge in a different fashion in different domestic jurisdictions. The combination of qualitative and quantitative methods of scientific inquiry shows that ILS whose domestic legal systems are permeated with a version of Islam adhere most firmly to those elements of the global order that are similar to principles embraced by the Islamic legal tradition and culture.<sup>16</sup> By way of illustration, international nonbinding third-party methods of peaceful resolution—in particular, mediation and conciliation—are procedurally similar to sharia-based dispute resolution.<sup>17</sup> Thus, there is a natural synergy there. International legalized methods of dispute settlement—arbitration and adjudication—are more attractive to ILS whose domestic legal systems incorporate strong secular laws.<sup>18</sup> In sum, different ILS are naturally attracted to different international settlement mechanisms.

The social science method is at the core of this research. In answering my research questions, I embrace methodological pluralism. To elucidate, inform, and visualize statistical results stemming from large-N cross-sectional time series data, my theoretical argument, as well as empirical implications, are immersed in multiple qualitative interviews with Islamic law scholars and practitioners of international law, including judges of the ICJ, states' legal counsels, and several policymakers and religious leaders.<sup>19</sup> These conversations allowed for in-depth examinations of causal factors and mechanisms shaping ILS' attitudes toward international law and international institutions.

Importantly, my research does not deal with how states—in my case ILS—should behave toward international law, the ICJ, or other methods of dispute resolution. In contrast, I focus on reality, the day-to-day practice of international law, ILS' attitudes toward the particular aspects of the global order, and their

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<sup>15</sup> See, e.g., POWELL, *supra* note 1; Emilia Justyna Powell, *Islamic Law States and Peaceful Resolution of Territorial Disputes*, 69 INT'L ORG. 777 (2015); Emilia Justyna Powell, *Not So Treacherous Waters of International Maritime Law: Islamic Law States and the UN Convention on the Law of the Sea*, in COMPARATIVE INTERNATIONAL LAW, *supra* note 5, at 571 (Anthea Roberts et al. eds., 2018) [hereinafter *Not So Treacherous Waters*].

<sup>16</sup> See POWELL, *supra* note 1; *Not So Treacherous Waters*, *supra* note 15.

<sup>17</sup> POWELL, *supra* note 1.

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

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

perception of the ICJ's jurisprudence. The social science method enables me to ask, "How do ILS assess the various aspects of international law?" "Do they see it as neutral and legitimate?" "What do policymakers and Islamic law scholars think of the nexus between Islamic law and international law?" One cannot understand the realities of the relationship between international law and Islamic law without moving beyond the question of how this relationship should be. Thus, there is a need for an empirical assessment. Why would ILS commit to resolving their contentions at the ICJ via signing the Optional Clause or becoming part of treaties with compromissory clauses? We cannot assume the effect of international law on ILS. The social science approach allows me to demonstrate that this effect is context-specific, hinging on the nexus between secular law and religious law within ILS' domestic jurisdictions. There is no one way in which the Islamic legal tradition is practiced, and this reality fundamentally impacts the relationship between the Islamic legal tradition as a whole and international law. Thus, all else equal, the efficacy of international law depends on features of domestic legal systems operating within these states.

Though my theory and empirical results capture central aspects of ILS' behavior, a multiplicity of dynamics remain unexplored or underexplored. Any data collection effort involves judgment and some measurement error. Like other methodologies, the social science approach is not perfect, but has inherent shortcomings and limitations. The relationship between international law, religion, domestic notions of justice, and politics with regard to any group of states requires much in-depth theoretical development. Nevertheless, I believe studying the nexus between the Islamic legal tradition and international law via the social science method constitutes an important step in the scholarly efforts to understand the practice of international law by a unique group of states.

### III. CONCLUSION

The social science approach has already shed much light on our perception of the way that international law is practiced and viewed across the globe. It is good to be skeptical about any methodological approach one adapts to study a research question. Human behavior—which in turn translates to outcomes on state-level behavior vis-à-vis international law—is inherently difficult to gauge. Yet, along with other methods, the social science approach can bring much to our understanding of international law and its efficacy. If grounded in solid theoretical framework and non-judgmental observational evidence, the social science approach adds important insights.

# Social Science Research and Reforms of International Institutions

Weijia Rao\*

## Abstract

*Building on Daniel Abebe, Adam Chilton and Tom Ginsburg's call for more social science research in international law, this Essay discusses ways in which social science research can be applied to inform reforms of international institutions. In the face of significant challenges to the current international legal order, active reform discussions have been ongoing concerning a number of international institutions. This Essay posits that in developing proposals to reform these international institutions, more attention should be paid to identify the causes of existing problems, which is important in an international setting where decision-making requires the consensus of multiple stakeholders. The social science approach can be useful in this regard. Using investor-state dispute settlement as an example, this Essay discusses how the social science approach can be applied to help understand the causes of the problem of excessive duration and costs of investor-state arbitration proceedings. Findings from social science research highlight the importance of mechanisms which insulate respondent state decision makers from domestic political pressure. These mechanisms deserve more attention in ongoing ISDS reform discussions.*

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## Table of Contents

I. Introduction.....	158
II. Social Science Research and the Excessive Duration and Costs Problem of ISDS .....	162
III. Social Science Research and Other Aspects of ISDS Reform.....	166
IV. Conclusion.....	167

## I. INTRODUCTION

After a period of robust growth with the creation of a significant number of new international courts and tribunals, international law has now come to a phase of backlashes and recalibration. Several African countries have withdrawn from the International Criminal Court (ICC) amid criticism of the court's bias against African countries.<sup>1</sup> One of the rallying points during the Brexit campaign was the Court of Justice of the European Union's (CJEU's) jurisdiction over the United Kingdom, jurisdiction which has come to an end following the finalization of Brexit.<sup>2</sup> Latin American countries such as Bolivia, Ecuador, and Venezuela have withdrawn from the International Centre for Settlement of Investment Disputes (ICSID) Convention after a series of claims being filed by foreign investors against these countries at ICSID.<sup>3</sup> Other countries have, *en masse*, terminated the bilateral investment treaties into which they entered.<sup>4</sup> Even the World Trade Organization's (WTO) dispute settlement system, which was once viewed as the "crown jewel" of the WTO, has now become partially paralyzed because of the United States' continuous objections to the reappointment of Appellate Body Members.<sup>5</sup>

In the meantime, countries are actively engaging in discussions of reforming international courts and tribunals. More than forty-five countries are participating in discussions of possible reforms of investor-state dispute settlement (ISDS) under the auspices of Working Group III of the United Nations Commission on International Trade Law (UNCITRAL).<sup>6</sup> Major WTO member countries also agree that the system needs reform and have started dialogues on this topic.<sup>7</sup>

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<sup>1</sup> South Africa: Withdrawal from the Rome Statute of the International Criminal Court, U.N. Doc. CN.786.2016.TREATIES-XVIII.10 (Oct. 25, 2016); Burundi: Withdrawal from Rome Statute of the International Criminal Court, U.N. Doc. C.N.805.2016.TREATIES-XVIII.10 (Oct. 28, 2016); Gambia: Withdrawal from the Rome Statute of the International Criminal Court, U.N. Doc. C.N.862.2016.TREATIES-XVIII.10 (Nov. 11, 2016).

<sup>2</sup> Eleanor Bennett, *UK Government Trumpets Renewed 'Control of Our Laws' and End of ECJ Jurisdiction After Making EU Brexit Deal*, JURIST (Dec. 24, 2020), <https://perma.cc/ZDG4-L363>.

<sup>3</sup> Matthew Weiniger, Christian Leathley & Joanne Greenaway, *Venezuela Follows Bolivia and Ecuador with Plans to Denounce ICSID Convention*, LEXOLOGY (Jan. 19, 2012), <https://perma.cc/RSE4-7CU4>.

<sup>4</sup> Kavaljit Singh & Burghard Ilge, *India Overhauls Its Investment Treaty Regime*, FIN. TIMES (Jul. 15, 2016), <https://perma.cc/GPR7-BNHU>; *see also* Ben Bland & Shawn Donnan, *Indonesia to Terminate More than 60 Bilateral Investment Treaties*, FIN. TIMES (Mar. 26, 2014), <https://perma.cc/BVQ4-PUKR>.

<sup>5</sup> Cosette Creamer, *From the WTO's Crown Jewel to Its Crown of Thorns*, 113 AJIL UNBOUND 51, 51 (2019).

<sup>6</sup> Julian Arato, *ISDS Reform: Working Group III Gets Down to Brass Tacks*, INT'L ECON. L. & POL'Y BLOG (Oct. 21, 2019), <https://perma.cc/7KEZ-H29J>.

<sup>7</sup> Isabelle Icsó, *USTR Nominee on the WTO: U.S. 'Can't Afford' Continued Disengagement*, INSIDE U.S. TRADE (Feb. 26, 2021), <https://perma.cc/3QLV-P2HD>; Hannah Monicken, *EU Moves Closer to U.S. on Appellate Body, Other WTO Reforms In New Strategy*, INSIDE U.S. TRADE (Feb. 18, 2021), <https://perma.cc/U4L7-B7UB>.

Other international courts such as the ICC and CJEU have also been the subject of reform proposals propelled by criticism against these institutions.<sup>8</sup>

As Abebe, Chilton, and Ginsburg note in their article, the evolution of scholarship on international law has always been influenced by real-world problems.<sup>9</sup> While earlier literature takes a largely theoretical approach to studying problems arising from international law practice, in the past two decades, there has been an empirical turn in international law scholarship.<sup>10</sup> Nevertheless, until recently, this line of empirical research has been largely motivated by high-level questions from prior theoretical debates, such as how international law is produced and whether international law matters.<sup>11</sup> While empirically assessing these issues can have implications for larger normative questions, it often does not speak directly to which normative prescriptions should be adopted to address real-world problems in international law.

This Essay argues that the backlash international law is currently facing, and the ongoing reforms of international institutions underscore the need for more social science research that is geared toward examining the *causes* of existing institutional problems. Abebe, Chilton, and Ginsburg describe social science research as identifying a research question, developing a specific hypothesis that can be empirically assessed, identifying a research design and data to assess the validity of the hypothesis, and presenting results while acknowledging the assumptions upon which they are based and the level of uncertainty associated with those results.<sup>12</sup> Building on their framework, this Essay proposes that to help inform the reform of various international institutions, more social science research should approach an existing institutional problem by asking which factors may have caused the problem, generating testable hypotheses based on a potential cause, and developing a research design that allows one to draw causal inferences about the effect of this cause.

Understanding the causes of a problem helps inform more tailored institutional reforms that specifically address these underlying causes. This is particularly important in the context of reforms of international legal institutions because of the wide variety of stakeholders. For example, during the ISDS reform discussions at UNCITRAL Working Group III, while countries generally agreed that the existing ISDS system needs reform, their positions diverged considerably

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<sup>8</sup> Douglas Guilfoyle, *Reforming the International Criminal Court: Is It Time for the Assembly of State Parties to Be the Adults in the Room?*, EJIL: TALK! (May 8, 2019), <https://perma.cc/CYS3-4RGQ>.

<sup>9</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law*, 22 CHL J. INT'L L. 1, 5 (2021).

<sup>10</sup> Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT'L L. 1, 1 (2012).

<sup>11</sup> *See id.* at 2–3, 12.

<sup>12</sup> Abebe et al., *supra* note 9, at 12–13.



as to which reforms to pursue.<sup>13</sup> After multiple rounds of discussions over the past three years, countries have identified six major areas of concerns over ISDS: “excessive costs, excessive duration of proceedings, lack of consistency in legal interpretation, incorrectness of decisions, lack of arbitral diversity, and lack of independence, impartiality, and neutrality of ISDS adjudicators.”<sup>14</sup> With respect to each of these concerns, the Working Group has put forward various reform options.<sup>15</sup> Countries have expressed divergent views on these options and have yet to reach consensus on the adoption of any reforms.<sup>16</sup> Social science research that clearly identifies the causes of existing problems will help facilitate consensus building amongst countries and provide guidance in terms of which reform option may be best suited to address a particular problem. Indeed, each reform option comes with its own trade-offs.<sup>17</sup> This makes it even more important to obtain a comprehensive understanding of the existing problem first, instead of rushing to implement reforms that may not get at the real causes of the problem.

As Abebe, Chilton, and Ginsburg note in their article, social science research is pluralistic in methods.<sup>18</sup> Both qualitative and quantitative methods can be instrumental in enhancing our understanding about the causes of a particular problem in the study of international law. However, the emphasis of these two types of methods is slightly different. Qualitative methods are more often applied to locate the potential causes of a problem, whereas quantitative methods are more often applied to assess the effect of a particular causal factor.<sup>19</sup> For example, one may conduct interviews to understand what has caused a particular problem and, on the other hand, apply a reduced-form analysis using observational data to identify the effect of a potential cause. Social scientists should embrace the use of both methods and, as Abebe, Chilton, and Ginsburg suggest in their article, pick the method most appropriate to the problem at hand.<sup>20</sup>

In applying quantitative methods to the study of international law, one major challenge is causal identification. International law, by its nature, is influenced by various forces working together. It can be difficult to tease out the effect of a

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<sup>13</sup> Anthea Roberts, *Incremental, Systematic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410, 414–15 (2018).

<sup>14</sup> Daniel Behn, Malcolm Langford & Laura Letourneau-Tremblay, *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. WORLD INV. & TRADE 188, 190 (2020).

<sup>15</sup> *Working Group III: Investor-State Dispute Settlement Reform*, U.N. COMM'N ON INT'L TRADE L., <https://perma.cc/DKT7-A97T>.

<sup>16</sup> *See id.*

<sup>17</sup> Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361, 361 (2018).

<sup>18</sup> Abebe et al., *supra* note 9, at 4.

<sup>19</sup> *See* Hebert Smith, *Effects of Causes and Causes of Effects, Some Remarks from the Sociological Side*, 43 SOCIO. METHODS & RSCH. 406, 409 (2014).

<sup>20</sup> *See* Abebe et al., *supra* note 9, at 15–17.

particular factor in a clean manner. In addition, unlike studies evaluating policy merits or effectiveness in the domestic setting that can leverage variations at the jurisdictional level (for example, a difference in differences study examining the employment effect of minimum wage increases in New Jersey versus Pennsylvania), it is difficult for international law scholars to find such variations to figure out whether a policy or institutional option is desirable or not, as international law is meant to be international and universal.

That said, this does not mean causal identification is impossible in the study of international law. As Shaffer and Ginsburg pointed out almost a decade ago, empirical work in international law should be guided by conditional international law theory, which focuses on the conditions under which international law is produced and has effects.<sup>21</sup> One empirical strategy for conditional international law theory is to leverage variations in the contexts in which international law operates, such as variations in the underlying treaty provisions, in the legal claims advanced during dispute settlement, and in the international law participants themselves. With the increased availability of fine-grained international law data and the development in identification strategies, one can employ a research design that exploits variations in the aforementioned dimensions to draw causal inferences in studying questions related to existing problems, such as why certain countries chose to terminate the international investment treaties they signed or what has led to prolonged proceedings in ISDS and WTO dispute settlement.

Importantly, one should always be clear about the assumptions being made and any limitations associated with the methodology or results. Because international law actors may not be familiar with sophisticated statistical methods, transparency on methodology and caution against overclaiming can help alleviate potential concerns about the credibility of the results.

The challenges of causal inferences in the international law context make it important to combine quantitative analysis with qualitative methods which contribute to the development of theories guiding quantitative research and provide valuable insights where quantitative methods have limitations. Another area that awaits more future work is the replication of prior research findings, which will generate more confidence that reform proposals made on the basis of existing social science research are, in fact, supported by robust empirical evidence.

In the remainder of this Essay, I use the excessive duration and costs problem of ISDS proceedings as an example to discuss how social science research may be applied to explore causes of a problem and shed light on potential solutions.

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<sup>21</sup> Shaffer & Ginsburg, *supra* note 10, at 1.

## II. SOCIAL SCIENCE RESEARCH AND THE EXCESSIVE DURATION AND COSTS PROBLEM OF ISDS

ISDS is a dispute settlement mechanism that allows foreign investors to bring claims against sovereign states before arbitral tribunals for alleged violations of the latter's investment protection obligations. ISDS has long been criticized for its lengthy and costly proceedings.<sup>22</sup> According to UNCITRAL, an average ISDS case lasts for approximately 3.75 years, which translates into average litigation and arbitration costs of millions of dollars for each side of the dispute.<sup>23</sup> The excessive length (and relatedly, excessive costs) of investor-state arbitration, which was designed to be a cost- and time-effective dispute settlement system, has given rise to wide criticism from countries participating in the process.<sup>24</sup> However, while there has been a recent increase in empirical research documenting this problem,<sup>25</sup> few studies have empirically examined the causes of the excessive duration and costs problem.<sup>26</sup> Different diagnoses of the causes may point to different prescriptions to address the problem. In particular, if one cause for prolonged proceedings is that countries are unwilling to settle cases because of domestic political pressure, then perhaps more institutional reform efforts should be focused on dispute prevention and mitigation at the domestic level rather than case management reforms or other procedural changes at the international level.

In a new article, I examine this potential cause by exploring the influence of domestic political pressure on state settlement behavior in ISDS cases.<sup>27</sup> The overall settlement rate in ISDS is much lower than what is typical in other litigation settings—only around twenty percent of all concluded ISDS cases were settled.<sup>28</sup> News reports and surveys of ISDS practitioners show that states are averse to settlement, which tends to generate public criticism for capitulating to the demands of foreign investors and “selling out” using public money.<sup>29</sup> In a 2018

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<sup>22</sup> See generally SUSAN D. FRANCK, *ARBITRATION COSTS: MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATION* (2019).

<sup>23</sup> Secretariat, U.N. Comm'n on Int'l Trade L., *Possible Reform of Investor-State Dispute Settlement (ISDS) — Cost and Duration: Note by the Secretariat*, ¶¶ 48, 56, U.N. Doc. A/CN.9/WG.III/WP.153 (Aug. 31, 2018).

<sup>24</sup> FRANCK, *supra* note 22, at 181–84.

<sup>25</sup> See, e.g., José Manuel Álvarez Zárate et al., *Duration of Investor-State Dispute Settlement Proceedings*, 21 J. WORLD INV. & TRADE 300, 303–04 (2020).

<sup>26</sup> For an exception, see Behn et al., *supra* note 14, at 18–21.

<sup>27</sup> Weijia Rao, *Domestic Politics and Settlement in Investor-State Arbitration*, J. LEGAL STUDIES (forthcoming).

<sup>28</sup> *Investment Dispute Settlement Navigator*, INV. POL'Y HUB, <https://perma.cc/L989-QYAN> (last updated Jul. 31, 2020).

<sup>29</sup> See, e.g., Bette Hileman, *Canada Capitulates on MMT, Settles with Ethyl*, CHEM. & ENG'G NEWS (Jul. 27, 1998), <https://pubs.acs.org/doi/pdf/10.1021/cen-v076n030.p013a>; Uchenna Awom & Patience

survey of ninety-seven experienced practitioners and government officials who have participated in ISDS proceedings, the most frequently mentioned obstacle to settlement in investor-state disputes was the desire to shift the blame to a third-party adjudicator, so that the government would not have to take responsibility for compensating foreign investors with public money.<sup>30</sup> These qualitative findings suggest that domestic political pressure may have caused respondent states to delay settlement or forego settlement opportunities altogether, which has the effect of substantially extending the length of arbitration proceedings.

To identify the effect of anticipated domestic public pressure on case settlement, I exploit variation in election timing in the respondent states and use it as a proxy for the government's sensitivity to domestic public pressure. Electoral disapproval is more likely to translate into loss of political power as elections approach. Hence, elected officials likely become increasingly cautious with settling with foreign investors in the run-up to elections. On the other hand, the time left until the next election should be exogenous to case quality. Thus, the research design allows one to draw causal inferences about the effects of domestic political pressure on state settlement decisions.

In the article, I find that a state becomes less likely to settle an ISDS case as it gets closer to the next election of the state leader. This finding suggests that state settlement decisions in ISDS are not made solely based on case merits. Instead, case settlement also appears to be affected by a political calculus which fluctuates based on election timing. Such political influence leads to delay, and in cases where domestic political pressure is high enough, a failure to settle. This corroborates prior qualitative findings and points to domestic political influence on state settlement decisions as a cause of lengthy and costly ISDS proceedings.

This finding has direct normative implications regarding pursuing reforms to address the problem of excessive duration (and relatedly, excessive costs) associated with ISDS proceedings. UNCITRAL has identified several possible measures to address concerns about excessive duration and costs, including promotion of dispute prevention and mitigation policies, implementing stricter timelines, adding new procedural rules to prevent disputing parties from delaying the process, establishing advisory centers to provide legal advice to countries, and providing arbitrators with case management training.<sup>31</sup> A majority of these measures aim to shorten case duration and reduce associated costs through

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Akpuru, *Nigeria: Malabu Deal Latest—Shell's Dirty Lies*, ALLAFRICA (May 24, 2012), <https://perma.cc/D7DH-HN4U>; Seraphina Chew, Lucy Reed & J Christopher Thomas, *Report: Survey on Obstacles to Settlement of Investor-State Disputes 1* (NUS Ctr. for Int'l L. Working Paper, Paper No. 2018/022, 2018), <https://perma.cc/8V28-SEUS>.

<sup>30</sup> Chew et al., *supra* note 29, at 12.

<sup>31</sup> Secretariat, U.N. Comm'n on Int'l Trade L., *supra* note 23, ¶ 101.

reforming various procedural aspects of ISDS.<sup>32</sup> While such procedural reform efforts can be valuable, the finding that countries' settlement decisions are affected by domestic political pressure highlights the importance of mechanisms that insulate respondent state decision makers in ISDS proceedings from such domestic political pressure. Without such mechanisms in place, even if reforms are made to improve case management and streamline the proceedings, case duration and costs may not be substantially reduced when domestic political pressure forces respondent states to continue litigation without settlement.

One way to insulate settlement decision makers from domestic political pressure is to delegate the decision-making power to a specialized agency or commission and have legal experts there issue detailed reports to explain the reasoning behind the settlement decision, illustrating why settlement is the desirable strategy in a particular case. These legal experts should be less susceptible to domestic political pressure as compared to politicians, and collective decision may further relieve them of concerns about potential repercussions from the domestic public. An expert report with detailed reasoning also helps elected officials justify the settlement decision to domestic audiences, which can mitigate potential domestic backlash against settlement with foreign investors.

A few Latin American countries have already established mechanisms serving similar purposes.<sup>33</sup> Peru, for example, established an inter-agency commission, Coordination and Response System for International Investment Disputes (SICRECI), which specializes in the prevention and handling of investor-state disputes.<sup>34</sup> Among other things, this commission is responsible for "assessing the possibility of reaching a settlement in the direct negotiation stage and participating in these negotiations."<sup>35</sup> The work of the commission is supported by a Technical Secretariat, whose core functions include "conducting an initial assessment of the dispute and preparing a preliminary report that is submitted to the other members; preparing reports on courses of action and strategies and any other information necessary for the Commission to perform its

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<sup>32</sup> Addressing concerns about time and costs through procedural reforms has also been the focus of ICSID's ongoing rules amendment project. *See* Meg Kinnear, *Continuity and Change in the ICSID System: Challenges and Opportunities in the Search for Consensus*, <https://perma.cc/98ZQ-3CPA>.

<sup>33</sup> *See* U.N. CONF. ON TRADE & DEV., *INVESTOR-STATE DISPUTES: PREVENTION AND ALTERNATIVES TO ARBITRATION*, at 86, U.N. Doc. UNCTAD/DIAE/IA/2009/11, U.N. Sales No. E.10.II.D.11 (2010) <https://perma.cc/66C3-NCES>.

<sup>34</sup> Ricardo Ampuero Llerena, *Peru's State Coordination and Response System for International Investment Disputes*, *INV. TREATY NEWS* (Jan. 14, 2013), <https://perma.cc/WK9T-56WR>.

<sup>35</sup> *See id.*

duties.”<sup>36</sup> In addition, the commission also works closely with the Peruvian entities responsible for concluding investment agreements to impose new requirements on foreign investors. Under these new requirements, investors have to present detailed information about the dispute at the time of dispute notification, so as to “facilitate the complete and full understanding of the dispute by the Special Commission . . . [to] increase the possibility of achieving a satisfactory outcome in the negotiation stage.”<sup>37</sup>

By requiring legal experts in the Special Commission to issue reports detailing the reasoning for the litigation (or settlement) strategies, based on all of the available information about the dispute, these institutional arrangements have the potential of insulating the decision makers from domestic political pressure so that they can make settlement decisions based on case merits rather than political whims. In this way, more cases, which otherwise would not be settled due to intense domestic political pressure, will be settled, likely at earlier stages of the dispute. Indeed, Peru credits its system with averting around 300 potential arbitration proceedings.<sup>38</sup> The facilitation of early settlement (when it is demonstrated to be more desirable than litigation) relieves respondent states of the burden of spending considerable public funds and resources defending investor claims, therefore contributing to the reduction of duration and costs of ISDS proceedings.

Another mechanism that may serve similar purposes is to have a third party independently assess the facts of a dispute and issue a report of its fact findings, upon which respondent state governments can rely to make settlement decisions. In this regard, ICSID’s most recent rules amendment proposals contain a stand-alone set of rules for fact-finding, which offer states and investors the opportunity to constitute a committee to make objective findings of fact that could resolve their dispute.<sup>39</sup> Reports resulting from these fact-finding proceedings can provide basis for respondent state governments’ settlement decisions and therefore alleviate their concerns about domestic backlash (to the extent that the report implies settlement is likely more desirable than litigation). Of course, strict time limits need to be imposed so that the fact-finding will not become another costly and drawn-out process itself.

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<sup>36</sup> *Id.*; see also U.N. CONF. ON TRADE & DEV., BEST PRACTICES IN INVESTMENT FOR DEVELOPMENT: HOW TO PREVENT AND MANAGE INVESTOR-STATE DISPUTES: LESSONS FROM PERU, at 35 (2011) <https://perma.cc/5H2H-7JGG>.

<sup>37</sup> See Llerena, *supra* note 34.

<sup>38</sup> See Nancy A. Welsh & Andrea Kupfer Schneider, *The Thoughtful Integration of Mediation into Bilateral Investment Treaty Arbitration*, 18 HARV. NEGOT. L. REV. 71, 118 (2013).

<sup>39</sup> ICSID, Proposals for Amendment of the ICSID Rules Working Paper 4 (2020), 193–204, <https://perma.cc/9NXJ-DLNS>.

### III. SOCIAL SCIENCE RESEARCH AND OTHER ASPECTS OF ISDS REFORM

The social science approach can be extended to study a broader range of problems in the international investment law sphere that are pertinent to ongoing ISDS reform discussions. For example, many critics consider the recent explosion of ISDS cases to be a major factor in contributing to a number of countries' terminations of bilateral investment treaties.<sup>40</sup> Countries learn about the consequences of their treaty commitments through their experiences in ISDS disputes, which propels them to terminate these treaties.<sup>41</sup> This has brought a lot of blame and controversy to ISDS, which is now at the center of a legitimacy crisis. However, an alternative or additional cause of the problem may be that these countries did not carefully negotiate the terms of these treaties and, as a result, are more likely to renege on their prior commitments. These two causes implicate different reform options to address the problem. While one suggests that more should be done to improve the fairness and quality of ISDS decisions, which is what most reform proposals in the area have centered on so far, the other points to the importance of having countries spend more effort and use more expertise in negotiating treaties. More social science research on this issue will help redirect reform efforts to needed places.

As another example, also in the context of ISDS reform, while countries share concerns over lack of impartiality and independence among arbitrators, their views diverge when it comes to deciding which reforms to pursue to address this problem. Some countries advocate for an overhaul of the ISDS system by replacing investor-state arbitration with a multilateral investment court, whereas other countries favor retaining the existing system but instituting more incremental reforms that redress these specific concerns.<sup>42</sup> More social science research on what causes biased decisions can help provide states with a clearer picture regarding which path to pursue. For instance, if there is no evidence that reappointment incentives *per se*, which are inherent to *ad hoc* appointment—the defining feature of arbitration—lead to biased decisions, then perhaps more incremental reforms, such as refining the arbitrator's code of conduct, address the problem better than a systematic overhaul does.<sup>43</sup>

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<sup>40</sup> See Yoram Z. Haftel & Alexander Thompson, *When Do States Renegotiate Investment Agreements? The Impact of Arbitration*, 13 REV. INT'L ORG. 25, 33 (2018).

<sup>41</sup> See *id.*

<sup>42</sup> See Roberts, *supra* note 13, at 411.

<sup>43</sup> See Weijia Rao, *Are Arbitrators Biased in ICSID Arbitration? A Dynamic Perspective*, 66 INT'L REV. L. & ECON. (forthcoming 2021).

#### IV. CONCLUSION

In a time when international law is facing significant challenges and undergoing rapid changes, Abebe, Chilton, and Ginsburg's call for more social science research in the field is timely and important. The social science research on international law has so far largely focused on documenting existing problems and examining high-level theoretical questions. This Essay posits that to inform reforms of international institutions, more social science research should be focused on identifying the causes of these problems and proposing policies or reforms that specifically address those underlying causes. This requires us to explore new frontiers of the conditional international law theory and exploit variations in both the substance of international law and international law participants. In an international setting where decision-making requires the consensus of a wide range of stakeholders, obtaining a comprehensive understanding of what caused existing problems is both important and necessary for implementing tailored reforms that help the field of international law overcome challenges at a pivotal time.



# International Law and Transnational Legal Orders: Permeating Boundaries and Extending Social Science Encounters

Gregory Shaffer\* & Terence C. Halliday†

## Abstract

*This Essay elaborates in three ways the call for a renewal of social science approaches to international law advanced by Daniel Abebe, Adam Chilton, and Tom Ginsburg. First, while we affirm the importance of what they call the “scientific method” of hypothesis testing, we argue that it can and must be complemented by several other well-institutionalized social science approaches to international law. Second, we loosen the conventional “internal”/“external” distinction in legal scholarship and make the case that conceptualization and empirics are integral to both approaches. Third, we propose that the full promise of social science approaches to international law can only be realized when the international is held in dynamic and temporal tension with the national and local. Expanding scholarship on transnational legal orders and ordering brings theory and research on international law (including conventional “internal” approaches) into productive engagement with growing bodies of socio-legal research and scholarship (the so-called “external” view), with mutual benefits for both. The Essay illustrates the promise of the transnational legal order framework with two illustrations, one from international trade law through the World Trade Organization and the other from international commercial law created and promulgated by United Nations Commission on International Trade Law.*

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## Table of Contents

I. Introduction.....	170
II. Amplifying “The Social Science Approach to International Law”.....	171
III. Permeating the Internal-External Binary from the Perspective of Practice	174
IV. Researching Transnational Legal Orders and Ordering .....	179
V. Exemplifying Social Science Scholarship on International Law within a TLO Framework .....	181
A. Illustration One: International Trade Law as “Public Law” and Practice	182
B. Illustration Two: International Trade Law as “Private Law” and Practice .....	182
VI. Conclusion.....	183

## I. INTRODUCTION

This Essay responds to the call for a renewal of social science approaches to international law advanced by Daniel Abebe, Adam Chilton, and Tom Ginsburg.<sup>1</sup> In their framework essay to this symposium, they define “the conventional social science approach to law” as “clearly stating a research question, developing hypotheses, using a research design to test that hypotheses based on some form of qualitative or quantitative data, and presenting conclusions, all while acknowledging the assumptions upon which they are based and the level of uncertainty associated with those results.”<sup>2</sup> They label this form of research an “external approach to law,” which they (conventionally) contrast with “internal,” “doctrinal” scholarship that is “descriptive” and “normative.”<sup>3</sup> They then illustrate their argument with empirical studies of international law involving such issues as whether Bilateral Investment Treaties lead to increased investment flows between the countries that sign them, the effectiveness of international human rights agreements, and the efficacy of international dispute resolution.<sup>4</sup>

Our Essay elaborates their call for social science in three ways. First, while we affirm the importance of what they call the “scientific method” of hypothesis testing, we argue that it can and must be complemented by several other well-institutionalized social science approaches to international law. Second, we reconceive the links between internal and external approaches to international law by proposing that conceptualization and empirics are integral to both approaches. We thus loosen the conventional “internal”/“external” distinction in legal scholarship, which is reflected in their essay and in critiques of the empirical approach that they advocate. Third, we propose that the full promise of social science approaches to international law can only be realized when the international is held in dynamic and temporal tension with the national and local, thus also permeating the international/national law dichotomy as reflected in methodologically nationalist scholarship. Processes of transnational legal ordering and the rise and fall of what we conceptualize as “transnational legal orders” (TLOs) bring theory and research on international law (including conventional “internal” approaches) into productive engagement with growing bodies of socio-legal research and scholarship (the so-called “external” view), with mutual benefits for both. In these ways, our approach can provide a bridge between those

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<sup>1</sup> Daniel Abebe, Adam Chilton & Tom Ginsburg, *The Social Science Approach to International Law and Its Applications*, 22 CHI. J. INT'L L. 1 (2021). As they note, such empirical study was earlier extensively surveyed and assessed in Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Law Scholarship*, 106 AM. J. INT'L L. 1 (2012).

<sup>2</sup> Abebe et al., *supra* note 1, at 5.

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

<sup>4</sup> *Id.* at 16–17, 21.

adopting internal (doctrinal) and external (empirical) approaches to international law.

## II. AMPLIFYING “THE SOCIAL SCIENCE APPROACH TO INTERNATIONAL LAW”

Abebe, Chilton, and Ginsburg present a particular version of “social science” based on deductive reasoning in which hypotheses are developed and tested. There are clear advantages to the deductive approach that they highlight. The researcher aims to be objective, posits a hypothesis, gathers data, and lets the data speak, either confirming or disproving hypotheses. In the process, this work can (and should) inform social decision making.

While this aspect of social-science engagement with law has many merits and is a critical component of a comprehensive project, a review of the extensive anthropological,<sup>5</sup> sociological,<sup>6</sup> political science,<sup>7</sup> economic,<sup>8</sup> and sociolegal<sup>9</sup> literatures on international law and institutions demonstrates that a multiplicity of methods and theories compose the richly textured promise of social science for the study and practice of international law. First, the complementarity of other empirical approaches is necessary because frequently, the most important questions cannot readily be reduced to quantitatively measurable variables. Even if they can be, there is an absence of valid and reliable data on cross-sectional or time-series studies of states and supranational institutions. Second, this complementarity is necessary because the ability to produce a verifiable theory relies on prior stages of understanding, concept development, and hypothesis production, and likewise depends upon later types of empirical research to make meaning of results that all too often are conflicting, ambiguous, or lacking in much

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<sup>5</sup> See, e.g., GALIT SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012); SALLY MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

<sup>6</sup> See, e.g., GREGOIRE MALLARD, *FALLOUT: NUCLEAR DIPLOMACY IN AN AGE OF GLOBAL FRACTURE* (2014); JOHN HAGAN, *JUSTICE IN THE BALKANS: PROSECUTING WAR CRIMES IN THE HAGUE TRIBUNALS* (2003); JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* (2000).

<sup>7</sup> See, e.g., ABRAHAM NEWMAN & HENRY FARRELL, *OF PRIVACY AND POWER: THE TRANSATLANTIC STRUGGLE OVER FREEDOM AND SECURITY* (2019); BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Emilie Hafner-Burton & James Ron, *Seeing Double: Human Rights Impact through Qualitative and Quantitative Eyes*, 61 *WORLD POL.* 360 (2009).

<sup>8</sup> See, e.g., DANI RODRIK, *ECONOMICS RULES: THE RIGHTS AND WRONGS OF THE DISMAL SCIENCE* 118, 144 (2015) (stressing that useful economic analysis requires choices among models that involve both science and craft).

<sup>9</sup> See, e.g., GREGORY SHAFFER, *EMERGING POWERS AND THE WORLD TRADING SYSTEM: THE PAST AND FUTURE OF INTERNATIONAL ECONOMIC LAW* (forthcoming 2021); Alexandra Huneus, *Pushing States to Prosecute Atrocity: The Inter-American Court and Positive Complementarity*, in *THE NEW LEGAL REALISM: STUDYING LAW GLOBALLY VOL. II* 225, 228–29 (Heinz Klug & Engle Merry eds., 2016).

explanatory power.<sup>10</sup> Hypothesis testing therefore is neither the starting point nor the ending point of social science work, but rather one important component of ways that social science can address law's relationships with society, politics, and the economy.<sup>11</sup>

The embeddedness of hypothesis testing in a wider multi-faceted enterprise of social science can be seen in the development of an extensive body of interdisciplinary scholarship in the past several years on the normative development, rise, contestation, and fall of TLOs.<sup>12</sup> This line of research and theory arose from an intuitive sense that a new framework was needed to understand and address the scope and diversity of social, economic, civil, health, environmental, and other problems that engage law across national frontiers, and in which international law is a component. The empirical realities of legally salient issues within and beyond the state required a theoretical framework that could reach across the entire landscape of problems purported to be susceptible to resolution or mitigation with the assistance of international hard and soft law. In addition, the diversity and dynamism of real-world issues demanded a framework that synchronically and diachronically embraces international, national, and local law, because normative development within these planes is inextricably intertwined in practice in ways that have grown over time.

From a social science perspective, the TLO framework emerged initially with an awareness that specific hypotheses or highly abstract frames respectively provided no systematic way to compare, contrast, and learn from developments in areas of law involving social problems from which one could build conditional theory subject to empirical confirmation, refinement, or disconfirmation, including for purposes of problem-solving.<sup>13</sup> We began with a high-level concept, "order," and both processual ("ordering") and institutional ("orders") expressions of this concept, which could bring sociological and legal frames to encompass the bewildering diversity of social problems and their relation to law, regulation, and governance. Here we consciously displaced an exclusive focus on *international law* by situating international law within the frame of *transnational legal ordering*. We

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<sup>10</sup> See, for example, studies on the question of whether international investment agreements induce greater flows of foreign direct investment, a topic raised both in Abebe et al., *supra* note 1, and Shaffer & Ginsburg, *supra* note 1. *But see* JONATHAN BONNITCHA, LAUGE N. SKOVGAARD POULSEN & MICHAEL WAIBEL, *THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME* 155–79 (2017).

<sup>11</sup> *But see* CARLO ROVELLI, *SEVEN BRIEF LESSONS ON PHYSICS* 23 (2014) ("Science begins with a vision. Scientific thought is fed by the capacity to 'see' things differently than they have previously been seen.").

<sup>12</sup> *TRANSNATIONAL LEGAL ORDERS* (Terence C. Halliday & Gregory Shaffer eds., 2015).

<sup>13</sup> Shaffer & Ginsburg, *supra* note 1 (discussing the importance of developing conditional theory in the study of international law).

brought old (“institutionalization”) and new (“recursivity”)<sup>14</sup> social science concepts to channel empirical research across and within conventionally defined subject areas of law, which then could be compared for the purposes of broader theory development.<sup>15</sup> We refined these further with the specification of inductively derived mechanisms that have been observed to drive cycles of legal change beyond the state until they reach a kind of moving equilibrium (or relative “settlement”) in what we characterize as a TLO.

While we elaborate further elements of this framework for social science engagement with international law below, suffice it to say here that this phase of theory development owes more to a Weberian genre of social science research on law than to a particular genre of strict hypothesis testing in contexts where quantitative data are already available or can be constructed.<sup>16</sup> It is a phase of inductive extrapolation and synthesis, of concept development and invention, of proposals for encompassing theory that may offer frames, then propositions, and press ultimately toward specific hypotheses that may be tested. In fact, in the first round of case studies using TLO theory, scores of hypotheses emerged, all susceptible to some form of historical, qualitative, or quantitative examination, that can be pursued in the refinement of such theory.<sup>17</sup> Therefore, we contend that social science approaches importantly include framework construction, concept elaboration, as well as hypothesis generation and testing, involving both deductive and inductive reasoning.

This expansive understanding of social science extends to methods.<sup>18</sup> While we share with Abebe, Chilton, and Ginsburg an appreciation of multiple social

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<sup>14</sup> Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOCIO. 1135 (2007).

<sup>15</sup> For studies across different areas, see TRANSNATIONAL LEGAL ORDERS, *supra* note 12; TRANSNATIONAL LEGAL ORDERING AND STATE CHANGE (Gregory Shaffer ed., 2013). For studies within a particular area of law, see TRANSNATIONAL LEGAL ORDERING OF CRIMINAL JUSTICE (Gregory Shaffer & Ely Aaronson eds., 2020); Tom Ginsburg, Terence C. Halliday & Gregory Shaffer, *Constitution-Making as Transnational Legal Ordering*, in CONSTITUTION-MAKING AND TRANSNATIONAL LEGAL ORDER 1 (Gregory Shaffer, Tom Ginsburg & Terence C. Halliday eds., 2019); Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, 5 U.C. IRVINE J. INT’L, TRANSNAT’L & COMPL. L. 1 (2020) (introducing a symposium issue). For a study of the globalization of legal education that reflects and feeds into these processes, see BRYANT GARTH & GREGORY SHAFFER, *THE GLOBALIZATION OF LEGAL EDUCATION: A CRITIQUE* (forthcoming 2021).

<sup>16</sup> See MAX WEBER, *LAW IN ECONOMY AND SOCIETY* (Max Rheinstein ed., Edward Shils trans., Harvard University Press 1954) (1925).

<sup>17</sup> See Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 518–24. On the importance of emergent analytics involving “discovery,” see Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 85, 119–21, 131, 136–37 (2009).

<sup>18</sup> There are debates within the social sciences regarding the relative advantages and disadvantages of deductive and inductive approaches, as well as whether social science can aspire to theory testing

science methods, we posit that the methodological norm in social science research embraces an array of qualitative methods as commonly as quantitative methods, which do not necessarily involve hypothesis testing, but also concept development, hypothesis formulation, and discovery. Systematic interviewing, participant observation, archival research, and systematic textual analysis, among others, are conventionally deployed in leading schools of the social sciences with the recognition that a privileging of a particular method leads less to a richer empirical understanding of issues than to a constriction of realms of empirical inquiry. But what is common to all these methods is that they form part of a larger process of social inquiry that includes some form of empirical verification, even if a problem, data set, or method cannot yield a hard quantitative result.

In sum, where we have common ground with Abebe, Chilton, and Ginsburg is, first, in their call for empirical research that includes hypothesis testing. Second, we agree that such research should start with a social problem, not a mere intellectual one. We stress, however, that researchers should recognize that the very conception of social problems involves social constructions implicated by ideology, politics, and social positioning, reflecting a researcher's background, interests, and proclivities.<sup>19</sup> Just as Anthea Roberts noted how international law is not “international” in that different national traditions reflect and propagate different conceptions of international law,<sup>20</sup> so the conceptualization of social problems and thus the variables that measure how effectively problems are addressed will reflect a researcher's positioning. The very framing of an issue as a problem constitutes an intervention in the world to the extent that the researcher intends her research to be relevant and useful.

### III. PERMEATING THE INTERNAL-EXTERNAL BINARY FROM THE PERSPECTIVE OF PRACTICE

Abebe, Chilton, and Ginsburg build upon a longstanding distinction between “internal” views of international law, which are characterized by descriptive, normative, and doctrinal analysis, and “external” approaches, which

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in the same way as the natural sciences. *See, e.g.*, BENT FLYVBJERG, MAKING SOCIAL SCIENCE MATTER (2001); IAN SHAPIRO, THE FLIGHT FROM REALITY IN THE SOCIAL SCIENCES (2005). In practice, inductive and deductive work always interact. Inductive probing leads to new hypotheses; and hypotheses inform inductive probing. As John Dewey stressed, researchers revise hypotheses through experience in response to the social problems they study. John Dewey, *Logical Method and Lan*, 10 CORNELL L.Q. 17, 24–26 (1924).

<sup>19</sup> *Cf.* Pierre Bourdieu, *Participant Objectivation*, 9 J. ROYAL ANTHROPOLOGICAL INST. 281, 283 (2003) (“What needs to be objectivized [ ] is . . . the social world that has made both the anthropologist and the conscious or unconscious anthropology that she (or he) engages in her anthropological practice.”).

<sup>20</sup> *See generally* ANTHEA ROBERTS, IS INTERNATIONAL LAW INTERNATIONAL? (2017).

examine the law from the outside, how it came to be, and its consequences.<sup>21</sup> Our research indicates that it may be time to loosen this distinction from the perspective of actual practice. To start, breaking down this binary will constructively expand the contributions that social science can make to internal as well as external legal questions. In addition, from a pragmatist perspective of social science and social action, both internal and external approaches have more in common than indicated by a strict separation. In particular, both operate within particular social contexts, and both conceptualize and aim to address perceptions of particular social problems.

On the one hand, for too long sociologists and other social scientists treated the internal processes of lawmaking, and, even more, the very substance and form of international law itself, as a black box—a region of activity colonized by lawyers and left to their exclusive epistemological claims. This separation of study suited the lawyers because it erected a fence around their mostly invisible doings. Our work, in part, aims to show how the social scientist can constructively open up this black box and reveal how doctrinal development can be leveraged as instances of behavior subject to social science inquiry.

Extending a line of scholarship on the rhetorical properties of global legal norms and scripts,<sup>22</sup> Block-Lieb and Halliday show that the varieties of law produced by the United Nations Commission on International Trade Law (UNCITRAL)—legislative guides, model laws, treaties—comprise a repertoire of rule-types, embedded in other rhetorical contexts such as preambles and glossaries.<sup>23</sup> These texts reflect, on the one side, an adaptation to the political challenge of finding global consensus on legal norms, and, on the other side, a prospective anticipation of what institutions (courts, executive agencies, legislatures) in nation-states could accept as international normative guidance to bring national law into concordance with such global norms.<sup>24</sup>

This work illustrates how a mere description of either the substantive or doctrinal elements of international hard and soft law fails to capture the fullness

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<sup>21</sup> Taking from H.L.A. Hart, Abebe, Chilton, and Ginsburg define “an ‘internal’ view of international law,” as “an approach that, whether descriptive or normative, is at its core a doctrinal exercise—as opposed to an ‘external’ view of international law—that is an approach that examines the law from outside, seeking how it came to be or what its consequences might be in the real world.” Abebe et al., *supra* note 1, at 5.

<sup>22</sup> See SUSAN BLOCK-LIEB & TERENCE C. HALLIDAY, GLOBAL LAWMAKERS: INTERNATIONAL ORGANIZATIONS IN THE CRAFTING OF WORLD MARKETS 227 (2017); Terence C. Halliday, Susan Block-Lieb & Bruce G. Carruthers, *Rhetorical Legitimation: Global Scripts as Strategic Devices of International Organizations*, 8 SOCIO-ECON. REV. 77 (2010); Alexander E. Kentikelenis & Leonard Seabrooke, *The Politics of World Polity: Script-writing in International Organizations*, 82 AM. SOCIO. REV. 1065 (2017).

<sup>23</sup> See generally BLOCK-LIEB & HALLIDAY, *supra* note 22.

<sup>24</sup> See TERENCE C. HALLIDAY & BRUCE CARRUTHERS, BANKRUPT: GLOBAL LAWMAKING AND SYSTEMIC FINANCIAL CRISIS (2009).



of ideological, political, and problem-solving work internalized in the very formal character of the law itself, whether looking back on where the law came from or looking forward to where the law is directed. When the substantive provisions of these laws are matched with the normative and material interests of lawmakers and the ecological dynamics of lawmaking processes, the normativity of law opens up more fully to social scientific exploration. In a pragmatic logic almost as strong as the “should” in normative approaches to law, a close examination of international law’s doctrinal content and form can be posed by the social scientist as a contingent proposition: if actors want a given outcome (as a normative ideal or pragmatic aim), what will be the substantive and formal properties of the law most likely to bring it about? This task is firmly within the epistemological mandate of both the social sciences and internal participants in legal processes. In other words, “internal” actors developing, interpreting, and critiquing international hard and soft law texts are highly interested in so-called “external” questions. Additionally, empirical research can be valuable for understanding and adapting the doctrine to dynamic changes in the world with which law interacts.

Similarly, through systematic interviewing, Shaffer found that internal actors are equally interested in understanding the processes that he studies, as they were “themselves engaged in quasi-social scientific ‘studies’ of the same processes.”<sup>25</sup> They too wished to understand and respond to legal processes and the issues that they address. They too aimed to “make sense” of developments in the trade law world that he studied, as they must respond to a continuously unfolding present on partial information in real time. They were interested in his work for the insights it might provide for the tasks before them.<sup>26</sup> Internal work, from this perspective, involves more than doctrine, but includes the relation of doctrine to concrete areas of legal practice.<sup>27</sup>

As legal realists have long stressed, internal and external approaches often mesh in practice.<sup>28</sup> Within the concept of internal approaches, we include both

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<sup>25</sup> Shaffer, *supra* note 9, at xiv (quoting Douglas R. Holmes & George E. Marcus, *Para-Ethnography*, in 2 THE SAGE ENCYCLOPEDIA OF QUALITATIVE RESEARCH METHODS 595 (Lisa M. Given ed., 2008)) (“By treating our subjects as collaborators, as epistemic partners, our analytical interests and theirs can be pursued simultaneously, and we can share insights and thus develop a common analytical exchange.”).

<sup>26</sup> Stewart Macaulay earlier documented the dilemma lawyers found in developing, applying, or ignoring contract law in the U.S. domestic context in relation to business goals. Stewart Macaulay, *Non-Contractual Relations and Business: A Preliminary Study*, 28 AM. SOCIO. REV. 55 (1963).

<sup>27</sup> BRIAN TAMANAHA, REALISTIC SOCIO-LEGAL THEORY 194 (1995) (“The notion of practice is an essential concept for a realistic approach because it joins behavior (activity) with interpretation (the meaning which informs the activity).”). Tamanaha nonetheless conceived of an internal/external divide in terms of the observer (participant or non-participant) and the observed (internal or external view of the practice). *Id.* at 177.

<sup>28</sup> See Gregory Shaffer, *The Legal Realist Approach to International Law*, in INTERNATIONAL LEGAL THEORY: FOUNDATIONS AND FRONTIERS (Jeffrey Dunoff & Mark Pollack eds., forthcoming 2021).

positivist doctrinal approaches and the internal work of instrumental actors that draft and interpret legal texts.<sup>29</sup> Instrumental actors, by definition, aim to define, interpret, and shape legal norms in light of their conception of a problem, and thus are concerned with assessing the empirical implications of norm formulation and norm application. Doctrinal internal approaches may purport not to be instrumental, but even so, they vary in the extent to which they expressly or implicitly take context into account. Legal positivists such as H.L.A. Hart address the social meaning of texts which implicitly reflects context.<sup>30</sup> Even Ronald Dworkin can be viewed, in part, as adopting a Weberian concept of *verstehen* (or understanding) when he characterizes an “internal point of view” as that of those engaged in legal argumentation—that is, those participants engaged in the “constructive interpretation” of law’s meaning.<sup>31</sup> In a related Weberian vein, sociologist Roger Cotterrell contends that “in order to understand law, the legal sociologist has to understand it as a participant, or as a participant does, or rather as many different kinds of participants do—lawyers or citizens, for example, living in the world of law.”<sup>32</sup> We would not go so far as to say “must,” as the stance depends on the empirical question asked, and whether one adopts a Weberian-interpretivist or Durkheimian-positivist position on social science. As argued in Section II, we call for a broad tent in conceptualizing social science approaches to law. Nonetheless, many social science studies of law would benefit from a closer understanding of the legal process.

Those adopting an internal approach participate in a social process in which they aim to contribute to the understanding and elaboration of legal norms. They help define, explicate, elaborate, and otherwise shape the meaning of legal norms as applied to different contexts. They do so at the international level, whether through the presentation of legal briefs and arguments before international tribunals and the rendering of decisions by these tribunals, or at other stages in the legal process, whether through treaty drafting, the development of non-

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<sup>29</sup> Charles Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203, 1209–10 (2015) (noting that Hart also characterized the distinction as between genuine versus instrumental rule followers).

<sup>30</sup> See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* vii, 113 (1961) (explaining that one of the two “minimum conditions necessary and sufficient for the existence of a legal system” is that “its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials” and characterizing this work as “descriptive sociology”).

<sup>31</sup> Compare RONALD DWORKIN, *LAW’S EMPIRE* 13, 52–53 (1986) (discussing constructive interpretation involving justification and fit), with MAX WEBER, *SELECTIONS IN TRANSLATION* 18–19 (W.G. Runciman ed., Eric Matthews trans., 1978), and MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 88 (Talcott Parsons ed., A.M. Henderson & Talcott Parsons trans., 1964) (defining *verstehen*). Similarly, the philosopher John Rawls stresses the role of “reflective equilibrium” in theorizing. See JOHN RAWLS, *A THEORY OF JUSTICE* 20 (1971).

<sup>32</sup> ROGER COTTERRELL, *LAW’S COMMUNITY* 369–70 (1996).

binding model agreements and guides for national legislators, the formulation of indicators to measure national and business compliance with legal norms, or the drafting of studies (such as by the U.N. International Law Commission presented to the U.N. General Assembly or by U.N. Special Rapporteurs presented to the U.N. Human Rights Council). Other bodies reference these texts at the international, national, and local levels (including domestic courts), further conveying, embedding, and reshaping legal norms as part of a transnational process. Scholarly doctrinal analysis, in turn, aims to further critique, refine, and otherwise influence such normative development.

Legal realists, working in the pragmatist tradition, contend that all norms are developed in social and political contexts and they must be subject to constant evaluation based on experience, which drives norm development.<sup>33</sup> Hanoch Dagan, for example, conceptualizes the legal realist understanding of law in terms of the constitutive tensions between internal and external factors, namely those of reason and power, legal craft and empirics, and tradition and progress.<sup>34</sup> Legal realists combine empirical analysis of law with internal decision making and critique in light of the social context to which law is applied.<sup>35</sup> Empirical work can be ignored, diagnostics can be based on plausible folk theories,<sup>36</sup> and law can be

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<sup>33</sup> Those working in a legal realist tradition, from Holmes, Cardozo, and Llewellyn, to contemporary legal scholars, focus on the application of texts to social facts. Compare Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (establishing the bad man theory of law), with BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 179 (1921) (contending law is subject to an “endless process of testing and retesting”), KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60 (1960) (studying law “as it works”), and Nourse & Shaffer, *supra* note 17 (on the importance of conditional theory and emergent analytics in relation to social facts).

<sup>34</sup> Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607 (2007). Relatedly, Brian Tamanaha shows how legal realists have been mislabeled as radical skeptics of law, whereas, although they were critical of legal doctrine not adapted to social context, they believed that law can serve as an “instrument” to advance “the social good,” and they “fervently labored to improve it.” BRIAN TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING 93–94 (2010).

<sup>35</sup> In this vein, the pragmatist philosopher John Dewey stressed the importance of combining internal principles and external analysis in legal decision making, writing:

For the purposes of a logic of inquiry into probable consequences, general principles can only be tools justified by the work they do. They are means of intellectual survey, analysis, and insight into the factors of the situation to be dealt with. Like other tools they must be modified when they are applied to new conditions and new results have to be achieved. Failure to recognize that general legal rules and principles are working hypotheses, needing to be constantly tested by the way in which they work out in application to concrete situations, explains the otherwise paradoxical fact that the slogans of the liberalism of one period often become the bulwarks of reaction in a subsequent era.

Dewey, *supra* note 18, at 26.

<sup>36</sup> Terence C. Halliday, *Plausible Folk Theories: Throwing Veils of Plausibility over Zones of Ignorance in Global Governance*, 69 BRIT. J. SOCIO. 936 (2018).

simply expressive and symbolic,<sup>37</sup> which is why empirics are important. Nonetheless, when actors aim to develop norms to shape behavior, they benefit from empirics. A realistic conception of law is not either/or (internal reason or external agency and structure), but both at once. Such an approach is particularly important for the development of processual theorizing and pragmatic problem-solving in which social contexts change.

Most importantly, the danger of insisting on too tight of a dichotomy for both doctrinal and empirical scholarship is that it cuts off inquiry, rather than opening up new spaces for investigation and critique. As Charles Barzun writes, the internal/external distinction

rarely serves as a useful conceptual tool to clarify issues or open up avenues of inquiry. Instead, it operates mainly as a rhetorical weapon whose function is to insulate particular substantive views from arguments deemed to be threatening to it. Its tendency has thus been to cabin scholarly debate about the nature and purposes of law, rather than to widen it, and to dampen original thinking about such questions, rather than to stimulate or provoke it.<sup>38</sup>

By loosening the distinction, more legal issues become relevant for empirical inquiry, and better understanding of legal practice will inform more nuanced empirical analysis.

#### IV. RESEARCHING TRANSNATIONAL LEGAL ORDERS AND ORDERING

The framework of studying norm development and change through transnational legal ordering processes illustrates the rich possibilities open to empirically oriented scholars. Traditionally, international law focused predominantly on interstate relations—“the law of nations”—such as regards territorial sovereignty, the treatment of foreign nationals’ person and property, and war and peace.<sup>39</sup> Abebe, Chilton, and Ginsburg’s essay, though grounded in our time, still tends to focus on traditional international law between nation-states. Over time, however, the scope of international law expanded to cover most substantive areas of law, from human rights and criminal law to regulatory law and business transactions. In parallel, the scale of international norm-making swelled, as actors aimed to use international hard and soft law and processes to

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<sup>37</sup> MURRAY EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

<sup>38</sup> Barzun, *supra* note 29, at 1209–10; *see also* Pierre Schlag, *Normativity and Politics of Form*, 139 U. PA. L. REV. 801, 920 (1991) (“[T]he rhetorical conventionality of the inside/outside distinction and its derivative, the internal/external perspective, have enabled controversial matters to be assumed into and out of existence without being questioned.”).

<sup>39</sup> Read, for example, the table of contents of 1 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, PEACE* (1905) and 2 L. OPPENHEIM, *INTERNATIONAL LAW: A TREATISE, WAR AND NEUTRALITY* (1906).

reach deep into state law and institutions.<sup>40</sup> Today, international law is an instrument for social ordering that involves much more than relations among states, as international law now addresses most areas of social life. The expanded scope and scale of international law—its breadth and depth—opens a vast array of subject areas for empirical study.

To study these developments, we created a theoretical framework that places international law in a broader transnational perspective, one that builds from empirical work and, in turn, develops hypotheses for further empirical investigation. In this work we develop a framework for the study of the transnational development of legal norms in which international law plays a role. By transnational legal ordering, we refer to the processes through which legal norms are framed, propagated, settled, institutionalized, contested, and changed transnationally. These processes can give rise to what we call a TLO—a collection of *legal* norms and associated organizations and actors that *shape* the understanding and practice of law across national jurisdictions in a particular field.<sup>41</sup> These norms are not static, but dynamically and recursively change within a transnational context in which norm making and practice at the international, national, and local levels interact. In a series of books and articles, we have applied this framework with others to a broad array of issue areas, ranging from regulatory and private law to constitutional and human rights law.<sup>42</sup>

The TLO framework, with its emphasis on legal orders and ordering, brings an integrated sociolegal vocabulary and method to international law thoroughly grounded in social science. Researchers begin by identifying how agents of legal change frame a problem to be mitigated by law, a characteristic method of sociologists and anthropologists. If a settled TLO is the goal of policy entrepreneurs, researchers must discover which longer-term facilitating circumstances and shorter-term precipitating conditions thrust an issue onto policy agendas beyond nation-states. Through different empirical research methods, law and social science scholars observe how actors mobilize to address economic, social, political, and other problems through means that entail international law. Research will reveal which combinations of substate, state, and supra-state actors, together with non-state, civil society and market actors, engage each other in a bid to produce legal responses. Reflecting normative and material interests, actors at different levels of social action—local, national, and

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<sup>40</sup> Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* 126 (Peer Zumbansen ed., 2020).

<sup>41</sup> TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 5 (defining a TLO as “a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions”).

<sup>42</sup> See *supra* note 15.

international—engage in transnational legal-ordering processes often through a mix of cooperation, competition, and conflict.<sup>43</sup>

An empirically grounded conditional theory will assess the circumstances in which an institutionalized TLO emerges. A TLO consists of more than a codified body of international law; it exhibits perceptible concordance of legal norms across transnational, national, and local levels of lawmaking and practice. Such legal ordering is constantly in motion. Legal change within a state or by a state can impel change in international law, just as change in international law can influence law reform by states and local institutions. Empirical research will reveal the degree to which relatively settled law results both formally and in practice, so that the law is predictable for practitioners and regulatory subjects.

We derive from TLO research on business and finance, human rights, and regulation in international law an extensive array of hypotheses which serve at least two purposes.<sup>44</sup> One is to underline the contingencies of TLOs: the conditions under which they rise and decline, and cooperate and compete; the circumstances in which they are propagated and resisted, and adapted and rejected; and the varieties of forms they can take in different issue-areas and in their temporal and geographical manifestations. Another is to display the extensive breadth of empirical inquiries, accompanied by the full panoply of social science methods, that open up for social scientists and legal scholars in mutually respectful partnership. TLO theory brings social science disciplines into conversation with law, and concomitantly brings scholars studying domestic legal change into engagement with counterparts studying international and transnational legal change.

## V. EXEMPLIFYING SOCIAL SCIENCE SCHOLARSHIP ON INTERNATIONAL LAW WITHIN A TLO FRAMEWORK

We now briefly summarize two research projects that illustrate the empirical study of transnational legal ordering and the settlement and unsettlement of TLOs.

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<sup>43</sup> Compare Gregory Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance*, 94 MINN. L. REV. 706 (2010) and TRANSNATIONAL LEGAL ORDERS, *supra* note 12 (discussing different forms of cooperative, competitive, and antagonistic alignment of legal-ordering processes), with BLOCK-LIEB & HALLIDAY, *supra* note 23 (highlighting cooperation, competition, competitive cooperation, and conflict).

<sup>44</sup> See, e.g., Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, *supra* note 12, at 475, 518–24.

### A. Illustration One: International Trade Law as “Public Law” and Practice

Gregory Shaffer’s forthcoming book, *Emerging Powers and the World Trading System*, exemplifies how international trade law developed through recursive interaction between domestic and international law and practice.<sup>45</sup> On the one hand, the United States had the greatest impact in shaping WTO norms. Many of its norms came out of U.S. law and practice, ranging from intellectual property and import relief law to the timelines for WTO dispute settlement and the organizing principles for WTO negotiations. Other countries, such as Brazil, India, and China (which are the three case studies covered in the book) adapted their laws, institutions, and professions in light of WTO norms. When they became adept at international trade law, they successfully challenged U.S. practices and resisted U.S. pressure on them, which helped catalyze U.S. disenchantment with the liberal economic order that it had been central in creating. Shaffer’s empirical study started with a problem—the role of trade law capacity in shaping norms and affecting outcomes. The work included a quantitative study based on an original survey, and systematic interviewing and participant observation over time.<sup>46</sup> It traced the contribution of legal capacity to the settlement and unsettlement of national and international trade law norms and practices within and across these major countries, implicating the broader international trading system.

### B. Illustration Two: International Trade Law as “Private Law” and Practice

In *Global Lawmaking*, Block-Lieb and Halliday show how a social science approach to lawmaking by UNCITRAL, one of the leading international organizations that creates international private law, affirms and extends the call by Abebe, Chilton, and Ginsburg for applying social science to the study of international law, while exemplifying the potential of alliances between social science and legal scholars.<sup>47</sup> They begin with three transnational problems, which are framed by ecologies of actors: to save failing businesses, especially those whose assets and liabilities cross borders; to free up capital for investment in transitional and developing economies; and to forestall the emergence of regional blocs that

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<sup>45</sup> SHAFER, *supra* note 9.

<sup>46</sup> *Id.* The work illustrates the benefits of partnering with those in other disciplines (such as political science) and those embedded in other national settings (such as in Brazil, China, and India). The book’s case studies were written with Michelle Rattou Sanchez Badin (Brazil), Henry Gao (China), and James Nedumpara and Aseema Sinha (India). The underlying survey and its analysis were conducted with political scientists Marc Busch and Eric Reinhardt.

<sup>47</sup> BLOCK-LIEB & HALLIDAY, *supra* note 23.

govern transport of goods through international waters. They demonstrate empirically that close attention to the process of developing transnational legal orders in three areas of commercial law to address these problems—corporate bankruptcy, secured transactions, and carriage of goods by sea—shows that the distinction between the “external” and “internal” substantially dissolves. Quantitative measurement of delegations’ participation in lawmaking and rhetorical analysis and counts of substantive rule-types demonstrate ways that the external penetrates almost entirely inside the internal such that codified doctrine both reflects and anticipates the economic and social and political contexts in which it *orders* behavior through *legal* norms. The study exemplifies the necessity of triangulating methods: archival research, participant observation, interviews, textual analysis, and coding and quantitative analysis of official records and official proceedings. In so doing, it responds less to a specific hypothesis, nor is it intent on presenting new hypotheses readily tested by quantitative methods. Rather, it endeavors to amplify the power of the TLO framework, expanding and refining its theoretical elements, and presents findings about efforts to institutionalize new legal orders that approach the pragmatics of innovative global governance.

## VI. CONCLUSION

In sum, we contend that law should no longer be studied in a methodologically nationalist perspective involving a sharp dichotomy of international and national norm development and practice, as reflected in predominant internal and external scholarly approaches. The national and international development of legal norms and practices transnationally intertwine and beckon for empirical study. The process of creating and elaborating the TLO framework itself demonstrates the richness of possible social science engagement with international law, including internal approaches to international law. It emerged as a way to bring some theoretical coherence to an enormously heterogeneous body of international law scholarship on a diverse array of issues framed as problems to be addressed through law. It involved the creation of new concepts—transnational legal ordering, transnational legal orders—and the incorporation of other concepts (recursivity, concordance, settling, alignment) into an integrated framework. That in turn has been creatively and critically applied by social scientists and international law specialists to business and finance, health and medicine, human rights, climate change, international crime, and fiduciary relationships. From these applications, scholars have generated scores of hypotheses and propositions on framing, rising and falling, propagating and resisting, and institutionalizing and structuring TLOs. The “testing” of these hypotheses has often not been possible by quantitative methods. More often the theory has been advanced by historical and qualitative social science empirical research. In this respect the TLO framework holds the promise of substantially



enhancing social science engagement with international law with the prospect of mutual enrichment. In so doing, it amplifies the spirit—and widens the scope—of Abebe, Chilton, and Ginsburg’s call for scholarship on international law enriched by social sciences.

# International Law After Dark: How Legalized Sex Work Can Comport with International and Human Rights Law

Joshua A. Fox\*

## Abstract

*Prostitution is often criminalized, but it should not be. While it is undisputed that criminalization assists in shrinking the sexual service industry and decreasing the prevalence of sex trafficking, countervailing evidence suggests that legal and regulated sex work is far safer for all involved. Indeed, the international law on the subject, which calls for an end to exploitation, violence, and trafficking, does not outlaw sex work in all of its forms. This Comment argues that legal sex work, when regulated adequately, comports with international law and promotes the human rights of sex workers that are curbed when the practice is outlawed. Drawing on recent analyses of the most common means of sex work regulation and criminalization, this Comment proposes a novel form of sex work regulation—rooted in the state of Nevada’s centuries-old brothel system—that best follows international law and promotes human rights. Using this framework, states can reconcile the often (and, at first blush, paradoxically) conflicting aims of protecting human rights and combatting human trafficking.*

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## Table of Contents

I. Introduction.....	187
II. Sex Workers' Rights in the Twenty-First Century .....	191
A. Opposition to the Sex Workers' Rights Movement .....	192
III. The International Law of Sex Work.....	193
A. International Law Since 1949.....	194
B. Pertinent International Human Rights Law.....	197
C. Significant Domestic Legal Frameworks.....	198
1. Abolitionist legal frameworks, like the one in Sweden, often take a hybrid approach in an effort to end sex work.....	198
2. Legalization regimes permit sex work in a limited manner.....	200
3. Decriminalization removes almost all regulation from the sex work industry .....	201
4. The complete prohibition of sex work is not viable.....	202
IV. Current Nevada Law .....	203
A. Attempts to Outlaw Sex Work are Ineffective.....	203
B. Nevada Law Promotes Human Rights and Comports with International Law.....	206
1. Nevada law legalizes sex work in a limited manner .....	206
2. Nevada law promotes human rights as guaranteed by international human rights law .....	208
3. Nevada law comports with international prostitution law.....	212
V. A Modified Nevada System Would Best Protect Human Rights and Comply with International Law.....	214
A. Modification One: Eliminate All Population-Related Requirements.....	215
B. Modification Two: Increased Screening Before Licensing .....	217
1. Expanded background check procedures will not increase barriers to entry.....	219
2. This modification, along with broader legalization, will reduce the stigma associated with sex work .....	220
VI. The Implementation of the Nevada Model.....	220
VII. Conclusion .....	221

## I. INTRODUCTION

Prostitution<sup>1</sup> is often called the “oldest profession in the world.”<sup>2</sup> Whether or not this is actually the case, that the trade has had a long and tumultuous history is undisputed. Historians and anthropologists trace its origins at least as far back as the brothels of ancient Egypt, but it is possible they extend much further.<sup>3</sup> Even so, since the time of the pharaohs, prostitution has been outlawed on numerous occasions.<sup>4</sup> Indeed, as recently as July 2020, Israel became the latest state to join the ranks of those that have attempted to outlaw the profession over the millennia. In fact, Israel is the most recent state to adopt the increasingly common Nordic Model for regulating prostitution,<sup>5</sup> a system developed in Sweden that aims to “end, rather than regulate, sex work” by criminalizing “buyers of sex.”<sup>6</sup> While it has gained popularity in the last two decades,<sup>7</sup> the Nordic Model is not the only means by which states regulate or outlaw prostitution. There are at least four

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<sup>1</sup> Herein, a number of terms are used that—while superficially similar—are different. “Prostitution” and “sex work” are used interchangeably to mean the *voluntary* engagement in sexual acts for remuneration. The latter is the preferred term for many in the industry, but the former is frequently used by lawmakers, so they are both used in this Comment. “Forced prostitution” or the “exploitation of prostitution,” on the other hand, can be defined as any sexual act, performed for money, that is done by way of the threat or use of force, coercion, deception, fraud, abduction, and/or abuse. This definition is adapted from those of human trafficking put forth by the United Nations (U.N.) in treaties such as the Protocol to Prevent, Suppress, and Punish Trafficking in Persons Especially Women and Children, Dec. 12, 2000, 2237 U.N.T.S. 319, <https://perma.cc/2UTM-X6C9>.

<sup>2</sup> Yugank Goyal & Padmanabha Ramanujam, *Ill-Conceived Laws and Exploitative State: Toward Decriminalizing Prostitution in India*, 47 AKRON L. REV. 1071, 1073 (2015).

<sup>3</sup> See *A Brief History of Brothels*, THE INDEP. (Jan. 21, 2006), <https://perma.cc/6G7G-2BCY> (tracing “[t]he first brothels proper” to ancient Egypt).

<sup>4</sup> See *id.* (“Throughout the ages, there have been plenty of folk determined to outlaw the trade.”). In this Comment, several legal schemes relevant to prostitution are discussed. Among the most pertinent are the Nordic Model (abolitionism), which criminalizes the buying of, but not the selling of, sexual services, decriminalization, which aims to fully deregulate sex work, legalization, which legalizes sex work in a limited and regulated manner, and prohibition, which fully outlaws sex work.

<sup>5</sup> See Toi Staff, *Seeking Prostitution Services Is Now Illegal in Israel*, TIMES OF ISRAEL (July 10, 2020), <https://perma.cc/F65D-76VS> (“Punishing prostitution clients was first introduced by Sweden in its 1999 Sex Purchases Act.”). For a discussion of another state’s attempt to institute the Nordic Model in 2020, see, for example, Vic Parsons, *Labour MP Tables Controversial Bill to Criminalise Buying Sex. Sex Workers Say It Would Put Their Lives in Danger*, PINK NEWS (Dec. 9, 2020), <https://perma.cc/9W8R-5HG2>.

<sup>6</sup> Rachel Marshall, *Sex Workers and Human Rights: A Critical Analysis of Laws Regarding Sex Work*, 23 WM. & MARY J. WOMEN & L. 47, 58 (2016).

<sup>7</sup> See *What is the Nordic Model?*, NORDIC MODEL NOW!, <https://perma.cc/8CMT-MQG2> (explaining what the Nordic Model is, noting the eight states where it is the law, and outlining why other states should enact similar legislation).

“legislation typologies” present in Europe and North America alone, and within each the law varies widely.<sup>8</sup>

Much of the development in prostitution law over the past century has been shaped by—and has shaped—international law. As a result, “international law has approached prostitution inconsistently.”<sup>9</sup> In the mid-twentieth century, for instance, the international community largely committed itself to prohibiting prostitution.<sup>10</sup> Less than a century later, a lot has changed, and the debate over the best legal framework for addressing prostitution continues. Thus, while eight states have adopted the Nordic Model, others approach sex work much differently. Germany, for example, enacted the Law Regulating the Legal Situation of Prostitutes in 2001, which “removed the morality language” from the nation’s prostitution laws and thereby granted sex workers access to “health insurance, public benefits, and labor rights law.”<sup>11</sup> Even prior to this, however, sex work was widely legal in Germany.<sup>12</sup> A number of other approaches exist within the European Union (E.U.) as well. Some states therein allow both indoor and outdoor prostitution but “prohibit the existence of brothels,” while others “tolerate prostitution and [typically do] not intervene in it.”<sup>13</sup> Across the Atlantic, the United States (U.S.) takes yet another approach. In the U.S., “there is no federal law banning sex work,” so laws “vary from state to state and even city to city,” with Nevada being the only state to legalize—in a limited fashion—sex work.<sup>14</sup> Nevada’s model, discussed in greater detail below, takes a brothels-only approach to sex work and, as this Comment will argue, is among the best in the world in terms of promoting human rights and comporting with international prostitution law.

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<sup>8</sup> See generally ANDREA DI NICOLA, ISABELLA ORFANO, ANDREA CAUDURO & NICOLETTA CONCI, TRANSCRIME, STUDY ON NATIONAL LEGISLATION ON PROSTITUTION AND THE TRAFFICKING IN WOMEN AND CHILDREN (2005), <https://perma.cc/XK83-5HVZ> [hereinafter TRANSCRIME] (presenting an overview of abolitionism, new abolitionism, prohibitionism, and regulationism as they exist in the E.U.).

<sup>9</sup> Tamarah Provost, Comment, *Shaky Ground: How Wavering Approaches to Prostitution Law Have Undermined International Efforts to End It*, 14 SANTA CLARA J. INT’L L. 615, 616 (2016).

<sup>10</sup> See Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others arts. 1–2, July 25, 1951, 96 U.N.T.S. 271 [hereinafter CSTPEPO].

<sup>11</sup> See Marshall, *supra* note 6, at 57 (citing Katherine Koster, *Legal in Theory: Germany’s Sex Trade Laws and Why They Have Nothing to Do with Amnesty Sex Work Proposal*, HUFFINGTON POST (Aug. 27, 2015), <https://perma.cc/MBV4-CQJY>).

<sup>12</sup> See *id.*

<sup>13</sup> See TRANSCRIME, *supra* note 8, at viii.

<sup>14</sup> Anna North, *The Movement to Decriminalize Sex Work, Explained*, VOX (Aug. 2, 2019), <https://perma.cc/772L-B5R6> (explaining that many sex workers in the U.S. want the industry to be decriminalized in order to avoid the issues and stigmatization that come with arrests and legal complications from engaging in the practice).

All of the aforementioned regulatory frameworks, from total criminalization to complete decriminalization,<sup>15</sup> do not exist in a vacuum, however. The states that enact them are largely United Nations (U.N.) members that share the goal of protecting the human rights outlined in the U.N.'s Universal Declaration of Human Rights (UDHR), which is part of global customary law.<sup>16</sup> Indeed, many of these nation states are party to later treaties and conventions that were inspired by the UDHR and focus explicitly on prostitution and human trafficking. These states share the international community's aim of ensuring that all people have "the inherent dignity and . . . equal and inalienable rights" that are the "foundation of freedom, justice, and peace in the world."<sup>17</sup> They recognize that the ability to choose one's employment and to work freely and "without any discrimination" in "favourable conditions" is fundamental to achieving these goals.<sup>18</sup> Ultimately, however, the states that are party to the UDHR and its progeny address these goals quite differently, including in the realm of sex work.

On the ground, the effects of these inconsistent policies are made clear by the sex workers' rights movement, which continues to grow globally.<sup>19</sup> This movement "exists to uphold the voice of sex workers" and promote the "acceptance of sex work," while at the same time opposing "all forms of criminalization."<sup>20</sup> While not all sex workers agree with the aims of the movement, its existence highlights the increasing pressure on governments to find balance between ending human trafficking and ensuring that the universal human rights of all citizens, including the right to work, are protected.<sup>21</sup> In addition, not only must the aforementioned domestic legal frameworks promote human rights, they must also comport with the inconsistent intricacies of the many international conventions and covenants pertinent to sex work and human trafficking. Fortunately, over the last three decades the international community has—at least

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<sup>15</sup> See Marshall, *supra* note 6, at 56 (describing New Zealand's novel approach to fully decriminalizing sex work).

<sup>16</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR] (encompassing much of the human rights language included in the later and broader International Bill of Human Rights).

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

<sup>18</sup> *Id.* art. 23.

<sup>19</sup> *Who We Are*, GLOBAL NETWORK OF SEX WORK PROJECTS (NSWP), <https://perma.cc/W3N9-54LW> [hereinafter NSWP] (explaining that this intercontinental group is campaigning for "[a]cceptance of sex work as work," the end to the criminalization of sex work, and the self-determination and self-organization of sex workers).

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

<sup>21</sup> *See* UDHR, *supra* note 16.

in part—come to view sex work as not inherently in conflict with human rights.<sup>22</sup> As such, the earliest international conventions, which at one time called for the complete prohibition of prostitution,<sup>23</sup> have become increasingly irrelevant.<sup>24</sup> In the current legal landscape, then, it is possible to craft policy that protects human rights, combats human trafficking, and complies with international law by regulating prostitution rather than outlawing it.<sup>25</sup> This piece proposes such a solution.

This Comment argues that legalization, not the extremes of full decriminalization or abolition, best comports with international law and furthers the goals of human rights law. Further, it recommends that the International Court of Justice (ICJ), upon request by an authorized agency concerned with the rights and health of sex workers, such as the World Health Organization (WHO), issue an advisory opinion advocating for the broad implementation of a legalization scheme similar to Nevada’s but with several important modifications. While the ICJ’s promotion of a modified version of Nevada’s system might confound policymakers at the outset, as the forthcoming comparative analysis reveals, the state’s method of legalization has profound benefits both in terms of human rights and international legal compliance.

This Comment proceeds in five parts. Section II introduces the current debate over the criminalization and legalization of sex work by exploring the modern sex workers’ rights movement. It notes the changing legal landscape with respect to prostitution and highlights that international and domestic prostitution law, the sex workers’ rights movement, and human rights law all aim to end exploitation and give a voice to marginalized groups. Section III delves into the current state of the law. This Section summarizes international law and human rights law as they pertain to prostitution before covering the major domestic legal frameworks that are currently in place. Section IV outlines the intricacies of

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<sup>22</sup> See Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 678 (2004) (“U.N. processes have recently accepted some distinction between voluntary and forced prostitution, at least in the case of adults, which implies that some forms of prostitution . . . may be acceptable by human rights standards.”).

<sup>23</sup> See generally CSTPEPO, *supra* note 10.

<sup>24</sup> See, e.g., G.A. Res. 48/104, Declaration on the Elimination of Violence against Women (Feb. 23, 1994) [hereinafter DEVAW] (including the word “force” in defining the type of prostitution considered to be “violence against women”); see also G.A. Res. 55/25, Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children art. 3 (Nov. 15, 2000) [hereinafter The Palermo Protocol] (considering the *exploitation* of prostitution part of human trafficking, but not prostitution itself).

<sup>25</sup> Compare, e.g., Ane Mathieson, Easton Branam & Anya Noble, *Prostitution Policy: Legalization, Decriminalization and the Nordic Model*, 14 SEATTLE J. SOC. JUST. 367 (2015) (concluding that the Nordic Model is the best policy for Seattle, Washington), with Marshall, *supra* note 6 (arguing in favor of a broad system of decriminalization created in consultation with sex workers and advocacy groups).

Nevada's current regulatory scheme and explains how they help it to comply with international law and promote human rights. This Section also compares Nevada's system in those respects to systems present elsewhere in the world. Section V introduces two modifications to Nevada's current system that, if made, would make the state's legal framework the best at both protecting human rights and comporting with international prostitution law. Finally, Section VI proposes a potential pathway for implementing a modified Nevada Model elsewhere in the world.

## II. SEX WORKERS' RIGHTS IN THE TWENTY-FIRST CENTURY

The sex workers' rights movement, although diverse due to its immense scale, generally advocates for "rights, not rescue."<sup>26</sup> As summarized by the Global Network of Sex Work Projects (NSWP), the "three core values" of the movement include working toward the "acceptance of sex work as work," as well as opposing "all forms of criminalisation . . . [and] supporting [the] self-organisation and self-determination of sex workers."<sup>27</sup> Through these binding principles, sex workers pursue the freedom to safely ply their trade without interference from law enforcement.

Beyond sex workers themselves, the movement consists of a "wide array of individuals and groups," as well as many large organizations, such as Amnesty International, the WHO, and UNAIDS.<sup>28</sup> A large number of these groups, including NSWP, call for the decriminalization of sex work as a means of promoting many of the human rights outlined in the UDHR. Indeed, NSWP's *Consensus Statement on Sex Work, Human Rights, and the Law* tracks the UDHR in many ways, including through its promotion of the "right to be free from discrimination," as well as the rights to "free choice of employment" and "to move and migrate."<sup>29</sup> These can be found almost verbatim in the UDHR's Articles Seven, Twenty-Three, and Thirteen, respectively.<sup>30</sup> In addition, NSWP is not alone in calling for the decriminalization of sex work in order to promote human rights. DECRIMNOW, a Washington, D.C.-based "campaign and movement to

<sup>26</sup> See Ine Vanwesenbeeck, *Sex Work Criminalization Is Barking up the Wrong Tree*, 46 ARCHIVES SEX BEHAV. 1631, 1632–36 (2017).

<sup>27</sup> NSWP, *supra* note 19.

<sup>28</sup> See Catherine Murphy, *Sex Workers' Rights are Human Rights*, AMNESTY INT'L (Aug. 14, 2015), <https://perma.cc/2B8S-Y6GF> ("[W]e are not [the first to address this issue].").

<sup>29</sup> See *Consensus Statement on Sex Work, Human Rights, and the Law*, NSWP (2013), <https://perma.cc/6P8W-UZFL> [hereinafter NSWP Consensus Statement] (sharing the thoughts of the "over 160 sex worker organisations in over 60 countries" that make up NSWP with respect to eight fundamental rights sex workers should/do/must have).

<sup>30</sup> UDHR, *supra* note 16 (including Article 7's statement that "[a]ll are . . . entitled without any discrimination to equal protection of the law," Article 13's guarantee of the "right to work, [and] to free choice of employment," and Article 23's protection of "the right to freedom of movement").



decriminalize sex work” is another example of the many groups that argue that decriminalization is necessary in order to promote “human rights, civil rights and liberties, health, [and] safety” among sex workers.<sup>31</sup> The sex workers’ rights movement is therefore full of groups that demand decriminalization in the name of promoting human rights.<sup>32</sup>

Similarly, those states that legalize and/or decriminalize sex work argue it is the best path forward for promoting human rights. New Zealand, which is among the first states to fully decriminalize sex work, for instance, did so “with the stated aims of [s]afeguarding human rights” and “[p]rotecting sex workers,” as well as “[c]reating an environment conducive to public health.”<sup>33</sup> Interestingly, however, there are many governments and advocacy groups that argue that the abolition of sex work, rather than its decriminalization, is the best way to promote human rights.

#### A. Opposition to the Sex Workers’ Rights Movement

Those who support the Nordic Model, which is outlined in greater detail in Section III below, do so because they believe that “buying human beings for sex is harmful, exploitative, and can never be safe.”<sup>34</sup> Many who promote the Nordic Model and similar abolition schemes argue that *all* “prostitution is a human rights issue.”<sup>35</sup> In the same way that many in the sex workers’ rights movement allude to the UDHR in asserting that decriminalization promotes human rights, those who oppose prostitution use similar strategies to make the opposite argument. The advocacy group Nordic Model Now!, for instance, notes that there must be a “new social consensus that recognizes the harm and violence intrinsic to prostitution.”<sup>36</sup> Harm and violence run directly counter to the UDHR’s assurance that all people have the right to “life, liberty, and security of person,” as well as the right not to be subjected to “torture or to cruel . . . treatment.”<sup>37</sup> In addition, states that outlaw

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<sup>31</sup> See *DECRIMNOW in Policy*, DECRIMNOW (2018), <https://perma.cc/48SH-7HWG>.

<sup>32</sup> See e.g., Melissa Gira Grant, *Amnesty International Calls for an End to the ‘Nordic Model’ of Criminalizing Sex Workers*, THE NATION (May 26, 2016), <https://perma.cc/W9EV-KCX5> (explaining Amnesty International’s updated stance calling for an end to the Nordic Model); see also *About Us*, INT’L COMM. ON THE RTS. OF SEX WORKERS IN EUR. (ICRSE), <https://perma.cc/G4NW-RX7Z> (“ICRSE opposes all forms of criminalisation of sex work . . . [and] seek[s] to put forward a labour rights’ perspective of sex work, whereby . . . [the] human rights of all sex workers are recognized.”).

<sup>33</sup> See *Prostitution law reform in New Zealand*, N.Z. PARLIAMENT (Jul. 10, 2012), <https://perma.cc/2Z7Y-LB8F>.

<sup>34</sup> See NORDIC MODEL NOW!, *supra* note 7.

<sup>35</sup> Mary Ann Peters, *Nordic Model Key to Beating Exploitation of Sex Workers*, THE CARTER CTR. (Apr. 18, 2016), <https://perma.cc/2LGF-JU63> (contending that the Nordic Model is successful in promoting human rights).

<sup>36</sup> *About Us*, NORDIC MODEL NOW!, <https://perma.cc/3CP4-AWD5>.

<sup>37</sup> UDHR, *supra* note 16, arts. 3, 5.

sex work often do so for similar reasons.<sup>38</sup> Israel’s Prohibition on Prostitution Consumption Law, for example—which instituted the Nordic Model in the Jewish state—begins by acknowledging the “harmful aspects of prostitution and the damages it involves.”<sup>39</sup> Thus, it is clear that the sex workers’ rights movement and other decriminalization advocates, as well as those who promote the abolition of prostitution, frequently share the goal of safeguarding human rights.

It is notable that groups with such similar aims have come to such different conclusions. Although there is no clear reason as to why this is the case, one suggestion is that those who advocate for decriminalization see a distinction between voluntary and involuntary prostitution, while those who call for the complete prevention of the practice do not. The Swedish government has acknowledged the existence of this debate and has pushed back on the contemporary view that voluntary sex work can be safe, noting that “[t]hose who defend prostitution argue that it is possible to differentiate between voluntary and non-voluntary prostitution,” before concluding that “the distinction . . . is not [actually] relevant.”<sup>40</sup> Regardless of the reason for this difference, it is important to recognize that the aim of many of those involved in the debate over sex work policy is to protect human rights. With this context in mind, it becomes possible to imagine a legal regime that takes into account the concerns of all sides—regulators, sex workers, and advocates—and ensures that human rights are protected, international law is followed, and public health is championed. In the forthcoming sections, this Comment argues in favor of one such framework, modeled after Nevada’s brothel system, that might best accomplish these goals.

### III. THE INTERNATIONAL LAW OF SEX WORK

The state of prostitution law in the world is complex. Although the primary international law on the subject can be found in documents from only a few key conventions and treaties, attempting to organize the myriad domestic legal frameworks is far more difficult.<sup>41</sup> Thus, after first exploring the relevant

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<sup>38</sup> See e.g., *English Summary of SOU 2010:49*, THE GOV’T OFFS. OF SWED., <https://perma.cc/GX84-FXKF> [hereinafter Summary of SOU] (“The ban [on the purchase of sexual services] was intended to fight prostitution and its harmful consequences.”).

<sup>39</sup> Prohibition on Prostitution Consumption Law, 5779-2019, §1 (2019–20) (Isr.).

<sup>40</sup> Summary of SOU, *supra* note 38, at 31. It is notable that modern international law, discussed at length in Section III, distinguishes between voluntary and involuntary sex work in speaking of the risks associated with the sale of sex. Indeed, as highlighted below, international law would conflict with international human rights law, which promotes the right to free choice of employment, were it to continue to call for the prohibition of voluntary sex work as it did in the last century.

<sup>41</sup> Compare, e.g., Marshall, *supra* note 6, at 52–53 (citing Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 FORDHAM INT’L L.J. 1178, 1205 (2010)) (“There are four types of legal regimes used to address sex work: prohibition, legalization, abolition, and decriminalization.”), *with*

international legal documents, this Section takes a broad approach in categorizing domestic prostitution laws in order to provide a sufficient overview of the most popular regimes and facilitate a comparison between them. In turn, Sections IV and V will propose a novel regulatory framework that both capitalizes on the successes of the systems discussed herein and attempts to mitigate their failures.

#### A. International Law Since 1949

As noted in Section I, international prostitution law has changed dramatically since 1949, when the first major U.N. convention on the subject took place. Although the most relevant documents are those that are most recent and reflect modern views of sex work and human trafficking, those that came earlier provide the foundation for the contemporary legal landscape, and so are worth noting.

In 1949, the U.N. General Assembly approved the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (CSTPEPO) and, in doing so, began a new age in sex work law.<sup>42</sup> One of the foundational documents in the modern history of prostitution law,<sup>43</sup> CSTPEPO took a hardline view of the practice. The widely ratified convention, which went into force in 1951, called out the “evil of the traffic in persons for the purpose of prostitution” and required signatories to punish all people who procured another person “for [the] purposes of prostitution,” even “with the consent of that person.”<sup>44</sup> It further made illegal the operating and financing of brothels.<sup>45</sup> In sum, those states—notably absent from which are the U.S., United Kingdom, and Germany—“that have signed, ratified, and implemented [CSTPEPO]” aim to “prevent[] prostitution.”<sup>46</sup>

CSTPEPO has not stood the test of time, however. Many of its provisions—including those defining human trafficking and those equating all forms of sex work with trafficking—are no longer followed. Indeed, in explaining the lasting impact of CSTPEPO, the European Commission noted that “the definition of trafficking of this convention was departed from in the Trafficking protocol to the U.N. Convention against Transnational Crime,” which is outlined later in this

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TRANSCRIME, *supra* note 8, at viii (breaking E.U. member policy regarding sex work into four groups: abolitionism, new abolitionism, prohibitionism, and regulationism).

<sup>42</sup> See *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, U.N. HUM. RTS. OFF. OF THE HIGH COMM’R (OHCHR), <https://perma.cc/4BY4-W2YT?type=image>.

<sup>43</sup> See *International Instruments Concerning Trafficking in Persons*, OHCHR (Aug. 2014), <https://perma.cc/9R45-XZ7J> (listing CSTPEPO as one of the “main international instruments used to combat human trafficking”).

<sup>44</sup> CSTPEPO, *supra* note 10, at art. 1.

<sup>45</sup> *Id.* art. 2.

<sup>46</sup> See *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, ORG. FOR SEC. & COOP. IN EUR., <https://perma.cc/V7SP-DMZD>.

Section.<sup>47</sup> With respect to CSTPEPO's discussion of prostitution, many of the ideas expressed therein were also departed from later in the twentieth century as the U.N. adopted some of the views advocated for by the sex workers' rights movement.

Among the more recent and more relaxed international documents pertaining to sex work is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).<sup>48</sup> CEDAW, adopted in 1979 for the purpose of eliminating "discrimination [against women] in all its forms and manifestations," contains provisions concerning sex work.<sup>49</sup> Unlike CSTPEPO, however, this convention features "pro-sex-worker language" that illustrates "a rising recognition that states must safeguard sex workers' rights."<sup>50</sup> Scholars consider CEDAW representative of a small but pivotal moment in the long history of sex work, in which the international community shifted, even if only slightly, "from an abolitionist mindset to one that recognizes the human rights of sex workers."<sup>51</sup>

The text of CEDAW illuminates this change. Article 6 of the convention proclaims that "[s]tates [p]arties shall take all appropriate measures . . . to suppress all forms of traffic in women *and exploitation of prostitution* of women."<sup>52</sup> When compared with CSTPEPO—which called for the prohibition of sex work regardless of the consent of the sex worker—CEDAW's Article 6 represents a major shift. Not only does Article 6 distinguish between trafficking and prostitution rather than consider sex work "the traffic in persons for the purpose of prostitution,"<sup>53</sup> it refers to trafficking and prostitution as separate acts, noting that the issue is with the *exploitation* of prostitution and not prostitution itself.<sup>54</sup> This pivot from the abolitionist thinking of CSTPEPO is further illustrated by CEDAW's legislative history, during which "Italy and the Netherlands expressly rejected" Morocco's attempt to include an amendment calling for the "suppression of prostitution" generally.<sup>55</sup> Thus, CEDAW is the first major international document that refers to sex work but does not call for its prohibition.

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<sup>47</sup> *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, E.U. EUROPEAN COMM'N, <https://perma.cc/6HU3-WU7Y?type=image>.

<sup>48</sup> *Convention on the Elimination of All Forms of Discrimination Against Women* art. 1, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

<sup>49</sup> *Id.*

<sup>50</sup> Chi Mgbako & Laura A. Smith, *Sex Work and Human Rights in Africa*, 33 *FORDHAM INT'L L.J.* 1178, 1201 (2010).

<sup>51</sup> *See* Marshall, *supra* note 6, at 53.

<sup>52</sup> CEDAW, *supra* note 48, art. 6 (emphasis added).

<sup>53</sup> CSTPEPO, *supra* note 10, art. 1.

<sup>54</sup> CEDAW, *supra* note 48, art. 6.

<sup>55</sup> *See* Mgbako & Smith, *supra* note 50, at 1201.

This is illustrative of a changing view of sex work that emphasizes the importance of safeguarding the human rights of those involved in it.<sup>56</sup>

Just over a decade after CEDAW went into force, the U.N. General Assembly “recogniz[ed] the urgent need for the universal application to women of . . . rights and principles with regard to [the] equality, security, liberty, integrity, and dignity of all human beings” by creating the Declaration on the Elimination of Violence against Women (DEVAW).<sup>57</sup> Although DEVAW does not address sex work at length, it does continue the U.N.’s trend—which emerged in CEDAW—of marking a “clear distinction between forced and voluntary prostitution.”<sup>58</sup> Indeed, Article 2 of DEVAW states that “[v]iolence against women shall be understood to encompass, but not be limited to . . . trafficking in women and *forced* prostitution.”<sup>59</sup> Through its use of the modifier “forced,” Article 2 is the U.N.’s “first clear departure from the abolitionist view of prostitution.”<sup>60</sup> The “absence of a general reference to prostitution” indicates the international community’s shifting perspective on sex work.<sup>61</sup> Today, nearly three decades after DEVAW, it is common to promote sex work as a means of safeguarding human rights and combatting trafficking.<sup>62</sup> Such an argument was almost unheard of on the international scale at the time of CSTPEPO, however.<sup>63</sup>

Further, in 2003, ten years after DEVAW, the U.N. Convention against Transnational Organized Crime and the Protocols Thereto, which contained the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (the Palermo Protocol), went into force.<sup>64</sup> The Palermo Protocol aims to “prevent and combat trafficking in persons” and to “protect and assist the victims of such trafficking, with full respect for their human rights.”<sup>65</sup> Like DEVAW and CEDAW before it, the Palermo Protocol does not consider prostitution alone exploitation, rather it alludes to “the *exploitation* of [ ] prostitution” in its definition of “trafficking in persons.”<sup>66</sup> The Palermo Protocol therefore only considers “the exploitation of [ ] prostitution,” rather than all sex

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<sup>56</sup> *Id.* (referring to “CEDAW general recommendation 19,” which recognizes the need to promote equal protection under the law for sex workers).

<sup>57</sup> DEVAW, *supra* note 24, pmb1.

<sup>58</sup> Marshall, *supra* note 6, at 53.

<sup>59</sup> DEVAW, *supra* note 24, art. 2 (emphasis added).

<sup>60</sup> Mgbako & Smith, *supra* note 50, at 1201.

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

<sup>62</sup> *See* NSW, *supra* note 19.

<sup>63</sup> *See* Mgbako & Smith, *supra* note 50, at 1200 (acknowledging that CSTPEPO established an “antiprostitution position” to safeguard human dignity and worth).

<sup>64</sup> The Palermo Protocol, *supra* note 24.

<sup>65</sup> *Id.* art. 2(a)–(b).

<sup>66</sup> *Id.* art. 3(a) (emphasis added).

work, to be trafficking.<sup>67</sup> Further, it is notable that while the Palermo Protocol states that the “consent of a victim of trafficking . . . shall be irrelevant,” such is only the case where “threat[s] or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent” are used.<sup>68</sup> Therefore, where consent is freely given, it is not only relevant to whether the transaction is considered trafficking and/or exploitation, it might well be conclusive evidence that the transaction is sex work rather than trafficking or exploitation. Even under the potentially concerning language of the Palermo Protocol, then, sex work is a legal practice.

Overall, modern developments in the international law governing sex work have seemingly followed the trajectory set by CEDAW’s recognition of the human rights of sex workers. Indeed, recent legal documents such as DEVAW and the Palermo Protocol appear far more concerned with outlawing forcible and coerced sexual contact, including trafficking, than voluntary sex work. Thus, the legalization scheme proposed in Sections IV and V of this Comment, which builds upon that currently in place in Nevada in order to best protect the human rights of sex workers, fits well into the international community’s current views of the practice.

## B. Pertinent International Human Rights Law

While there are a number of major human rights documents that might be useful in surveying the modern human rights landscape, the UDHR stands alone as a “milestone document in the history of human rights.”<sup>69</sup> It is so significant, in fact, that it figures prominently in the International Bill of Human Rights.<sup>70</sup> Further, the UDHR, because of its broad applicability and immense importance, is of great use in discussing the rights of sex workers.

Although some of the UDHR’s more philosophical portions apply to the plight of sex workers, including Article 1’s assurance that “[a]ll human beings are born free . . . and should act towards one another in a spirit of brotherhood” and Article 2’s guarantee that all of the “rights and freedoms” discussed are applicable to all people, it is the substantive portions of the UDHR’s later articles that are most relevant.<sup>71</sup> Article 5, for instance, states that “[n]o one shall be subjected to

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

<sup>68</sup> *Id.* art. 3(b).

<sup>69</sup> *The Universal Declaration of Human Rights*, OHCHR, <https://perma.cc/N53B-J96P>.

<sup>70</sup> *See* The International Bill of Human Rights, OHCHR, <https://perma.cc/Z5WS-V7J8>. The International Bill of Human Rights consists primarily of the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.

<sup>71</sup> UDHR, *supra* note 16, arts. 1–2.

torture or to cruel, inhuman or degrading treatment or punishment.”<sup>72</sup> This is germane to sex work, where abuse and violence can be commonplace.<sup>73</sup> Perhaps even more applicable to sex workers and the laws criminalizing their behavior and the industry generally is Article 12, which declares that no one “shall be subjected to arbitrary interference with his privacy.”<sup>74</sup> Further, Article 13 secures the “right to freedom of movement and residence within the borders of each state,” and Article 19 protects “the right to freedom of opinion and expression.”<sup>75</sup> Finally, and perhaps most importantly for sex workers, Article 23 of the UDHR guarantees “the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment,” while Article 25 supplements this by guaranteeing that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including . . . housing and medical care.”<sup>76</sup> Thus, the UDHR aims to ensure that the “inalienable rights of all members of the human family,” including sex workers, are protected and promoted.<sup>77</sup>

### C. Significant Domestic Legal Frameworks

The common systems for regulating and deregulating sex work can be grouped into four broad categories: abolition, legalization, decriminalization, and prohibition.<sup>78</sup> While abolition and legalization are quickly becoming among the most common systems globally, perhaps due to the growing recognition that sex work is not inherently criminal, all four schemes are important because lawmakers hoping to create an optimal system might well borrow from each. Indeed, the framework proposed by this Comment in the forthcoming sections is itself rooted in analyses of the four systems outlined below.

#### 1. Abolitionist legal frameworks, like the one in Sweden, often take a hybrid approach in an effort to end sex work

Under an abolitionist approach to sex work, “[p]arties involved in prostitution can be liable to penalties, including in some cases, the clients.”<sup>79</sup> In fact, abolitionist countries typically “criminalize buyers of sex, but not sex workers

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<sup>72</sup> *Id.* art. 5.

<sup>73</sup> *See, e.g.,* Mgbako & Smith, *supra* note 50, at 1180 (discussing the “physical and sexual abuse” experienced by African sex workers).

<sup>74</sup> UDHR, *supra* note 16, art. 12.

<sup>75</sup> *Id.* arts. 13, 19.

<sup>76</sup> *Id.* arts. 23, 25.

<sup>77</sup> *Id.* pmb.

<sup>78</sup> *See* Marshall, *supra* note 6, at 56.

<sup>79</sup> TRANSCRIME, *supra* note 8, at viii.

themselves” in what has been called a “hybrid approach.”<sup>80</sup> This system targets “the demand for sexual services” in an attempt to “help fight prostitution and its harmful consequences.”<sup>81</sup> Sweden, the first country to enact this sort of law, hoped it would foster a more “gender equal society,” deter “prospective purchasers of sex[,] and serve to reduce the interest” of foreign groups in creating an organized sex industry in Sweden.<sup>82</sup> While there are disputes over whether Sweden’s system—dubbed the Nordic Model—is as effective as initially hoped, evidence does suggest it has had at least some impact in shrinking the state’s sex work industry.<sup>83</sup>

Supporters of abolition, including the European Parliament,<sup>84</sup> champion the Nordic Model and systems like it as useful in making “advances in gender equality”<sup>85</sup> and as effective in combatting both human trafficking and the “immense damage prostitution has on all women.”<sup>86</sup> The government of Sweden, which—as noted above—set out to achieve these goals in authorizing this system, “released a report [in 2010] touting the effectiveness of the legislation.”<sup>87</sup> The results contained within this report were questionable,<sup>88</sup> however, and other studies suggest the criminalization of the purchase of sex has had generally negative consequences for all parties involved, in part because it “relegates sex workers to the shadows” where abuse and violence are prevalent and are exacerbated by inadequate access to medical care.<sup>89</sup> Overall, it can be said that the

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<sup>80</sup> Marshall, *supra* note 6, at 58.

<sup>81</sup> Summary of SOU, *supra* note 38, at 29.

<sup>82</sup> *Id.*

<sup>83</sup> See, e.g., TRANSCRIME, *supra* note 8, at 102 (discussing some of the successes of Sweden’s approach, including an observed decline in the market for trafficking victims).

<sup>84</sup> Ashleigh M. Kline, Note, *The Fallacy of Free Will in Prostitution: Encouraging Prostitution Reform to Prevent the Repeated Victimization of Vulnerable Persons*, 25 MICH. ST. INT’L L. REV. 665, 689 (2017) (citing Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, but Not the Victim—Sweden’s Sexköpslagen in America*, 37 WM. MITCHELL L. REV. 1989, 1995 (2011)) (advocating for the implementation of the Nordic Model, or a system like it, in the U.S.).

<sup>85</sup> See Mathieson, Branam & Noble, *supra* note 25, at 428 (concluding that the Nordic Model is the best policy for Seattle, Washington).

<sup>86</sup> Kline, *supra* note 84, at 687.

<sup>87</sup> See Marshall, *supra* note 6, at 61.

<sup>88</sup> *Id.* (citing Ann Jordan, *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, 4 CTR. FOR HUM. RTS. & HUMANITARIAN L. 1, 6 (2012)) (“The report was immediately criticized upon release, with experts noting the evaluation completely lacked any scientific rigor.”).

<sup>89</sup> See May-Len Skillbrei & Charlotta Holmström, *The ‘Nordic Model’ of Prostitution Law Is a Myth*, THE CONVERSATION (Dec. 16, 2013), <https://perma.cc/GEX4-QGG4> (arguing that the studies depicting Sweden’s prostitution laws as a success “report on specific groups . . . not the state of prostitution more generally” and therefore are misleading because they leave out “[m]en involved in prostitution, women in indoor venues, and those selling sex outside the larger cities”); see also Vanwesenbeeck, *supra* note 26, at 1632–36 (arguing that the criminalization of sex work is ineffective and harmful to those involved); Mgbako & Smith, *supra* note 50, at 1206.



goal of the Nordic Model is to promote human rights and equality through inducing a “fear of arrest [in,] and [an] increased public stigma” among, purchasers of sex.<sup>90</sup> The successes and failures of this approach are outlined in greater detail in Section IV below.

## 2. Legalization regimes permit sex work in a limited manner

Legalization is perhaps the broadest category discussed herein. For instance, while the term “abolition” often applies to the hybrid approach embodied in the Nordic Model, the term “legalization” encompasses a wide swath of regulatory schemes, from that in Germany to that in Nevada and beyond. Indeed, the general term “legalization” is so sweeping that the E.U. split up its member states that have such systems into multiple groups in order to foster a clearer analysis.<sup>91</sup> For the purposes of this Comment, however, this distinction is immaterial. What is most important is that legalization in its broadest sense be contrasted with decriminalization and abolition.

Germany is perhaps the European country most famous for its legalization of sex work. Germany allows all prostitution “if exercised according to the regulations” proscribed at the state (*Länder*) and national level.<sup>92</sup> Further, as of 2002, the country began considering sex work as “work,” thereby granting sex workers access to “social security measures (unemployment, health insurance and pension schemes)” that they previously were not eligible for.<sup>93</sup> The aim of Germany’s scheme is to ensure sex work can continue while controlling “the excesses, abuses, disorders, and other undesirable social and public health consequences associated with [it].”<sup>94</sup> In much the same way, Nevada’s long history of legalized sex work<sup>95</sup> has contributed to its continued embrace of the practice, particularly because the state government has found that “[l]egal sex workers report less violence and a heightened sense of security working in the brothel industry than plying their trade illegally.”<sup>96</sup> The Nevada system, different than that in Germany in many respects, including its requirement that sex work only occur in registered brothels and its mandate that “legal prostitutes . . . undergo

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<sup>90</sup> Ann Jordan, *The Swedish Law to Criminalize Clients: A Failed Experiment in Social Engineering*, 4 CTR. FOR HUM. RTS. & HUMANITARIAN L. 1, 1 (2012).

<sup>91</sup> See TRANSCRIME, *supra* note 8, at viii (explaining the difference between “new abolitionism,” “abolitionism,” and “regulationism”).

<sup>92</sup> *Id.* at 25.

<sup>93</sup> *Id.* at 110.

<sup>94</sup> Marshall, *supra* note 6, at 62 (quoting Mgbako & Smith, *supra* note 50, at 1208).

<sup>95</sup> See Michelle Rindels, *The Indy Explains: How Legal Prostitution Works in Nevada*, THE NEVADA INDEP. (May 27, 2018), <https://perma.cc/6AVS-C4M3> (“The state’s earliest brothels date back to Nevada’s early mining days in the 19th century.”).

<sup>96</sup> Jennifer Heineman, Rachel T. MacFarlane & Barbara G. Brents, *Sex Industry and Sex Workers in Nevada*, UNLV REPS. (2012), <https://perma.cc/593R-NAHU>.

mandatory health checks” at regular intervals, is therefore yet another “legal system of prostitution.”<sup>97</sup>

Much like the Nordic Model and similar systems of abolition, legalization schemes are subject to both praise and criticism. While both responses will be addressed substantially in Sections IV and V, it is worth noting that a recent study of the legalization system in Nevada concluded that “the legalization of prostitution brings a level of public scrutiny, official regulation, and bureaucratization to brothels that decreases . . . systematic violence.”<sup>98</sup> Further, there are other studies that support—at least in part—the modes of legalization present in states like Germany and Nevada,<sup>99</sup> but there is no shortage of those that oppose them as well.<sup>100</sup>

### 3. Decriminalization removes almost all regulation from the sex work industry

As of writing, New Zealand is the only state to have fully decriminalized prostitution.<sup>101</sup> In doing so, New Zealand removed “all [previously enacted] laws related to sex work.”<sup>102</sup> Further, through New Zealand’s Prostitution Reform Act (PRA), the country’s legislature legalized sex work “for any citizen over the age of eighteen,” and allowed brothels with fewer than four workers to operate without a license.<sup>103</sup> Widely considered a success, the PRA “provides several protections for sex workers, which means that their human rights and citizenship can be safeguarded.”<sup>104</sup> These protections include the ability to sue, for instance, when a client deliberately removes “his condom without [the worker’s] consent during

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<sup>97</sup> *Id.* at 1, 9.

<sup>98</sup> Barbara G. Brents & Kathryn Hausbeck, *Violence and Legalized Brothel Prostitution in Nevada: Examining Safety, Risk and Prostitution Policy*, 20 J. INTERPERSONAL VIOLENCE 270, 270 (2005).

<sup>99</sup> See, e.g., David H. Rogers, *The Viability of Nevada’s Brothels as Models for Regulation and Harm Reduction in Prostitution*, FSU LIBR., at 16 (2010), <https://perma.cc/2LXA-7NT7> (citing *Crime and Justice in Nevada*, NEVADA DEPARTMENT OF PUBLIC SAFETY (2008)) (“[T]he vast majority of prostitution arrests [in Nevada] . . . happen[ed] in counties with no legal venue for prostitution.”).

<sup>100</sup> See TRANSCRIME, *supra* note 8, at 110–16 (noting that “Germany is a major country of destination for human trafficking”).

<sup>101</sup> See Marshall, *supra* note 6, at 56.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 59 (citing Fraser Crichton, *Decriminalising Sex Work in New Zealand: Its History and Impact*, OPENDEMOCRACY (Aug. 21, 2015), <https://perma.cc/7DQE-QLEG>).

<sup>104</sup> See Gillian M. Abel, *A Decade of Decriminalization: Sex Work ‘Down Under’ but Not Underground*, 14 CRIMINOLOGY & CRIM. JUST. 580, 581 (Nov. 2014).

penetrative sex.”<sup>105</sup> Thus, in its first seventeen years, New Zealand’s PRA has helped show that the decriminalization of sex work can be beneficial.<sup>106</sup>

Of note, however, are the unique circumstances that may help drive the PRA’s success. Although certainly not the only reasons for the impressive track record of the PRA, New Zealand’s small size, small population, relative isolation, and strict borders likely contribute to the law’s success.<sup>107</sup> Further, there have still been some issues since the PRA went into force. Sporadic difficulties with underage sex workers have arisen, for instance, as have allegations of a “major trafficking problem” stemming from the near-total lack of regulation of the industry.<sup>108</sup> Thus, while there are those who suggest that full decriminalization as New Zealand has done is the optimal method for “regulating” sex work,<sup>109</sup> many of those individuals also admit that New Zealand is a test case that may not be indicative of how such a system would function in a larger, more diverse, and less isolated state like those in continental Europe or North America.<sup>110</sup>

#### 4. The complete prohibition of sex work is not viable

Although there remains skepticism by some in the general public,<sup>111</sup> experts on all sides of the modern sex work debate tend to recognize that there is little

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<sup>105</sup> *Id.* at 586.

<sup>106</sup> See Marshall, *supra* note 6, at 59–60; see also Gillian Abel, Lisa Fitzgerald & Cheryl Brunton, *The Impact of the Prostitution Reform Act on the Health and Safety of Sex Workers* (2007) (finding “many positive outcomes” and “few, if any, negative consequences” from the PRA).

<sup>107</sup> See Abel, *supra* note 104, at 581.

<sup>108</sup> See, e.g., Fraser Crichton, *Decriminalising Sex Work in New Zealand: Its History and Impact*, OPENDEMOCRACY (Aug. 21, 2015), <https://perma.cc/7DQE-QLEG> (discussing certain issues with the PRA, such as “some recent controversy regarding under-age street workers in Auckland”); see also Thomas Coughlan, *NZ’s Approach to Sex Work Under Fire*, NEWSROOM (Nov. 22, 2017), <https://perma.cc/MQB6-7PJZ> (“[T]he United States State Department . . . report on trafficking accuses New Zealand of having a major trafficking problem, which authorities have been slow to address.”).

<sup>109</sup> Marshall, *supra* note 6, at 64 (“While one country’s experience with decriminalization . . . is not necessarily indicative of all [such] efforts . . . countries considering how to address sex work under the law would benefit from studying New Zealand.”); see also Brents & Hausbeck, *supra* note 98, at 270 (“[P]roponents of decriminalization . . . [sometimes] argue that state regulation, as in the legalized brothel industry, just replace illegal pimps with legal ones.”).

<sup>110</sup> See, e.g., Marshall, *supra* note 6, at 64; Giulia Magri, *Full Decriminalisation Would Be Disaster for Malta – Prostitution and Sex Trafficking Survivors*, THE INDEP. (Oct. 18, 2020), <https://perma.cc/669F-4PZA> (recognizing the characteristics of Malta, including the large size of its migrant community, that render it an unlikely candidate for success at full decriminalization).

<sup>111</sup> For a discussion of the views of Americans on the criminalization of sex work, see, for example, Elizabeth Nolan Brown, *What Americans Think About Prostitution Laws*, REASON (Feb. 6, 2020), <https://perma.cc/L233-Y59W> (finding that 52% of Americans, including 66% of those between the ages of 33 and 44, favor the decriminalization of prostitution); Peter Moore, *Significant Gender Gap on Legalizing Prostitution*, YOUNG (Mar. 10, 2016), <https://perma.cc/A8JQ-GW9P> (“Americans narrowly say that accepting money for sex should be illegal (43%) rather than legal (40%).”).

merit to arguments in favor of complete prohibition. Indeed, one recent study ignored the subject altogether because “most human rights scholars and activists agree” that such strict policies are detrimental to human rights and, as a result, fail to meet the standards set out by international human rights law.<sup>112</sup> Further, these policies “relegate[] sex workers to the shadows of society, where they are vulnerable to abuse and exploitation.”<sup>113</sup> As such, they fail to promote human rights and do little to comport with international prostitution law as it pertains to protecting people from exploitation and violence.<sup>114</sup>

#### IV. CURRENT NEVADA LAW

The Nevada Revised Statutes contain several provisions relevant to a discussion of sex work and human trafficking.<sup>115</sup> This Section provides an in-depth look at Nevada prostitution law as compared to those models discussed above in order to show that—at present—the state’s system complies with existing international law and creates several positive externalities that promote human rights. There are gaps where Nevada’s legal framework could improve, however, and they are covered in Section V.

##### A. Attempts to Outlaw Sex Work are Ineffective

Prostitution, “whether ‘actively prohibited, tacitly condoned, [or] formally regulated’ . . . remains a thriving industry regardless of its legal status.”<sup>116</sup> Its long history, outlined briefly in Section I, is proof of this. Yet, there are still many who argue that the most sensible way to address the practice is to continue to “develop . . . strateg[ies] to combat” it.<sup>117</sup> In observing the repeated history of failed attempts to ‘fix’ the prostitution ‘problem’ by outlawing the practice, one is reminded of a quote long misattributed to Albert Einstein: “The definition of insanity is doing the same thing over and over again and expecting different

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<sup>112</sup> Marshall, *supra* note 6, at 57 n.77.

<sup>113</sup> Mgbako & Smith, *supra* note 50, at 1206. For a discussion of the reasons that myriad human rights and public health organizations oppose the criminalization of sex work, see, for example, *Why Sex Work Should Be Decriminalized*, HUM. RTS. WATCH (Aug. 7, 2019), <https://perma.cc/A2MD-Y89A> (concluding, after studies in Cambodia, China, Tanzania, and the U.S., that sex work must be decriminalized to protect “personal autonomy and privacy”); Bryan Lufkin, *Should Prostitution Be a Normal Profession?*, BBC, <https://perma.cc/SL6M-C3F6>.

<sup>114</sup> See, e.g., DEVAW, *supra* note 24, art. 2 (defining “violence against women” as, among other things, trafficking in women and forced prostitution).

<sup>115</sup> See generally NRS 201.295–440.

<sup>116</sup> Goyal & Ramanujam, *supra* note 2, at 1073.

<sup>117</sup> Margot Wallström, *We’re Taking Up the Fight Against Prostitution*, SWED. MINISTRY OF FOREIGN AFFS. (Mar. 8, 2019), <https://perma.cc/9JJZ-R3U4>.

results.”<sup>118</sup> In fact, the results of current attempts to outlaw sex work are at best categorized as inconclusive and, at worst, are indicative of “a failed experiment in social engineering.”<sup>119</sup>

Turning to the Nordic Model, which is perhaps the most popular system for outlawing sex work in the West, the Swedish government frequently states that its approach to sex work “has been effective in reducing the demand for prostitution,”<sup>120</sup> yet there is evidence that its legislation actually “failed to accomplish a decrease in the number of sex workers.”<sup>121</sup> Further, the Swedish government’s main study indicating the success of the Nordic Model—the Skarhed Report—contains “[n]o evidence the law reduced the number of sex buyers” or sex workers.<sup>122</sup> Similarly, the “[Swedish] government does not know whether there has been any change in the number of ‘exploited sex workers,’” which includes victims of sex trafficking, in the years since the enactment of the Nordic Model.<sup>123</sup> Finally, any declines in sex work in Sweden since 1999 are difficult to attribute to the ban.<sup>124</sup>

As this Comment aims to explore the successes and failures of Nevada sex work law as compared to its counterparts elsewhere in the world in order to promote the implementation of the former, what is most important is whether the Nordic Model comports with international law and promotes human rights. First, with respect to promoting human rights and upholding international law by ending trafficking, the impact of the Nordic Model is questionable. In the wake of the ban on the purchase of sex, for instance, the Swedish government has admitted to not having accurate data on the occurrence of human trafficking in and across the nation’s borders.<sup>125</sup> In addition, there is evidence that the ban on the purchase of sex work has “caused an increased risk of violence” for sex

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<sup>118</sup> Sarah Pruitt, *Here Are 6 Things Albert Einstein Never Said*, HISTORY (Apr. 7, 2017), <https://perma.cc/G6JH-5TNE>.

<sup>119</sup> Jordan, *supra* note 90, at 1.

<sup>120</sup> Wallström, *supra* note 117.

<sup>121</sup> See Marshall, *supra* note 6, at 61 (explaining that the increased risk of violence stems from “greater competition among women for fewer clients”).

<sup>122</sup> Jordan, *supra* note 90, at 6.

<sup>123</sup> *Id.* at 8.

<sup>124</sup> Susanne Dodillet & Petra Östergren, *The Swedish Sex Purchase Act: Claimed Success and Documented Effects*, THE HAGUE (Mar. 3–4, 2011), <https://perma.cc/7Y3L-HXR2> ([R]eports and documents that have a scientific rather than ideological basis do not support these success claims.”); see also Michelle Goldberg, *Swedish Prostitution Law Is Spreading Worldwide—Here’s How to Improve It*, THE GUARDIAN (Aug. 8, 2014), <https://perma.cc/H6XL-6DNW>.

<sup>125</sup> See Jordan, *supra* note 90, at 8.

workers as they compete for business.<sup>126</sup> Research also suggests that there is “routine harassment by police” under the Swedish law.<sup>127</sup> With respect to general international and human rights law, then, the Nordic Model has not been as successful as touted by the Swedish government.

Further, as noted in Section II, much of the specific international law pertaining to prostitution aims to end “violence against women,” including “forced prostitution.”<sup>128</sup> Both DEVAW and CEDAW, as well as the Palermo Protocol, attempt to do so by making it a crime to subject women to violence, forced prostitution, and/or prostitution that is exploitative.<sup>129</sup> While those who enacted the Nordic Model aimed to end all such forms of cruel treatment, it is entirely unclear whether the law has done so.<sup>130</sup> Thus, there is no indication that the Nordic Model—at least as applied in its home country—makes strides to comport with the antitrafficking and forced prostitution provisions of international law. The same is true when the Nordic Model is assessed through a human rights lens.

Returning to a few key provisions of the UDHR, it is clear that the Nordic Model is unsuccessful in promoting the human rights of sex workers. With respect to the universal “right to work” and to “free choice of employment,”<sup>131</sup> effectively outlawing an entire industry by criminalizing its consumers fails to protect these rights. Further, while the UDHR demands that all people have the “right to a standard of living adequate for the health and well-being of himself and his family, including . . . housing,”<sup>132</sup> sex workers living in Nordic Model countries are “tormented by the threat of eviction” because landlords “are [often] vulnerable to pimping charges if they collect money earned from” sex work.<sup>133</sup> Such conditions, along with “an increase in stigma,” “an increase in unprotected sexual services,”

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<sup>126</sup> See Marshall, *supra* note 6, at 61 (explaining that the increased risk of violence stems, in part, from “greater competition among women for fewer clients”). Both Marshall, *supra* note 6, and Jordan, *supra* note 90, acknowledge that it is probable that some buyers have changed their behavior in light of the creation of the Nordic Model but assert that how many and to what extent is unknown. Thus, the increased risk of violence cited by Marshall is likely due to a combination of factors, such as fewer clients and a less clear path for legal recourse against abusers, rather than fewer clients alone.

<sup>127</sup> See Grant, *supra* note 32.

<sup>128</sup> DEVAW, *supra* note 24, art. 2.

<sup>129</sup> See, e.g., The Palermo Protocol, *supra* note 24, art. 3.

<sup>130</sup> See Dodillet & Östergren, *supra* note 124, at 3 (“[W]hen reviewing the research and reports available, it becomes clear that the [Swedish] Sex Purchase Act *cannot* be said to have decreased prostitution, trafficking for sexual purposes, or had a deterrent effect on clients to the extent claimed.”); see also Jordan, *supra* note 90.

<sup>131</sup> UDHR, *supra* note 16, art. 23.

<sup>132</sup> *Id.* art. 25.

<sup>133</sup> Goldberg, *supra* note 124.

and violence at the hands of police and clients,<sup>134</sup> might well be considered “cruel . . . or degrading treatment” in violation of Article 5 of the UDHR as well.<sup>135</sup> Thus, it is not at all clear that the Nordic Model—despite its good intentions—comports with international law or promotes human rights pursuant to the UDHR.

## B. Nevada Law Promotes Human Rights and Comports with International Law

### 1. Nevada law legalizes sex work in a limited manner

Besides the Nordic Model, one of the other main legal frameworks for handling prostitution in the West is legalization. Thus, it is important to compare the two in order to understand which better promotes human rights and complies with international law. As the legalization schemes currently in place are diverse, this Comment explains only one—that present in Nevada. Throughout this Section, however, the Comment addresses where Nevada law diverges from other such schemes, particularly that in Germany.

Nevada’s sex work laws are statutorily defined.<sup>136</sup> In general, the state makes it “unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution,” colloquially known as a brothel.<sup>137</sup> While sex work is legal in such houses, there are additional restrictions on who can take part in the industry. By statute, an individual who engages in sex work in a licensed house of prostitution “after testing positive” in a state-sanctioned HIV test is guilty of a felony, for instance.<sup>138</sup> This provision is particularly impactful because the state health department requires sex workers to have state health cards and undergo “weekly exams and monthly blood testing,” although these measures are at the worker’s expense.<sup>139</sup> Similarly, condoms are required at all of Nevada’s houses of prostitution.<sup>140</sup> Further, any individual who compels another to “reside in a house of prostitution” or engage in prostitution, a practice known as

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<sup>134</sup> Sandra K. Chu & Rebecca Glass, *Sex Work Law Reform in Canada: Considering Problems with the Nordic Model*, 51 ALBERTA L. REV. 101, 107 (2013).

<sup>135</sup> UDHR, *supra* note 16, at art. 5.

<sup>136</sup> *See generally* NRS 201.295–440.

<sup>137</sup> NRS 201.354(1).

<sup>138</sup> NRS 201.358.

<sup>139</sup> Rogers, *supra* note 99, at 11; *see also* Brents & Hausbeck, *supra* note 98, at 276 (noting that “each person who applies for employment as a prostitute must take a . . . test for HIV and syphilis [and gonorrhea and chlamydia] . . . [and] [e]very week thereafter while working in a brothel” must undergo additional testing).

<sup>140</sup> *See* Alexa Albert, *Lesson in Condom Use from Women of Mustang Ranch*, L.A. TIMES (May 28, 2001), <https://perma.cc/AD7V-BTCL?type=image> (advocating for the safe use of condoms after conducting studies among Nevada’s sex workers).

pandering, is guilty of a felony as well.<sup>141</sup> Thus, while sex workers in Nevada are independent contractors<sup>142</sup> who can purchase their own insurance policies and openly and safely negotiate their own contracts with both brothel owners and clients,<sup>143</sup> they are protected by the law—including through the restriction of sex work to licensed houses of prostitution where “in-house and regulatory safety mechanisms,” as well as “good relations with police,” foster security.<sup>144</sup>

Beyond regulating the activities of sex workers, Nevada places limitations on where houses of prostitution can operate. State law both criminalizes those who own or operate property on which “illegal prostitution”<sup>145</sup>—meaning that which occurs outside of a licensed brothel and/or by an unlicensed worker—occurs and contains specific mandates on where a licensed brothel can be located.<sup>146</sup> These location-based restrictions include requirements that houses of prostitution be kept away from schools, churches, and other locales thought important for community-building.<sup>147</sup> In addition, no houses of prostitution can operate in counties “with populations of 700,000 or more,” and even then, it is up to each individual county to determine whether or not to license such institutions.<sup>148</sup> Thus, it is clear that while Nevada legalizes sex work, the state’s laws are more prohibitive than those present elsewhere. In Germany, for instance, although “the regulation of prostitution is under the competences of the *Länder*” in practice, both indoor and outdoor prostitution are generally permitted.<sup>149</sup> Further, until 2017, there were no permitting or medical consultation requirements for sex workers at the national level in Germany.<sup>150</sup> On the spectrum from Sweden to

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<sup>141</sup> NRS 201.360.

<sup>142</sup> See NRS 244.345(1)(b) (explaining the procedure to get a license).

<sup>143</sup> Anna Turner, *I Applied for a Job at Nevada’s Most Famous Brothel*, THRILLIST (July 21, 2016), <https://perma.cc/8YWT-CD7J> (outlining the application process, including mandatory STD and HIV testing, applying for a Nevada business license, and obtaining a background check/card from the local sheriff’s office).

<sup>144</sup> Brents & Hausbeck, *supra* note 98, at 277.

<sup>145</sup> NRS. 201.395.

<sup>146</sup> NRS 201.380–390 (mandating that brothels can neither be located within 400 yards of a school or place of worship nor on any street “fronting the principal business street” of a town).

<sup>147</sup> *Id.* While this regulation might appear to increase the stigma surrounding sex work, similar zoning laws pertaining to the location of firearms dealers, gun ranges, and adult stores in many states suggest this prohibition is not meant to target sex work or suggest that the practice is inherently immoral.

<sup>148</sup> Rindels, *supra* note 95.

<sup>149</sup> TRANSCRIME, *supra* note 8, at 25.

<sup>150</sup> See *Germany Introduces Unpopular Prostitution Law*, DEUTSCHE WELLE (2017), <https://perma.cc/48ZK-NYX7> [hereinafter DEUTSCHE WELLE] (explaining that the new law requires sex workers to register and “seek a medical consultation,” requires condoms, restricts instances in which “a sex worker must service several men concurrently,” penalizes those who



New Zealand, then, Germany falls somewhere in the middle, while Nevada—at present—sits a bit closer to Sweden in order to both preserve the “live-and-let-live” legacy of the state and protect those involved in the industry.<sup>151</sup>

## 2. Nevada law promotes human rights as guaranteed by international human rights law

While other systems for regulating and outlawing prostitution have some merit,<sup>152</sup> Nevada’s current system—especially as modified in Section V of this Comment—strikes a better balance between protecting human rights and complying with international law.<sup>153</sup>

To begin, Nevada law promotes the universal human right to work and to employment as protected by Article 23 of the UDHR.<sup>154</sup> While any involuntary labor, including slavery and forced prostitution, does not comport with the “free choice of employment” promoted by Article 23, the ability to voluntarily become a sex worker and otherwise freely enter the sex industry is protected therein. Indeed, the legislative history of Article 23 suggests that its purpose was to

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accept services from individuals forced into prostitution, and mandates that new brothels apply for permits, among other regulations).

<sup>151</sup> Rindels, *supra* note 95. Unlike Nordic Model states, which, as explained in Section IV(A), tend to ineffectively attempt to suppress the demand for sex work, Nevada does not try to do so. Rather, the state allows demand to fluctuate naturally and instead focuses on ensuring the industry is safe for both buyers and sellers.

<sup>152</sup> See, e.g., Kline, *supra* note 84, at 688–89 (citing Heather Monasky, Note, *On Comprehensive Prostitution Reform: Criminalizing the Trafficker and the Trick, but Not the Victim—Sweden’s Sexköpslagen in America*, 37 WM. MITCHELL L. REV. 1989, 2028 (2011)) (explaining that a 2010 study by the Swedish government indicates that Sweden has less prostitution and trafficking than neighboring countries); see also Max Waltman, *Sweden’s Prohibition of Purchase of Sex: The Law’s Reasons, Impact and Potential*, 34 WOMEN’S STUD. INT’L F. 449, 459–60 (stating that Sweden’s criminalization of the purchase of sex appears to have drastically cut down on the number of prostitutes in the country, as well as the number of men purchasing sex).

<sup>153</sup> See Skillbrei & Holmström, *supra* note 89 (“[T]he Swedish Sex Purchase Act is often said to be an effective tool against human trafficking. The evidence for this claim is weak.”); Daria Snadowsky, Note, *The Best Little Whorehouse Is Not in Texas: How Nevada’s Prostitution Laws Serve Public Policy, and How Those Laws May Be Improved*, 6 NEV. L.J. 217, 233 (2005) (describing the fear sex workers have—when prostitution is illegal—of filing complaints to report abuse).

<sup>154</sup> UDHR, *supra* note 16, art. 23. As noted in Section IV(B)(1), individuals who test positive for HIV are prohibited from engaging in legal sex work in Nevada. As a result, the Nevada Model is not in complete compliance with Article 23. While this is potentially problematic from a human rights perspective, it is the result of a cost-benefit analysis—like many health codes and OSHA regulations—that imposes restrictions on who can conduct work and in what manner in order to protect the health and safety of the broader public. This Comment does not attempt to discern whether or not this balancing is correct. For a discussion of why it might not be, see Carrie Weisman, *Should HIV-Positive Workers Be Allowed in the Sex Industry? Some Advocates Say Yes.*, IN THESE TIMES (July 10, 2019), <https://perma.cc/L7GW-ZJY5>. For a discussion of the impact this restriction has had on the continuity of work of registered sex workers in Nevada, see Jen Lawson, *Police Say HIV Growing Threat Among Call Girls*, LAS VEGAS SUN (Sept. 26, 2013), <https://perma.cc/ZD5V-9TJR> (“[N]o licensed prostitute has tested positive for HIV.”).

promote “economic empowerment” among all individuals, with particular attention paid to women.<sup>155</sup> Article 23 does not favor some forms of employment over others but rather aims to ensure all individuals are protected in their employment and are paid adequately for their services, whatever they may be.<sup>156</sup> In addition, although CEDAW is not part of the UDHR and will be discussed more below, the contention that sex work is protected by the UDHR is bolstered by CEDAW’s acknowledgement that “[t]he right to work is an *inalienable* right of all human beings.”<sup>157</sup> Finally, paying particular attention to how Nevada law functions, both Article 23 of the UDHR’s guarantee that “[e]veryone has the right to form and to join trade unions” and Article 20’s protection of “the right to . . . peaceful assembly and association” arguably protect the formation and existence of brothels as well.<sup>158</sup>

Beyond Article 23’s right to work, that provision also guarantees the right to “just and favourable conditions of work.”<sup>159</sup> Nevada law promotes this right at present. With respect to favorable work conditions, for instance, there is evidence that—when sex work is outlawed—those who engage in the practice are marginalized and are therefore faced with inadequate work conditions.<sup>160</sup> Such conditions include “limited bargaining power when it comes to negotiating with clients,” as well as harassment by both police and clients as “sex workers are pushed to more dangerous working environments, such as clandestine street[s].”<sup>161</sup> In contrast, in Nevada’s brothels, although there are occasional issues,<sup>162</sup> the state’s laws “were established . . . out of a concern with [ ] three frames of violence (interpersonal violence against prostitutes, violence against community order, and the violence of disease).”<sup>163</sup> Keeping these concerns in mind, the law was crafted to guide brothels toward valuing both their own economic viability *and* the health and safety of their employees.<sup>164</sup> As a result,

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<sup>155</sup> *Universal Declaration of Human Rights at 70: 30 Articles on 30 Articles- Article 23*, OHCHR, <https://perma.cc/L5WL-F7SA>.

<sup>156</sup> *Id.*

<sup>157</sup> CEDAW, *supra* note 48, art. 11 (emphasis added).

<sup>158</sup> UDHR, *supra* note 16, arts. 20, 23.

<sup>159</sup> *Id.* art. 23.

<sup>160</sup> See Marshall, *supra* note 6, at 54–55 (explaining that the criminalization or marginalization of sex work leads to worsening work conditions for sex workers).

<sup>161</sup> *Twenty Years of Failing Sex Workers: A Community Report on the Impact of the 1999 Swedish Sex Purchase Act*, FUCKFÖRBUNDET (2019), <https://perma.cc/G4GY-PHZD> (reporting on the impacts of the Nordic Model in Sweden in its first 20 years in force).

<sup>162</sup> Rogers, *supra* note 99, at 29 (“[I]t is inevitable that not all prostitutes and customers will follow regulations.”); see also Brents & Hausbeck, *supra* note 98, at 277 (acknowledging that some “brothel owners . . . [do not care] about safety mechanisms” as much as others).

<sup>163</sup> Brents & Hausbeck, *supra* note 98, at 277.

<sup>164</sup> *Id.*

Nevada brothels protect sex workers from the very start, including during the negotiation process, in which house managers are able to listen to the “private” interactions between workers and clients in order to ensure adequate payment and safe negotiations.<sup>165</sup> Furthermore, sex workers typically deposit their payment with the house manager after negotiations but before engaging in any sexual activity, at which point they can bring up “any strange feelings or problems.”<sup>166</sup> In addition to the safety measures that are in place during negotiation and payment, houses typically provide panic buttons for their workers and maintain good relationships with local law enforcement to deal with any issues that do arise.<sup>167</sup> Thus, Nevada law does well to ensure that sex workers experience adequate work conditions. Treated as workers rather than criminals or something in between, Nevada’s sex workers experience the benefits of organization, regulation, and law enforcement.<sup>168</sup>

Similarly, the UDHR’s guarantee of a “right to a standard of living adequate for the health and well-being of [oneself and one’s] . . . family, including . . . housing and medical care,” is promoted by Nevada law.<sup>169</sup> In addition to the mandate that condoms be worn in brothels to prevent pregnancy, sexually transmitted infections, and other diseases, all sex workers undergo preliminary health screenings before being licensed.<sup>170</sup> Further, as noted above, they must undergo additional testing on a weekly and monthly basis in order to continue selling their services.<sup>171</sup> Indeed, research suggests that—because of the financial and legal liability brothel owners face in the event of a sex worker contracting or spreading an illness—Nevada’s legal system incentivizes safe behavior from the top down at these institutions.<sup>172</sup> These sorts of health benefits are common in systems of legalization beyond Nevada, however, and are one factor that suggest that legalization is a healthier approach than abolition. While Germany’s medical testing requirements are more relaxed than those in Nevada, for example, sex

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<sup>165</sup> *Id.* at 278 (acknowledging that, while these measures are in place to protect employees, they also help managers stop employees from stealing from the brothel).

<sup>166</sup> *Id.* at 279.

<sup>167</sup> *Id.* at 280–81.

<sup>168</sup> Abel, Fitzgerald & Brunton, *supra* note 106, at 119 (“Street-based workers were significantly more likely than managed and private participants to report [refusal by a client to pay, theft by a client, physical abuse/violence, and/or rape by a client] in the last 12 months.”).

<sup>169</sup> UDHR, *supra* note 16, art. 25.

<sup>170</sup> Brents & Hausbeck, *supra* note 98, at 276.

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

<sup>172</sup> *See* Snadowsky, *supra* note 153, at 228 (describing the liability owners face if a customer contracts an STI from a sex worker who has tested positive).

workers there “have full access to social security measures,” including health insurance.<sup>173</sup> This is typically not the case in those states that outlaw the practice.

While most forms of legalization help to promote the UDHR’s right to an adequate standard of living in terms of healthcare, Nevada’s brothel system specifically helps to ensure a standard of living that includes housing. Indeed, while not all sex workers in Nevada reside in their places of work, they “usually live in the brothel[s].”<sup>174</sup> While the sex workers “pay taxes, work card fees, ‘house’ fees, and room and board,” the guarantee of housing and of a “confined community space” typically leads to less violence and a more secure environment.<sup>175</sup> This is quite different from countries like Sweden where, as noted above, reports indicate that sex workers struggle to find any housing at all.<sup>176</sup>

Finally, Nevada law—for all of its intrusiveness with respect to licensing and health checks—promotes the right to privacy protected by the UDHR’s Article 12.<sup>177</sup> The ability to work in a private business under the protection of the law rather than in fear of it ensures that sex workers can live their lives free of police violence and other abuses at the hands of the state. The ability to choose one’s profession and go about one’s business freely is fundamental to the right to privacy, and Nevada law does well to protect it.

Viewing Nevada’s prostitution law through the lens of the UDHR, it is clear that the state’s regulations are successful in protecting sex workers’ fundamental rights to housing, healthcare, safety, employment, and privacy. There are, however, places where Nevada law could do better in promoting human rights. Indeed, there remain unnecessary barriers to entry, such as the costs associated with licensing and medical examinations, that inhibit the ability of some who are interested in becoming sex workers from doing so. Further, Nevada’s limitation on which counties may license brothels limits certain universal human rights as well, including the right to “freedom of movement.”<sup>178</sup> Thus, in Section V, this Comment proposes modifications that can be made to Nevada law that—if applied by other states that choose to implement such a system—will help to better promote human rights. Before explaining these proposed changes, however, it is first necessary to explore how Nevada law fares in relation to international prostitution and human trafficking law.

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<sup>173</sup> TRANSCRIME, *supra* note 8, at 110; *cf.* Chu & Glass, *supra* note 134, at 107–08 (describing the health and healthcare issues sex workers face under the Nordic Model).

<sup>174</sup> Heineman, MacFarlane & Brents, *supra* note 96, at 9.

<sup>175</sup> *Id.*

<sup>176</sup> Goldberg, *supra* note 124.

<sup>177</sup> UDHR, *supra* note 16, art. 12.

<sup>178</sup> *Id.* art 13.

### 3. Nevada law comports with international prostitution law

Although Nevada law legalizes sex work in a limited fashion, it complies with current international law as set out in DEVAW and the Palermo Protocol. Article 2 of DEVAW, for instance, defines “violence against women,” in part, as “trafficking in women and forced prostitution.”<sup>179</sup> All states, including Nevada, New Zealand, Germany, and Sweden, make clear that their goal is to comport with this provision and end these harmful practices. The only difference is their methodologies for doing so.<sup>180</sup>

With respect to Nevada, the state’s mandate that sex work be confined to brothels has assisted in ending trafficking and forced prostitution. In fact, Nevada’s crime statistics indicate that those counties without legal brothels have substantially higher arrest rates for extra-legal prostitution than those with legal sex work.<sup>181</sup> As noted above, prostitution outside of regulated and monitored brothels often leads to exploitation and violence, so these statistics indicate that perhaps legalized brothel sex work helps alleviate some of the issues outlawed by Article 2 of DEVAW. Although there are salient counterarguments to relying on this data, including that arrest rates may simply be higher in counties without legal sex work because those are typically the state’s larger and more urban counties, it is notable that when those counties without legal sex work are removed from Nevada’s crime statistics, the state has among the lowest instances of prostitution arrests in the U.S., even when compared to states with similarly rural populations.<sup>182</sup> It is therefore not at all clear that it is the urban/rural divide leading to these different crime rates. Rather, legal sex work in those Nevada counties may genuinely contribute to both lower arrest rates and incidences of extra-legal sex work, as well as the adverse impacts that come along with it. Indeed, that is among the reasons that Section V of this Comment suggests eliminating the population-based restrictions on where brothels can open.

In addition, other studies suggest that Nevada’s system complies with Article 2 of DEVAW’s call to end forced prostitution and trafficking as well. A largely qualitative review of Nevada’s brothels, for instance, concluded that while “an answer to the question of whether or not violence is inherent in the sale of adult

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<sup>179</sup> DEVAW, *supra* note 24, art. 2.

<sup>180</sup> See, e.g., Alexa Bejinariu, *Human Trafficking: A Comparison of National and Nevada Trends*, UNLV CTR. FOR CRIME & JUST. POL’Y (2019), <https://perma.cc/B99S-HSXD> (explaining some of Nevada’s trafficking prevention policies and programs); see also *2019 Trafficking in Persons Report: Sweden*, U.S. DEP’T OF STATE (2019), <https://perma.cc/JG98-AXP4> (highlighting Sweden’s campaign to end human trafficking).

<sup>181</sup> See Rogers, *supra* note 99, at 20–21 (citing *Crime in the United States Table 69: Arrest Data by State*, FBI (2008)) (comparing arrest rates for prostitution in Nevada counties with and without legal brothels and finding substantially higher rates in those without legalized sex work).

<sup>182</sup> See *id.* at 22 (explaining that “[o]nly North Dakota had a lower rate” of prostitution and criminal vice than the counties in Nevada where sex work is legal).

consensual sex remains elusive . . . [t]here is a strong indication . . . that legal brothels generally offer a safer working environment than their illegal counterparts.”<sup>183</sup> This study suggested that not only is this true with respect to physical safety, but also with respect to “contagion,” meaning illness.<sup>184</sup> If, as history indicates, prostitution is a constant despite what the law says, then Nevada’s system for regulating it does well to comply with international law criminalizing forced prostitution, violence against women, and human trafficking. As stated above in terms of promoting human rights, however, there are areas where Nevada can improve,<sup>185</sup> and those are discussed in Section V.

Further, the Palermo Protocol, although less explicit regarding the legality of voluntary sex work, appears to allow the sort of system present in Nevada. To begin, the Palermo Protocol outlaws the “exploitation of prostitution.”<sup>186</sup> Given the background against which this protocol was adopted, including CEDAW, which “shift[ed] from an abolitionist mindset to one that recognize[d] the human rights of sex workers,”<sup>187</sup> it is unlikely the Palermo Protocol intended to abolish all forms of sex work. Lending credence to this interpretation of Article 3 of the Palermo Protocol is its discussion of consent.<sup>188</sup> Article 3 makes the consent of the “victim” irrelevant *if* the threat or use of force, coercion, abduction, fraud, deception, abuse of power, or payment is used to achieve it, but Article 3 does not say that freely given consent renders sex work exploitation.<sup>189</sup> Nevada law, which allows sex work if it is voluntary and creates protocols to ensure such is the case, therefore complies with the Palermo Protocol.

In contrast to the Nevada Model, other systems in which sex work is less regulated (such as those in Sweden and Germany) tend to foster more hostile and exploitative environments than that present in Nevada’s brothels. Thus, they may violate the Palermo Protocol. In fact, evidence suggests that a system such as Nevada’s not only allows for safer policing,<sup>190</sup> but perhaps even fosters increased

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<sup>183</sup> Brents & Hausbeck, *supra* note 98, at 293; *see also* Heineman, MacFarlane & Brents, *supra* note 96 (“Legal sex workers report less violence and a heightened sense of security working in the brothel industry than plying their trade illegally in other venues.”).

<sup>184</sup> *Id.*

<sup>185</sup> *See, e.g.*, Charleston v. State of Nevada, 423 F. Supp. 3d 1020 (D. Nev. 2019) (dismissing claims that Nevada’s legalized sex work violates federal sex trafficking law for lack of standing).

<sup>186</sup> The Palermo Protocol, *supra* note 24, art. 3.

<sup>187</sup> Marshall, *supra* note 6, at 53.

<sup>188</sup> *See* The Palermo Protocol, *supra* note 24, art. 3(a)–(b).

<sup>189</sup> *Id.*

<sup>190</sup> *See* Rogers, *supra* note 99, at 13.

policing for other illegal activity, such as trafficking.<sup>191</sup> This is certainly in the spirit, if not the letter, of international agreements such as the Palermo Protocol and DEVAW, which indicate that women are “entitled to equal enjoyment and protection of all human rights.”<sup>192</sup> Nevada’s sex work laws therefore both comport with international prostitution law and promote human rights. As stated above, however, there is much room for improvement. Section V suggests modifications to Nevada’s sex work law that the International Court of Justice might consider in issuing an advisory opinion pertaining to sex work and human trafficking.

#### V. A MODIFIED NEVADA SYSTEM WOULD BEST PROTECT HUMAN RIGHTS AND COMPLY WITH INTERNATIONAL LAW

The legalization of sex work, particularly as Nevada has approached it, has many benefits. Unfortunately, it also has several drawbacks. While there is a “substitution effect” in those states that legalize prostitution, in which the demand for illicit prostitution declines in favor of legal sex work, for instance, countervailing evidence suggests states with legal prostitution “experience a larger reported incidence of trafficking in flows.”<sup>193</sup> Beyond this issue, there are others that need to be considered before legalizing sex work. Indeed, there are also concerns that *any* regulation beyond abolition might lead to police harassment, even when an individual is in full compliance with the law.<sup>194</sup> This is exacerbated by burdensome bureaucratic policies, such as expensive licensing requirements.<sup>195</sup> Finally, and somewhat relatedly, sex work carries a stigma, and often this leads those engaged in the practice to have difficulty “reintegrat[ing] into the

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<sup>191</sup> See Snadowsky, *supra* note 153, at 233–34 (citing Jeremy Hay, *You’re Under Arrest, Spread Your Legs*, 7 GAUNTLET MAGAZINE (1994), <https://perma.cc/XXA6-PBC6> (online version printed under the title *Police Abuse of Prostitutes in San Francisco*)) (arguing that policing for illicit prostitution is wasteful); see also Andrew Breiner, *These 3 Graphs Could Change Your Mind About Legalizing Sex Work*, THINK PROGRESS (July 31, 2015), <https://perma.cc/8Q32-R2YS> (showing how, after decriminalization, New Zealand’s sex work industry shrank, while the willingness of sex workers to report violence to police increased).

<sup>192</sup> DEVAW, *supra* note 24, arts. 1, 3.

<sup>193</sup> See Seo-Young Cho, Axel Dreher & Eric Neumayer, *Does Legalized Prostitution Increase Human Trafficking?*, 41 WORLD DEV. 67, 82 (2013) (suggesting that the available data indicates that countries with legalized prostitution “experience a larger reported incidence of trafficking inflows” than those countries that criminalize sex work but also see a “substitution effect” in which the demand for illicit prostitutes declines in favor of legal sex work).

<sup>194</sup> See Marshall, *supra* note 6, at 62 (arguing that Germany’s legalization system is less effective at stopping police abuse than New Zealand’s full decriminalization regime).

<sup>195</sup> See *id.* at 62 (citing Molly Smith, *The Problem with the “Swedish Model” for Sex Work Laws*, THE NEW REPUBLIC (June 8, 2015), <https://perma.cc/GPW6-P8BK>) (explaining the argument that “legalized model[s] still criminalize” those sex workers who cannot or do not fulfill the requirements necessary to comply with regulation).

community on equal terms” after retirement.<sup>196</sup> In order to safely legalize sex work, these issues must be addressed. This Section proposes ways that Nevada law can be modified to do so.

#### A. Modification One: Eliminate All Population-Related Requirements

The Nevada Model is “not an ideal model in that many of its regulations are unofficial, outdated, and inefficient. But it succeeds because it recognizes prostitution as a reality and therefore functions to protect all the affected parties.”<sup>197</sup> Therefore, this Comment proposes two key modifications to the Nevada system to help make it more up-to-date and efficient without constraining its ability to protect those involved in the industry. The first of these proposed modifications is the elimination of population-based restrictions on legalized sex work. This change will help curb illegal prostitution and, in doing so, continue to cut down on violence and human trafficking.

Nevada outlaws sex work in counties with populations greater than 700,000. In order to lessen the adverse effects of illegal prostitution, as well as comport with international law and promote human rights, this restriction must be abolished. Indeed, it is often noted that “any public policy aimed at alleviating the worst effects of illegal prostitution in metropolitan areas with legal, regulated prostitution will have to go beyond legalizing brothels in exclusively rural” areas.<sup>198</sup> This is the case because, at least in Nevada, consumers of sex work in areas where it is illegal “are not content to drive to legal brothels in neighboring counties.”<sup>199</sup> Instead, they indulge in illegal prostitution, which—as noted above—is far less safe for all parties involved. In addition, beyond the basic policy argument that legalizing brothel prostitution broadly will improve the work conditions of sex workers, this change has major human rights and legal implications as well.

With respect to human rights, legalizing brothel prostitution in all areas, regardless of population, ensures that states uphold Articles 13 and 23 of the UDHR. In terms of the former, which protects the “right to freedom of movement and residence within the borders of each state,” outlawing sex work in some regions but not others restricts sex workers’ ability to move freely while still pursuing safe and legal job opportunities.<sup>200</sup> The same is true with respect to Article 23, which guarantees “the right to work, to free choice of employment . . .

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<sup>196</sup> See Waltman, *supra* note 152, at 454–57 (citing concerns regarding the stigmatization and reintegration of prostitutes).

<sup>197</sup> Bejinariu, *supra* note 106.

<sup>198</sup> See Rogers, *supra* note 99, at 19–21 (citing *Crime in the United States Table 69: Arrest Data by State*, FBI (2008)).

<sup>199</sup> *Id.*

<sup>200</sup> UDHR, *supra* note 16, art. 13.



and to protection against unemployment.”<sup>201</sup> Without universally legal sex work,<sup>202</sup> a sex worker who is forced to move from one area (such as a state within a larger country, a county within a state, etc.) to another might find herself out of work and/or a criminal for continuing to pursue her career. This is in violation of UDHR Articles 13 and 23.

Further, the general guarantee that all people are entitled to a life free of “cruel, inhuman, or degrading treatment” is violated when sex workers are forced to choose between remaining in one locale (perhaps in which they face abuse, violence, or other poor conditions) in order to continue working and moving to a desired location where they face unemployment.<sup>203</sup> Similarly, since sex workers who engage in the trade in areas where it is illegal often face dangerous work conditions, violence, and/or abuse, those jurisdictions that continue to outlaw prostitution based on a characteristic as arbitrary as population<sup>204</sup> risk violating UDHR Article 5’s protection against cruel treatment as well.<sup>205</sup> Finally, it is also noteworthy that, in states like Germany that provide access to welfare, unemployment, and health benefits to individuals engaged in legally recognized “work,” the universal legalization of sex work will provide these benefits to sex workers in a manner that promotes the right to an adequate standard of living as guaranteed by the UDHR. Thus, given these considerations and the aforementioned fact that Nevada’s counties with legal brothel prostitution report among the lowest levels of extra-legal prostitution in the U.S., it seems in the interest of human rights to eliminate the population restriction before expanding Nevada’s system to other states around the globe.

In addition, the elimination of these population-based restrictions would help a modified Nevada system better comport with international sex work law. With sex work universally legalized, those who want to take part in the industry will be able to “actively seek out work themselves” rather than be “coerced into prostitution and kept subservient by [frequently abusive] pimps.”<sup>206</sup> The

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<sup>201</sup> *Id.* art 23.

<sup>202</sup> This call for “universally legal sex work” is limited by the authority of local governments. As is the case in Nevada, some local governments may choose not to license brothels despite having the ability to do so. For the purposes of this Comment, however, what is envisioned is a system in which the decision to license brothels is made at purely the local level and not mandated by the state or national government.

<sup>203</sup> UDHR, *supra* note 16, art. 5.

<sup>204</sup> Rogers, *supra* note 99, at 22 (citing RONALD WEITZER, *Sex Work: Paradigms and Policies*, in *SEX FOR SALE* (2009)) (explaining that “opposition from the gaming industry” is the primary reason for Nevada’s prostitution population restriction).

<sup>205</sup> *See* Marshall, *supra* note 6, at 54–55.

<sup>206</sup> *See* Snadowsky, *supra* note 153, at 228–33 (citing HIV statistics, the ability to contract with brothel owners, age restrictions, and other regulations that ensure the safety and health of voluntary sex workers in brothels).

proliferation of regulated brothels, particularly in urban environments in which sex work tends to be relatively common, will combat this form of coercion, which itself violates international agreements such as DEVAW.<sup>207</sup> More competition in the sex industry might also further improve conditions for brothel workers, including through increased bargaining power and benefits, as brothel operators are forced to compete for employees.<sup>208</sup>

The general reduction in violence that accompanies legalized brothel prostitution<sup>209</sup> will also assist states in complying with Article 2 of DEVAW, which outlaws “[v]iolence against women, including “violence related to exploitation” and “violence perpetrated or condoned by the State” (such as police violence).<sup>210</sup> From the perspective of both human rights and international prostitution law, then, legalizing brothel prostitution in all regions regardless of population size and density will aid in both protecting those involved in the trade as required by the UDHR and in curbing all of the forms of coercion and violence specifically outlawed by documents like DEVAW. Thus, this modification builds on the sturdy foundations of Nevada’s current system and should be considered should the ICJ promulgate an advisory opinion pertaining to managing sex work.

## B. Modification Two: Increased Screening Before Licensing

At present, all that is required to become a sex worker in Nevada is a general contractor’s license and a card from the local sheriff’s department following a procedure that is “basically the same as a background test,” meaning the applicant must merely have a “clean record.”<sup>211</sup> While these requirements are useful in protecting the broader industry and have, in fact, been emulated elsewhere in the world,<sup>212</sup> if the legal framework proposed herein is to better promote human rights and comport with international law (particularly those laws criminalizing human trafficking), it must do more to ensure those involved in sex work are doing so freely.

<sup>207</sup> See, e.g., DEVAW, *supra* note 24, art. 1; see also CEDAW, *supra* note 48, art. 3(a).

<sup>208</sup> Nevada’s brothel owners are referred to as “legal pimps” by some due to the power they can wield over their employees. See, e.g., Michelle L. Price, *Nevada is Weighing a Ban on Brothels as the State’s Most Famous Legal Pimp Runs for Office*, BUS. INSIDER (June 11, 2018), <https://perma.cc/63WC-SV77>. An increase in work opportunities coupled with a relatively stagnant employee base, however, should foster improved working conditions and lessen this power imbalance. See Abel, Fitzgerald & Brunton, *supra* note 106, at 7.

<sup>209</sup> See, e.g., Brents & Hausbeck, *supra* note 98, at 271.

<sup>210</sup> DEVAW, *supra* note 24, art. 2.

<sup>211</sup> Turner, *supra* note 143. Applicants must also undergo health screenings, but those are not at issue in this Subsection.

<sup>212</sup> See DEUTSCHE WELLE, *supra* note 150 (discussing the new licensing scheme for sex workers in Germany).

In order to better combat sex trafficking, then, states that implement a system akin to Nevada's must expand their background check procedure to include in-person interviews and a preliminary waiting period, during which local authorities allow the applicant to work—assuming he/she is healthy and has passed the normal background check—while any “red flags” are assessed.<sup>213</sup> Studies suggest that such protocols will assist in fighting trafficking.<sup>214</sup> Indeed, in Lyon County, Nevada, for instance, recent prostitute work card applications included “a variety of red flags in the background checks that might suggest trafficking,” but these “red flags” often went uninvestigated.<sup>215</sup> Instituting mandatory interviews that assess the applicant's situation rather than just their criminal history, along with a more thorough review process complete with “more and better equipment to handle applications” will correct the “real weaknesses and gaps in the” current review process without compromising the ability of those interested in becoming sex workers to do so.<sup>216</sup> This refined review process must include sufficient equipment to verify passport authenticity and other non-local identification cards.<sup>217</sup> By expanding this preliminary review process, states that adopt the modified Nevada system (Nevada Model) will ensure compliance with international law and help promote human rights.

With respect to international law, every document discussed in Section III above outlaws—in some manner—practices that harm women or deprive an individual of their liberty. Indeed, DEVAW includes the “arbitrary deprivation of liberty” in its definition of “violence against women,”<sup>218</sup> while CEDAW mandates that states must combat “all forms of traffic in women,”<sup>219</sup> and the Palermo Protocol states as its purpose the prevention of “trafficking in persons.”<sup>220</sup> Instituting an expanded system of background checks, complete with the proposed waiting period during which an applicant can work on a temporary basis

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<sup>213</sup> In the midst of the COVID-19 pandemic, in-person background checks are less viable than they would otherwise be. The ability to meet with the applicant one-on-one is of great importance in ensuring they are willfully applying to be a sex worker, however, so—should such meetings be at all possible using social distancing and other precautionary measures—they are still encouraged.

<sup>214</sup> See Michelle Rindels, *Lyon County: A Third of Prostitutes Registered in 2017 Had Red Flags of Possible Human Trafficking*, THE NEV. INDEP. (Oct. 19, 2018), <https://perma.cc/78GP-2UKM> (calling for “more staff and better equipment to handle applications,” among other improved resources, after 30% of sex worker card applicants in Lyon County, Nevada had “red flags” on their applications that went uninvestigated).

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *See id.*

<sup>218</sup> DEVAW, *supra* note 24, art. 1.

<sup>219</sup> CEDAW, *supra* note 48, art. 6.

<sup>220</sup> The Palermo Protocol, *supra* note 24, art. 2.

pending full approval, will help the Nevada Model better comport with these provisions of international law.

Further, not only might these improvements assist governments in assessing “red flags” and curbing trafficking, they might have a deterrence effect as well.<sup>221</sup> Indeed, the U.S. Department of Justice (DOJ) recognized that “police deter crimes when they do things that strengthen a criminal’s perception of the certainty of being caught.”<sup>222</sup> Thus, an improved system of background checks that thoroughly investigates “red flags” that might indicate an applicant is being trafficked could itself deter trafficking and help the Nevada Model comport with the international law against trafficking.

The same is true with respect to the UDHR. Combatting human trafficking strongly promotes Article 5’s guarantee that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment.”<sup>223</sup> In fact, increased protection against human trafficking also promotes the UDHR’s assurance that all people have a right to privacy and to be protected from “arbitrary interference” with that of their family and home.<sup>224</sup> Finally, given the horrors faced by victims of trafficking, an improved system of combatting it will better ensure that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family.”<sup>225</sup> Therefore, the improved background check procedure proposed herein will better help the Nevada Model comport with international law and promote human rights.

1. Expanded background check procedures will not increase barriers to entry

Additionally, it is of note that the expanded background check procedures outlined above will not raise application costs and therefore will not increase barriers to entry in violation of UDHR Article 23. Although this is more of a policy discussion that needs to be carried out on a state-by-state basis, administrative costs created by implementing the expanded background check system (as well as the cost of the current system) should adequately be offset by the reduced cost of policing (including the cost of arrests) resulting from the legalization of sex work.<sup>226</sup>

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<sup>221</sup> See NAT’L INST. OF JUST., *Five Things About Deterrence*, U.S. DEP’T OF JUST. (May 2016), <https://perma.cc/ZJ8X-GWDY>.

<sup>222</sup> *Id.*

<sup>223</sup> UDHR, *supra* note 16, art. 5.

<sup>224</sup> *Id.* art. 12.

<sup>225</sup> *Id.* art 23.

<sup>226</sup> For statistics regarding much of the world’s criminal justice spending per capita, see Graham Farrell & Ken Clark, *What Does the World Spend on Criminal Justice*, HEUNI (European Inst. for Crime Prevention & Control Paper No. 20, 2004), <https://perma.cc/AK8H-DXP5>.

2. This modification, along with broader legalization, will reduce the stigma associated with sex work

Should the ICJ issue an advisory opinion advocating for the adoption of a system that legalizes brothel prostitution, the two improvements discussed in this Section should be included so that the proposed system best complies with international law and promotes human rights. In addition, the broad legalization of sex work will help combat any stigma<sup>227</sup> currently attached to the practice. In fact, despite the Nevada Model's tendency to treat sex workers differently than other workers, including through required periodic health screenings, the broad legalization system proposed herein will help the public view sex workers as average healthy individuals employed in a legitimate line of work. Indeed, while some contend that it is only a "myth" that legalizing prostitution will reduce the stigma for those involved,<sup>228</sup> others argue that it is actually "criminalization [that] fuels [the] stigma, by framing commercial sex as immoral, illicit, and unlawful, by declining sex worker's (human and worker) rights[,] and by powering negative opinions."<sup>229</sup> This criminalization-fueled stigma leads to psychological stress on the part of sex workers, as well as to a decline in "sex workers' social status and control over sexual and employment-related negotiations."<sup>230</sup> Thus, not only will the legalization regime proposed herein promote human rights and comport with international law to a greater extent than any other system surveyed, it will also fight the stigma that persists around sex work.<sup>231</sup>

## VI. THE IMPLEMENTATION OF THE NEVADA MODEL

As any reasonable shopper knows, "one size fits all" typically means a little discomfort for everyone. The same is true of legal and policy proposals. Thus, this

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<sup>227</sup> See generally Cecilia Benoit, S. Mikael Jansson, Michaela Smith & Jackson Flagg, *Prostitution Stigma and Its Effect on the Working Conditions, Personal Lives, and Health of Sex Workers*, 55 J. SEX RSCH. 457 (Nov. 2017).

<sup>228</sup> Jacqueline Gwynne, *MYTH: Legalizing Prostitution Reduces the Stigma*, NORDIC MODEL NOW!, <https://perma.cc/838G-YRV4>.

<sup>229</sup> Vanwesenbeeck, *supra* note 26, at 1632; North, *supra* note 14; Ronald Weitzer, *Resistance to Sex Work Stigma*, 21 SEXUALITIES 717, 725 (Jan. 2017) ("If the national legal context is one where prostitution is criminalized, the legal order itself compounds stigmatization and the authorities have a vested interest in treating sex work as deviant."). These studies suggest that, even when treated differently than other workers, sex workers fare much better in the public's opinion when their trade is legalized in even a limited manner.

<sup>230</sup> Vanwesenbeeck, *supra* note 26, at 1632.

<sup>231</sup> The history of marijuana in the U.S. provides an interesting case study on the relationship between illegality and stigmatization. For a discussion of part of the complex origins of the U.S.' criminalization of the drug, see Becky Little, *Why the US Made Marijuana Illegal*, HISTORY (Aug. 31, 2018), <https://perma.cc/WFG2-52DG>. Despite its relatively recent outlawing, marijuana is often highly stigmatized, see, for example, Travis D. Satterlund, Juliet P. Lee & Roland S. Moore, *Stigma Among California's Medical Marijuana Patients*, 47 J. PSYCHOACTIVE DRUGS 10 (2015).

Comment does not call for sweeping new international agreements or the imposition of sanctions on those states that do not undertake to implement the Nevada Model or a variation thereof. Rather, it merely encourages interested parties with the proper authorization to request an advisory opinion from the International Court of Justice pertaining to the legalization of sex work.<sup>232</sup> In doing so, authorized agencies in favor of the legalization and/or decriminalization of sex work, such as the WHO, can encourage the ICJ to offer its advice regarding the “legal questions” surrounding the practice’s legalization.<sup>233</sup> In its opinion, the ICJ likely will find that, given the current legal landscape, the proposals herein, and the recent qualitative and quantitative studies pertaining to the prevalence of trafficking and the conditions faced by sex workers in Nevada, Sweden, and elsewhere, the Nevada Model is a sensible approach that promotes human rights and comports with international law better than any other system.

Further, it is clear that beyond the legal ramifications associated with changing laws pertaining to sex work, there are also moral, philosophical, and perhaps even religious implications. As a result, it is important to reiterate that this Comment opposes the placing of sanctions on those states that decline to implement the Nevada Model. The broader international community has itself only recently come to recognize voluntary sex work as a valid practice. Thus, it is wholly unreasonable to penalize those states that do not agree with this rather new sentiment. Indeed, with time, it is likely that those states that initially hold out will adopt this more modern point of view on their own. The international community can only do so much to influence the people and governments who consent to be a part of it, and there is no reason to hope for spontaneous universal agreement on any issue, especially one as contentious and personal as the sale of sex.

## VII. CONCLUSION

This Comment argues that the legalization of sex work is both permitted by current international law and is the best method for ensuring those who engage in the practice are safe, healthy, and secure in their human rights. Indeed, while the Nordic Model and other criminalization schemes seem to make progress in the fight to end human trafficking, they do so in a manner that abrogates numerous human rights and limits free choice. Similarly, other systems—such as the decriminalization model employed in New Zealand—are effective in promoting

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<sup>232</sup> *Organs and Agencies Authorized to Request Advisory Opinions*, INT’L CT. OF JUST., <https://perma.cc/9STW-9L4A>.

<sup>233</sup> U.N. Charter art. 96, ¶ I–II. For more information on ICJ advisory opinions, see *What Is an Advisory Opinion of the International Court of Justice (ICJ)?*, DAG HAMMARSKJÖLD LIBRARY, <https://perma.cc/C2XV-V473> (citing *Advisory Jurisdiction*, INT’L CT. OF JUST., <https://perma.cc/4YWG-PHHT>) (“In general, advisory opinions are not binding, but may inform the development of international law.”).

human rights but might be ineffective at combatting human trafficking, especially if attempted elsewhere in the world. The Nevada Model proposed herein, on the other hand, has the potential to be the most effective means of regulating sex work while both protecting human rights and combatting human trafficking. By upholding the UDHR while also fighting human trafficking and curbing violence, coercion, and abuse, the Nevada Model is a sort of compromise between the sex workers' rights movement, which promotes decriminalization to protect human rights, and those who advocate for abolition in order to achieve that same goal.

As with any untested proposition, there are bound to be surprises in implementing the Nevada Model should the ICJ recommend states begin doing so. The novel solution proposed herein is reliant upon data and research that is difficult to obtain (such as rates of human trafficking and extra-legal prostitution), and so there are bound to be unexpected discoveries as states proceed in employing it. Thus, at the very least, the Nevada Model will be a framework on which states that choose to legalize prostitution can build.

# Cured: Proposing a Solution to the Hague Convention’s “Zone of Disease” Defense

Savannah Mora\*

## Abstract

*Each year, thousands of children are taken from their homes to foreign countries by one of their parents (the “taking parent”) without the consent of their other parent (the “left-behind parent”). This phenomenon is frequently referred to as international child abduction. If both the country from which the child was taken and the country to which the child was taken are signatories to the Hague Convention, the left-behind parent can file a petition for return of the child under the treaty. Recently, in a number of courts around the world, taking parents facing Hague Convention litigation have argued that, because of the risks of international travel during the COVID-19 pandemic, their children should not be returned. These taking parents invoke Article 13(b) of the Convention, which provides a defense against a child’s return if there is “a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.” Taking parents contend that if children are obligated to travel internationally to satisfy return orders pursuant to the Convention, the children will be exposed to the virus and thus face a “grave risk” under Article 13(b).*

*This Comment argues that courts should adopt a rebuttable presumption against Article 13(b) defenses predicated on the risks of an infectious disease, or “zone of disease” defenses. This construction of the defense does not comport with existing precedent or the goals of the Hague Convention, and refusing to return abducted children on these grounds could lead to serious, long-term harm for the children. Instead, courts should only find a “grave risk” in cases where the child faces a particularized, demonstrable risk of serious complications incident to infection. This Comment encourages courts to fashion responsible and pragmatic protective measures to attach to Hague Convention return orders, ensuring both the safety and the prompt return of children who have been abducted.*

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## Table of Contents

I. INTRODUCTION .....	225
II. THE RETURN OF CHILD PETITION .....	229
A. The Purpose of the Hague Convention: Restoring the Status Quo .....	230
B. Factual Circumstances of Abduction .....	232
C. Procedural Matters & Central Authorities .....	234
D. Prima Facie Case and Defenses .....	237
III. ARTICLE 13(B): THE <i>FRIEDRICH</i> FRAMEWORK .....	238
IV. ALTERNATIVES TO THE IMMEDIATE RETURN OF THE CHILD .....	240
V. COVID-19'S IMPACT ON HAGUE CONVENTION CASES .....	243
A. Logistical Obstacles to the Administration of Proceedings .....	243
B. Guidance from the HCCH .....	244
C. Article 13(b) Issues .....	246
VI. ANALOGIZING INFECTIOUS DISEASE TO EXISTING PRECEDENT .....	249
A. The Illusive "Zone of Disease" .....	249
B. Zone of War .....	252
VII. SUGGESTIONS .....	254
A. The Rebuttable Presumption .....	254
B. The Unclean Hands Doctrine .....	257
VIII. CONCLUSION .....	259

## I. INTRODUCTION

In February 2020, the same month that the novel coronavirus (COVID-19) first appeared in Europe,<sup>1</sup> an eleven-year-old girl, PT, arrived in England with her mother.<sup>2</sup> PT, a “polite, calm, and confident girl,” was likely surprised to find herself in England.<sup>3</sup> She had lived in Spain her entire young life, and her mother had not told her that they were traveling to England.<sup>4</sup> Actually, PT’s mother had told her that they were moving to another town in Spain.<sup>5</sup> Instead, the mother and daughter arrived in England and immediately moved in with the mother’s new partner in the southeastern region of the country.<sup>6</sup> PT later reported that she was “a bit scared” of her mother’s new partner and that he shouted at her.<sup>7</sup>

Back in Spain, PT’s father, who shared parental responsibility of PT with PT’s mother under a judgement issued by the Spanish courts, alleged the child’s move to England took place without his knowledge or consent.<sup>8</sup> Initially, PT was told to lie to her father about their whereabouts.<sup>9</sup> When PT’s father did eventually learn that PT was living in England with her mother, he demanded that the child be returned to Spain.<sup>10</sup> PT’s mother refused, so the father traveled to England, hoping to retrieve PT.<sup>11</sup> The mother met the father at a shopping mall in England and allowed him to see PT, but she again refused to permit him to take the child back to Spain.<sup>12</sup>

Because the mother had unilaterally moved PT from Spain to England in breach of the father’s custody rights and without his consent or knowledge, the father had a strong case for international child abduction. On March 10, 2020, PT’s father filed a petition in the English courts for the child’s return to Spain<sup>13</sup> under the Hague Convention on the Civil Aspects of International Child

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<sup>1</sup> Gianfranco Spiteri et al., *First Cases of Coronavirus Disease 2019 (COVID-10) in the WHO European Region*, 25(9) EURO SURVEILLANCE (2020), <https://perma.cc/GK3K-XKQU>. Please be advised that the COVID-19 pandemic is still ongoing at the time of writing and publication. Any characterizations and discussions of COVID-19 in this Comment reflect only the understanding and research of the author and should not be relied on for any medical or scientific purposes.

<sup>2</sup> KR v. HH [2020] EWHC (Fam) 834, [3] (Eng.).

<sup>3</sup> *Id.* at [31].

<sup>4</sup> *Id.* at [36], [31].

<sup>5</sup> *Id.* at [31].

<sup>6</sup> *Id.* at [6].

<sup>7</sup> *Id.* at [32].

<sup>8</sup> *Id.* at [37]–[38].

<sup>9</sup> *Id.* at [38].

<sup>10</sup> *Id.* at [7].

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at [8].

Abduction (the Hague Convention or the Convention).<sup>14</sup> The Hague Convention provides a shared civil remedy among States Party—a return of child order—for left-behind parents in international child abduction cases.<sup>15</sup> The return of child remedy is available to left-behind parents who can establish a prima facie case under the Convention. Left-behind parents establish a prima facie case by demonstrating that their child was wrongfully removed or retained outside the child’s habitual residence and in violation of custody rights that the left-behind parent was actively exercising.<sup>16</sup> If the court finds that the left-behind parent has established a prima facie case, it must then determine whether any affirmative defenses apply that would permit the abductor to keep the child in the country that the child was abducted to.

After PT’s father filed a return of child petition in the English courts, a Children and Family Court Advisory and Support Service (CAFCASS) officer interviewed PT.<sup>17</sup> The social worker told England’s High Court, Family Division in London, that PT was “very angry with her mother for taking her to England against her wishes” and that the child’s emotional state was one of “desperation” at having been removed from Spain.<sup>18</sup> The judge noted that the social worker, “who is an extremely experienced CAFCASS Officer,” told him that that “this was only the second time in her long experience that she had encountered a child expressing such strong views in favour of return, despite remaining throughout in the care of their primary carer.”<sup>19</sup>

The High Court judge found that PT’s father had established a prima facie case for return and that PT had, in fact, been abducted from Spain by her mother.<sup>20</sup> In response, PT’s mother argued that the COVID-19 pandemic posed a “grave risk of harm” to PT and that, because traveling to Spain would put the child at risk of infection, PT should remain in England with her.<sup>21</sup> Thus, the judge was asked to consider one of the Hague Convention’s limited affirmative defenses. Under Article 13(b) of the Convention, a court is not bound to return a child if “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”<sup>22</sup> A grave risk exists, *inter alia*, where the return of the child would put

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<sup>14</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 [hereinafter The Hague Convention].

<sup>15</sup> *See id.*

<sup>16</sup> *Id.* art. 3.

<sup>17</sup> KR v. HH [2020] EWHC (Fam) 834, [10] (Eng.).

<sup>18</sup> *Id.* at [34].

<sup>19</sup> *Id.* at [33].

<sup>20</sup> *Id.* at [39].

<sup>21</sup> *Id.* at [46]–[47].

<sup>22</sup> The Hague Convention, *supra* note 14, art. 13.

him or her “in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease.”<sup>23</sup> In this case, PT’s mother argued that the child faced a heightened risk of infection by traveling during a pandemic and returning to Spain, where COVID-19 infections were high. In essence, the mother raised a “zone of disease” defense.

The High Court examined the mother’s “zone of disease” defense in two parts. First, the judge considered that, on the date the judgment was prepared, March 29, 2020, the pandemic was more advanced in Spain than in the England—the official death toll stood at 6,528 in Spain and 1,228 in England.<sup>24</sup> However, the judge also noted that the COVID-19 pandemic was a “serious public health emergency” in both countries and predicted that infection numbers would continue to rise in England and in Spain in the coming weeks.<sup>25</sup> Thus, he observed, “there is a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.”<sup>26</sup> The High Court also noted that “those who are considered most at risk of serious complications from coronavirus are the elderly and those with underlying health conditions. Neither PT, nor her parents, fall within this category.”<sup>27</sup>

Second, the judge considered the increased risk of infection that PT would face by traveling internationally to return to her father in Spain. “I accept that international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation,” wrote the judge.<sup>28</sup> “[T]he risk of infection posed by air travel, whilst no doubt significantly greater than normal, is not so high that either government [ ] felt [it] necessary to end flights altogether.”<sup>29</sup> Ultimately, the judge concluded that while flying from England to Spain during the pandemic would increase the child’s risk of contracting the virus, “such a risk, when considered in the context of the likely harm that would be suffered by PT should she contract the virus, [ ] sufficient to amount to the ‘grave risk’ of physical harm required by Art[icle] 13(b).”<sup>30</sup>

In light of this finding, the High Court ordered PT’s immediate return. The High Court noted that, because there was no guarantee that flights would continue to operate between England and Spain much longer, any delay in travel could

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<sup>23</sup> Friedrich v. Friedrich, 78 F.3d 1060, 1069 (6th Cir. 1996) (emphasis omitted).

<sup>24</sup> KR v. HH [2020] EWHC (Fam) 834, [46] (Eng.)

<sup>25</sup> *Id.* at [47].

<sup>26</sup> *Id.*

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

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

make the child's return to Spain "practically impossible" and leave her stranded in England with her abductor until the resolution of the pandemic.<sup>31</sup>

PT's case was among the first of its kind. It illustrates the challenges a court faces when navigating the uncharted territory of the "zone of disease" defense. From the beginning of the COVID-19 pandemic until January 2021, at least eight Hague Convention cases explicitly addressed the risks of infection in the context of the grave risk of harm defense.<sup>32</sup> Although the COVID-19 pandemic is an unprecedented public health crisis, it is not the last time judicial and administrative authorities will be asked to adjudicate Hague Convention cases against the backdrop of an infectious disease outbreak. The impact of COVID-19 on international child abduction litigation has exposed serious gaps in Article 13(b) caselaw and guidelines. To this author's knowledge, no legal scholarship has directly examined the "zone of disease" formulation of the grave risk of harm defense, even though it bears a resemblance to other well-established forms of the defense, like the zone of war formulation. Now that courts are beginning to observe defendants in Hague Convention cases harness the global pandemic for their benefit, it is crucial to develop a robust and operable framework for evaluating Article 13(b) defenses predicated on the risks of an infectious disease. This Comment is the first step in helping fill that void.

First and foremost, this Comment relies on the text of the Convention and on its accompanying explanatory report, which is instructive regarding the intentions of the Convention drafters. To flesh out provisions of the Convention, this Comment will often rely on interpretations put forward by U.S. courts, which provide a robust and coherent body of caselaw. This Comment will also discuss a number of foreign judgments that interpret the Convention, including several recent cases dealing with the "zone of disease" defense in the COVID-19 context.

Sections II and III discuss the Hague Convention's purpose, its exceptions, and the prima facie case for return under the Convention. The Convention rests upon a conviction that the best way to combat international child abduction is to refuse to grant it legal recognition. Thus, the treaty is designed to restore the legal status quo between the parties by returning the child to his or her habitual residence. Section IV explores alternatives to the immediate return of an abducted child and discusses the potential long-term consequences for a child if a "zone of

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<sup>31</sup> *Id.* at [50].

<sup>32</sup> *See, e.g., id.*; FamC (MC TA) 52595-02-20 *The Father v. The Mother* (2020) (Isr.), <https://perma.cc/E8NN-HEZS>; C v. G [2020] IECA 233 (Ir.); *Re N (a child)* [2020] EWFC 35 (Eng.); *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*14 (M.D.N.C. Aug. 26, 2020); Thüringer Oberlandesgericht [OLGZ] [Higher Regional Court of Thuringia] Mar. 17, 2020, 1 UF 11/20 (Ger.); Oberlandesgericht Karlsruhe [OLGZ] [Higher Regional Court of Karlsruhe] June 25, 2020, 2 UF 200/19 (Ger.) <https://perma.cc/ZU2P-Z5KG>; Amtsgericht Hamm Familiengericht Beschluss [Hamm Local Court], Apr. 23, 2020, 32 F 14/20, (Ger.) <https://perma.cc/9EQ6-5SS9>.

disease” defense is successful. Section V explains COVID-19’s impact on Hague Convention cases. Section VI analogizes the risks of infectious diseases to existing categories of risk found in Article 13(b) caselaw in order to evaluate the viability of “zone of disease” defenses under current precedent. Section VII proposes a framework for evaluating grave risk of harm defenses predicated on the risks of an infectious disease.

This Comment’s proposal upholds the goals of the Hague Convention in restoring the legal status quo between parties and disincentivizing forum shopping by securing the prompt and safe return of the child. Ultimately, this Comment concludes that, absent a showing of particularized risk to the child, courts should reject grave risk of harm defenses where the underlying risk alleged is exposure to an infectious disease. Judicial and administrative authorities charged with adjudicating the Hague Convention are empowered to exercise judicial discretion and to fashion protective measures, often referred to as undertakings, to ensure that a child’s return is safe. This Comment recommends that in lieu of granting grave risk of harm exceptions—which would flatly deny left-behind parents’ petitions for return—courts should exercise their powers to deliver common-sense solutions to the logistical and safety obstacles posed by infectious diseases.

## II. THE RETURN OF CHILD PETITION

Each year, thousands of children are taken from their homes to foreign countries by one of their parents (the “taking parent”) without the consent of their other parent (the “left-behind parent”).<sup>33</sup> This phenomenon is frequently referred to as international child abduction. If both the country that the child was taken from (the child’s “habitual residence”) and the country the child was taken to (“the State of refuge”) are signatories to the Hague Convention, the left-behind parent can file a petition for return of the child under the treaty.<sup>34</sup> As long as the child is under sixteen years old, the Convention allows the left-behind parent to civilly enforce the child’s return from one State Party to another.<sup>35</sup> A decision under the Convention does not purport to resolve the underlying custody issues on their merits; a return of child order simply seeks to restore the parties’ legal and geographical status quos.<sup>36</sup>

To enforce the child’s return, the left-behind parent must establish a prima facie case for return of the child. A successful prima facie case under the Convention creates a presumption that the child should be returned and

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<sup>33</sup> For a statistical analysis of applications made in 2015 under the Hague Convention, see HAGUE CONF. ON PRIV. INT’L L., GLOB. REP. 3 (2018), <https://perma.cc/HA27-L9DV>.

<sup>34</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>35</sup> *Id.* art. 4.

<sup>36</sup> *Id.* art. 19.

establishes that the taking parent is, in fact, an abductor. Then, the abductor has the opportunity to raise one or more defenses opposing return. The United States and over 100 other countries<sup>37</sup> have ratified the Hague Convention, which is “the most important international treaty on the subject of international child abduction and probably in all of international family law.”<sup>38</sup> This Section examines the purpose of the Hague Convention, the factual circumstances of international child abduction, the procedural obligations of States Party, and the *prima facie* case for return of a child under the Convention.

#### A. The Purpose of the Hague Convention: Restoring the Status Quo

The Convention provides a civil remedy—a return of child order—to left-behind parents who demonstrate that their custody rights may have been violated by their child’s “wrongful[ ] remov[al] or ret[ention]” outside the child’s country of “habitual residence.”<sup>39</sup> The left-behind parent, with the assistance of his or her government’s foreign service department, brings suit against the taking parent in the State of refuge. If the left-behind parent is successful in obtaining a return of child order, this order does not necessitate the left-behind parent will gain custody; it only assures that the child will be returned to his or her country of habitual residence.<sup>40</sup>

The Convention serves a crucial procedural and administrative role in combating international child abduction and includes important “safety valves” like Article 13(b) to protect the wellbeing and wishes of the child. However, the goal of the Hague Convention is easily misunderstood given “the drama implicit in the fact that it is concerned with the protection of children in international relations.”<sup>41</sup> Accordingly, it may surprise some to learn that cases litigated under the Convention do not decide the merits of the underlying custody dispute.<sup>42</sup> “[T]he Convention’s stated object . . . is to secure the prompt return of children who have been wrongfully removed or retained.”<sup>43</sup> By securing the prompt return of the child but declining to reach the underlying custody dispute, the Convention

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<sup>37</sup> Ratifying nations include: the U.S., Brazil, Hong Kong and Macau, Australia, Canada, Iraq, Japan, France, Italy, South Korea, Mexico, the U.K., South Africa, Morocco, Russia, and Thailand. Notable exclusions include: China, India, the Philippines, Iran, and Vietnam. *Status Table: 28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONF. ON PRIV. INT’L L., <https://perma.cc/3E7T-N6EQ>.

<sup>38</sup> JEREMY D. MORLEY, *INTERNATIONAL FAMILY LAW PRACTICE* § 9:1 (updated July 2020).

<sup>39</sup> The Hague Convention, *supra* note 14, arts. 1, 3.

<sup>40</sup> *Id.* art. 19.

<sup>41</sup> *Rinau v. Lithuania*, App. No. 10926/09, ¶ 15 (Dec. 3, 2019), <https://perma.cc/92MX-UHR9>.

<sup>42</sup> The Hague Convention, *supra* note 14, at art. 19.

<sup>43</sup> Elisa Pérez-Vera, *Explanatory Report: Hague Convention on Private International Law*, in *ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION* 426, 431 (1982) <https://perma.cc/T5X5-U2VL> [hereinafter *The Pérez-Vera Report*].

combats and deters the practice of international child abduction by neutralizing the potential benefits of forum shopping.<sup>44</sup>

International child abduction creates unfair legal *and* logistical advantages for the abductor. It is these artificially-created advantages that often lead parents to abduct their children internationally in the first place.<sup>45</sup> First, abductors use international child abduction to impermissibly forum shop for favorable custody laws in other countries.<sup>46</sup> A parent may abduct a child to a country with more favorable custody laws intending to exploit those laws to the left-behind parent's disadvantage.<sup>47</sup> Alternatively, the taking parent may seek an opportunity to relitigate—or simply escape—a custody judgment that was decided unfavorably against them in the child's habitual residence.<sup>48</sup> Even if the custody consequences of abduction are secondary in the taking parent's mind to his or her primary motivation for removing the child, the taking parent will still stand to benefit from "the consolidation through lapse of time of the situation brought about by the removal of the child."<sup>49</sup> Second, by abducting a child internationally, the taking parent erects a sizeable logistical and financial hurdle for the left-behind parent who must pursue cross-border litigation to retrieve his or her abducted child.<sup>50</sup>

Recognizing the unfair legal and logistical advantages international child abduction confers on taking parents, the Hague Convention's official explanatory report, the Pérez-Vera Report, firmly states that "the Convention as a whole rests upon . . . the conviction that *the best way to combat [illegal child removals] at an international level is to refuse to grant them legal recognition.*"<sup>51</sup> Because the Convention drafters saw forum shopping as a loophole that incentivized and enabled international child abduction, they placed considerable weight on the "restoration of the status quo" via the "prompt return" of the abducted child.<sup>52</sup> Once the child is returned to his or her habitual residence, the parents are to litigate any outstanding custody disputes according the laws of that country, which is "in principle best placed to decide upon questions of custody and access."<sup>53</sup>

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<sup>44</sup> *Id.* at 429.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *See generally id.*

<sup>48</sup> *See generally id.*

<sup>49</sup> *Id.* at 429.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 434 (emphasis added).

<sup>52</sup> *Id.* (quoting The Hague Convention, *supra* note 14, art. 1).

<sup>53</sup> The Hague Convention, *supra* note 14, art. 19; the Pérez-Vera Report, *supra* note 43, at 434–435.



## B. Factual Circumstances of Abduction

The circumstances of international child abduction vary considerably. Sometimes, the taking parent ostensibly takes the child on vacation but never returns. In a prototypical case handled by the State Department in 2004, a mother took her child to Rio de Janeiro for a vacation; the father planned to join them there later.<sup>54</sup> Three days after arriving in Rio, the mother initiated divorce proceedings in Brazil and demanded that the father travel to Brazil to sign papers ceding full custody of their child to her.<sup>55</sup>

In other cases, the taking parent disappears with the child unexpectedly, and the left-behind parent has no indication of where they have gone—or if the child has even left the country. A recent case heard in the U.K.’s Family Division of the High Court is illustrative of this type of “ghosting.” In *AX v. CY*,<sup>56</sup> the father and mother, who both lived in Spain, had what appeared to be an amiable custody agreement, which had been incorporated into a written document in March 2018 with the assistance of lawyers.<sup>57</sup> There was no indication to the father that there were any issues with the agreement, so “it came as a considerable surprise to him, and no doubt great dismay as well,” to learn that neither the mother nor the child were living in their home in Barcelona and that the child was no longer attending her school.<sup>58</sup> In December 2018, the mother sent the father a picture of the child in London, and the father learned the potential whereabouts of his daughter for the first time.<sup>59</sup> The father provided the court with telephone transcripts in which the mother told him that there was nothing he could do:

Do you think you’re going to win by searching the whole world or what[?] . . . [A]nd when you come to look for your daughter, wherever you think she is, look, come with a lot of money in your pocket . . . [Y]ou won’t have anywhere to look to find me . . . Nobody knows where I live.<sup>60</sup>

Sometimes, taking parents flee with children after an unfavorable custody decision is handed down by the child’s habitual residence.<sup>61</sup> Unlike “ghosting,” which intentionally catches the left-behind parent off guard, this type of abduction may be responsive to preventative measures advocated for by the Permanent

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<sup>54</sup> U.S. DEP’T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL ABDUCTION 26 (2010), <https://perma.cc/7XV8-MV5Y> [hereinafter STATE DEP’T, REPORT ON COMPLIANCE].

<sup>55</sup> *Id.*

<sup>56</sup> [2020] EWHC (Fam) 1599 (UK).

<sup>57</sup> *Id.* at [7]–[8].

<sup>58</sup> *Id.* at [8].

<sup>59</sup> *Id.* at [10].

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

<sup>61</sup> See STATE DEP’T, REPORT ON COMPLIANCE, *supra* note 54, at 30.

Bureau of the Hague Conference on Private International Law (HCCH).<sup>62</sup> Preventative measures are proactive steps taken by the government to intervene in a hostile custody situation before an abduction takes place.<sup>63</sup>

In contrast, some taking parents may be fleeing an abusive relationship. The issue of domestic violence generally, and specifically instances where victims of domestic violence employ international child abduction to escape the abuse of themselves and their families, has recently become more visible in the public consciousness.<sup>64</sup> One particularly harrowing case, *Van De Sande v. Van De Sande*,<sup>65</sup> describes escalating physical and verbal abuse directed by the father, Davy, at the mother, Jennifer, and their children.<sup>66</sup> Jennifer and the children finally escaped their abuser in 2004, during a visit to Jennifer's parents in the U.S., when Jennifer told Davy that she and the children would not return to Belgium.<sup>67</sup> Davy "threatened to kill the children. He had earlier threatened to kill Jennifer. And the next day, in a conversation with Jennifer's brother, he threatened to kill 'everybody.'"<sup>68</sup> Eventually, Jennifer informed her father about Davy's threats.<sup>69</sup> Jennifer's father called law enforcement and a police officer escorted Davy from the house.<sup>70</sup> Later, the court found that Davy's abuse amounted to a grave risk of harm under Article 13(b) and accordingly denied his petition for return of the children to Belgium.<sup>71</sup> There are a number of legal scholars whose work sheds light on this intersection between domestic violence and international child abduction.<sup>72</sup> As *Van De Sande* illustrates, Article 13(b) acts as an important safeguard in this context.

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<sup>62</sup> See generally HAGUE CONF. ON PRIV. INT'L L., *Part III—Preventative Measures*, in GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2005) <https://perma.cc/3M9E-GKNQ>.

<sup>63</sup> See generally *id.*

<sup>64</sup> See, e.g., Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 TEX. INT'L L.J. 621 (2014).

<sup>65</sup> 431 F.3d 567 (7th Cir. 2005).

<sup>66</sup> *Id.* at 529, 569–70.

<sup>67</sup> *Id.* at 569.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 570.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 572.

<sup>72</sup> See, e.g., Kyle Simpson, *What Constitutes A "Grave Risk of Harm?": Lowering the Hague Child Abduction Convention's Article 13(b) Evidentiary Burden to Protect Domestic Violence Victims*, 24 GEO. MASON L. REV. 841, 846 (2017); Shani M. King, *The Hague Convention and Domestic Violence: Proposals for Balancing the Policies of Discouraging Child Abduction and Protecting Children from Domestic Violence*, 47 FAM. L.Q. 299, 300 (2013); Karen Brown Williams, *Fleeing Domestic Violence: A Proposal to Change the Inadequacies of the Hague Convention on the Civil Aspects of International Child Abduction in Domestic Violence Cases*, 4 J.

### C. Procedural Matters & Central Authorities

While the circumstances of the abduction—and the culpability of the parties—are case-specific, the procedural path for filing a Hague Convention case is standardized across States Party.<sup>73</sup> Under Article 6 of the Convention, each country that has ratified or acceded to the Convention is required to have a Central Authority (in the U.S., the State Department), which is the main point of contact for parents and other governments involved in abduction cases.<sup>74</sup> Once the left-behind parent realizes that the child is missing, he or she will inform the Central Authority in his or her country that an abduction has occurred. The Central Authority works with the left-behind parent to complete an application, required under Article 8 of the Convention, in order to initiate the process.<sup>75</sup> Then, the Central Authority forwards the completed application to the corresponding Central Authority in the State of refuge and monitors the case throughout the foreign administrative and legal processes.<sup>76</sup> Documents submitted as part of a Hague Convention application to the Central Authority are “admissible in courts in partner countries without the formalities often required by courts for admitting documents from foreign countries.”<sup>77</sup>

Cooperation between Central Authorities is a cornerstone of the Convention and absolutely essential to the Convention’s efficacy in addressing the scourge of international child abductions. Article 7 of the Convention requires Central Authorities “to secure the prompt return of children” “either directly or through an intermediary” and to “take all appropriate measures”:

- a) to discover the whereabouts of a child who has been wrongfully removed or retained;
- b) to prevent further harm to the child or prejudice to interested parties by taking or causing to be taken provisional measures;
- c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues;

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MARSHALL L. J. 39, 41–42 (2011); Noah L. Browne, *Relevance and Fairness: Protecting the Rights of Domestic-Violence Victims and Left-Behind Fathers Under the Hague Convention on International Child Abduction*, 60 DUKE L.J. 1193, 1194 (2011); see also Quillen, *supra* note 64, at 622; Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 51 (2008)

<sup>73</sup> NAT’L CTR. FOR MISSING & EXPLOITED CHILD., LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 3 (2012) <https://perma.cc/PND3-AFQQ> [hereinafter NCMEC, HAGUE CONVENTION MANUAL].

<sup>74</sup> The Hague Convention, *supra* note 14, art. 6.

<sup>75</sup> *Id.* arts. 6, 8.

<sup>76</sup> *Id.* art. 9.

<sup>77</sup> *Important Features of the Hague Abduction Convention—Why the Hague Convention Matters*, BUREAU OF CONSULAR AFFAIRS, U.S. DEP’T OF STATE, <https://perma.cc/7ZHB-2UU7>.

- d) to exchange, where desirable, information relating to the social background of the child;
- e) to provide information of a general character as to the law of their State in connection with the application of the Convention;
- f) to initiate or facilitate the institution of judicial or administrative proceedings with a view to obtaining the return of the child and, in a proper case, to make arrangements for organising or securing the effective exercise of rights of access;
- g) where the circumstances so require, to provide or facilitate the provision of legal aid and advice, including the participation of legal counsel and advisers;
- h) to provide such administrative arrangements as may be necessary and appropriate to secure the safe return of the child;
- i) to keep each other informed with respect to the operation of this Convention and, as far as possible, to eliminate any obstacles to its application.<sup>78</sup>

As discussed later in Sections V, VI, and VII, in the infectious disease context, the Central Authorities' duty to secure the "prompt return of children" may be in tension with their obligation to do so "[safe]ly."<sup>79</sup>

If the child is abducted to the U.S., for example, the State Department (the U.S.'s Central Authority) will begin the process of locating the child after receiving from the Central Authority of the child's habitual residence a completed application filed by the left-behind parent.<sup>80</sup> The State Department partners with other governmental and non-governmental agencies, including the International Social Service, the Federal Bureau of Investigation, the International Criminal Police Organization (INTERPOL), individual states' missing-child clearinghouses, and the National Center for Missing and Exploited Children (NCMEC), to locate the child "using school, employment, financial, social security, police, postal, internet or other public records."<sup>81</sup> The investigative process may be particularly arduous if the taking parent has transitory living accommodations, difficulty enrolling the child in school, illegal immigration status, or a fear of detection by law enforcement.<sup>82</sup>

Once the child is located, the U.S. State Department will try to negotiate with the taking parent to voluntarily return the child.<sup>83</sup> If those efforts are unsuccessful, the State Department will attempt to secure an affordable or *pro bono* attorney for the left-behind parent by sending outreach letters to attorneys who

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<sup>78</sup> The Hague Convention, *supra* note 14, art. 7.

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

<sup>80</sup> NCMEC, HAGUE CONVENTION MANUAL, *supra* note 73, at 3.

<sup>81</sup> *Id.* at 92.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 93.

have agreed to consider representation.<sup>84</sup> Once the left-behind parent has retained an attorney, that attorney will aid the left-behind parent in filing a Hague petition for the return of the child in the appropriate court. Impediments to smooth litigation may include language barriers to effective attorney-client communication and financial barriers that prevent the left-behind parent from traveling to the State of refuge for hearings.<sup>85</sup>

Not all U.S. courts are equally prepared to handle Hague Convention cases, which are “unusual” under the most straightforward circumstances.<sup>86</sup> To alleviate confusion, the State Department will send a letter to the judge presiding over the case that “explains the State Department’s role as U.S. Central Authority for the Hague Convention and refers to key provisions of the Hague Petition and documents regarding the history of the Hague Convention (*i.e.*, the Pérez-Vera Report).”<sup>87</sup> The State Department will also provide the judge with a list of other judges in the same (or nearby) jurisdiction(s) who may be able to provide their own experience as a guide.<sup>88</sup>

The State Department’s Hague Convention procedures are an example of how one Central Authority—albeit one in a demonstrably compliant State Party<sup>89</sup>—has decided to fulfill its requirements under Article 7. But this illustration also demonstrates how, even in compliant countries and under the best of circumstances, international child abduction cases are far from smooth sailing for the left-behind parent. In countries that have a demonstrated pattern of noncompliance with the Convention, judicial authorities fail to implement and comply with the provisions of the Convention and authorities fail to take appropriate steps to locate children or enforce return orders, leaving petitions unresolved—sometimes for years.<sup>90</sup> Thus, although the Hague Convention, and the cross-border cooperation the Convention mandates, has undoubtedly eased the otherwise-unmanageable burden on left-behind parents attempting to retrieve their abducted children, these cases remain extremely burdensome for the left-behind parent. This holds true even in complaint countries—but especially in those countries exhibiting a pattern of noncompliance.

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

<sup>85</sup> *Id.* at 94–95.

<sup>86</sup> *Id.* at 98.

<sup>87</sup> *Id.* at 99.

<sup>88</sup> *Id.*

<sup>89</sup> U.S. STATE DEP’T, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 8 (2020) <https://perma.cc/3W7C-HV5C>.

<sup>90</sup> Each year the U.S. State Department issues an annual report on compliance with the Hague Convention. In 2020, Argentina, Brazil, Costa Rica, Ecuador, Egypt, India, Jordan, Peru, Romania and the U.A.E. were all flagged as States Party demonstrating a pattern of noncompliance. *Id.*

## D. Prima Facie Case and Defenses

Article 3 of the Hague Convention provides that:

The removal or the retention of a child is to be considered wrongful where –  
 a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and  
 b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.<sup>91</sup>

It is typical for courts in the U.S. and in other States Party to condense and reframe these Article 3 elements into a threshold determination of habitual residence, followed by a two-step inquiry to determine whether the removal or retention was “wrongful.”<sup>92</sup> Consider the U.S. Supreme Court’s articulation of the prima facie case for wrongful removal under the Convention: the left-behind parent must establish by a preponderance of the evidence<sup>93</sup> that (1) the child was habitually resident in a foreign country immediately before his or her removal to or retention in the U.S., (2) the removal or retention is in breach of the petitioner’s custody rights under the law of the foreign country, and (3) the petitioner was exercising his or her custody rights at the time of removal or retention.<sup>94</sup>

There are five potential defenses<sup>95</sup> to a prima facie case of wrongful removal or retention, which, according to the Pérez-Vera Report, must be strictly construed—“applied only as far as they go and no further”—to prevent the Convention from becoming a “dead letter.”<sup>96</sup> These defenses include: the “age and maturity” exception (Article 13), the consent exception (Article 13(a)), the “now-settled” exception (Article 12), the human rights exception (Article 20), and the “grave risk of harm” exception (Article 13(b)).<sup>97</sup> The most common of these defenses is the Article 13(b) grave risk exception,<sup>98</sup> which is the subject of this Comment.

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<sup>91</sup> The Hague Convention, *supra* note 14, art. 3.

<sup>92</sup> The Pérez-Vera Report, *supra* note 43, at 444.

<sup>93</sup> International Child Abduction Remedies Act, 22 U.S.C. § 9003(e)(1) (implementing the Hague Convention in the U.S.).

<sup>94</sup> *See, e.g.,* Chafin v. Chafin, 568 U.S. 165, 168 (2013).

<sup>95</sup> MELISSA L. BREGER ET AL., *New York Law of Domestic Violence* § 4.6 (3d ed. 2020).

<sup>96</sup> The Pérez-Vera Report, *supra* note 43, at 434.

<sup>97</sup> The Hague Convention, *supra* note 14, arts. 12, 13 & 20.

<sup>98</sup> Sharon C. Nelson, *Turning Our Backs on the Children: Implications of Recent Decisions Regarding the Hague Convention on International Child Abduction*, 2001 U. ILL. L. REV. 669, 676 (2001).

### III. ARTICLE 13(B): THE *FRIEDRICH* FRAMEWORK

Article 13(b) of the Hague Convention states that

the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.<sup>99</sup>

*Friedrich v. Friedrich* is the preeminent case on the Article 13(b) grave risk defense. Not only does it define the grave risk exception for U.S. courts, it is also frequently cited in Hague Convention decisions abroad.<sup>100</sup> In *Friedrich*, the Sixth Circuit held that an Article 13(b) grave risk exists in two circumstances. The first is where “there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute—e.g., returning the child to a zone of war, famine, or disease.”<sup>101</sup> The second is “in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.”<sup>102</sup> As previously noted, in conducting an Article 13(b) analysis, “courts cannot consider information that would be proper in a plenary custody hearing, engage in a custody determination, or address who would be the better parent” because judges adjudicating Hague Convention cases are not authorized to pass judgment on the underlying custody dispute.<sup>103</sup>

Historically, American courts have construed the Article 13(b) defense narrowly, rarely finding a grave risk of harm to the child. This approach aligns with the drafters’ intention that all of the Convention’s defenses “be interpreted in a restrictive fashion.”<sup>104</sup> Applying the *Friedrich* framework, “U.S. courts have held that the defense is not satisfied in cases [where, upon return, the child will face] poverty, unfavorable living conditions, or limited educational opportunities.”<sup>105</sup> Additionally, pursuant to the Convention’s objective of deterring forum shopping by abductors, U.S. courts have found arguments predicated on psychological harm created by the child’s future separation from their abductor unconvincing, holding that “[t]he harm to the child must be greater

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<sup>99</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>100</sup> *See, e.g.*, C v. G [2020] IECA 223 (Ir.).

<sup>101</sup> *Friedrich v. Friedrich*, 78 F.3d 1060, 1069 (6th Cir. 1996) (emphasis omitted).

<sup>102</sup> *Id.*

<sup>103</sup> Lauren Cleary, *Disaggregating the Two Prongs of Article 13(b) of the Hague Convention to Cover Unsafe and Unstable Situations*, 88 FORDHAM L. REV. 2619, 2632 (2020).

<sup>104</sup> The Pérez-Vera Report, *supra* note 43, at 434.

<sup>105</sup> Cleary, *supra* note 103, at 2633.

than what is normally to be expected when a child is taken away from one parent and passed to another parent.”<sup>106</sup>

Foreign courts differ from those in the U.S. and each other in their treatment of the grave risk of harm exception in many of the exception’s applications. For example, the treatment of grave risk of harm defenses concerning allegations of domestic violence tends to vary considerably between courts.<sup>107</sup> In contrast, the treatment of Article 13(b) exceptions predicated on “the unsuitability of conditions in the child’s habitual residence writ large” is relatively uniform internationally.<sup>108</sup> That is because *Friedrich* is “well-known” throughout the global judiciary, and many courts employ it as a guide when adjudicating this type of defense, leading to more consistent results.<sup>109</sup> In most countries, however, there is a dearth of cases dealing with a grave risk of harm defense predicated on conditions in the child’s habitual residence. In the courts that have seen this construction of the exception raised, it has been “raised most frequently with regard to Israel.”<sup>110</sup> The vast majority of courts concluded that the war-zone conditions in Israel did not constitute a grave risk of harm to the child.<sup>111</sup> An Argentinian court of first instance reasoned that “[u]nfortunately, acts of terrorism due to political, racial and religious intolerance occur all over the world. As the Prosecutor for Minors points out in his judgment . . . in the city of Buenos Aires, where [the child currently lives], terrorist acts were perpetrated . . . which . . . caused outrage around the world.”<sup>112</sup> The court’s judgment rests on the distinction between a particularized risk and a general, or universal, one.

Because Article 13(b) is so often litigated and so often fraught with confusion relative to the Convention’s other defenses, it is the only Convention defense about which the Permanent Bureau of the Hague Conference on Private International Law (HCCH) has seen necessary to publish a guide. The HCCH’s Guide to Good Practice (the Guide) provides guidance on the operation of Article 13(b) defenses under the Hague Convention to all States Party.<sup>113</sup> The Guide to

<sup>106</sup> *Id.* at 2634.

<sup>107</sup> Peter McEleavy, *Case Law Analysis: Risks Associated with the Child’s State of Habitual Residence*, HAGUE CONF. ON PRIV. INT’L L.: INT’L CHILD ABDUCTION DATABASE (INCADAT) (April 2013) <https://perma.cc/9JRU-E68Y> [hereinafter McEleavy, *Habitual Residence Case Law Analysis*].

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> Buenos Aires Court of First Instance, 05/10/2001, “A v. A.” (2001) (Arg), <https://perma.cc/GAY7-3EMF>.

<sup>113</sup> HAGUE CONF. ON PRIV. INT’L L., *Part V—Article 13(1)(b)*, in [DRAFT] GUIDE TO GOOD PRACTICE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2019), <https://perma.cc/TJ6N-QGZ7> [hereinafter HCCH, ARTICLE 13(B) GUIDE].



Good Practice outlines three types of “grave risk.”<sup>114</sup> These types of risk are: a grave risk that the return would expose the child to physical harm, a grave risk that the return would expose the child to psychological harm, and a grave risk that the return would otherwise place the child in an intolerable situation. The Guide explains that these three types of risk must be (1) evaluated for the gravity of the risk and (2) assessed through a “forward-looking” lens.<sup>115</sup> First, the level of risk must be “grave”—“the risk must be real and reach such a level of seriousness to be characterized as ‘grave.’”<sup>116</sup> The Guide explains that the Convention drafters replaced “substantial risk” with “grave risk” because “‘grave’ was considered a more intensive qualifier.”<sup>117</sup> Second, the exception should focus on the situation the child will face once returned.<sup>118</sup> Although past experiences in their country of habitual residence may bear on this analysis, courts should be sure to factor in any changes that may have taken place since the child was last in the county that may affect his or her future experiences.<sup>119</sup>

There is some evidence that the Guide has proven a useful resource for courts struggling with conflicting interpretations of Article 13(b). In 2011, the United Kingdom Supreme Court clarified the scope of the Article 13(b) defense in its seminal case *Re E (Children)*. The decision echoed a number of the principles set forth in the Guide and added that “[t]here is no need for Art[icle] 13(b) to be narrowly construed. By its very terms it is of restricted application. The words of Art[icle] 13 are quite plain and need no further elaboration or gloss.”<sup>120</sup>

#### IV. ALTERNATIVES TO THE IMMEDIATE RETURN OF THE CHILD

If a court finds that the abductor has failed to establish a grave risk of harm defense, the child must be returned to his or her country of habitual residence. However, the judge is empowered to temporarily stay the return order. This option is useful in the context of infectious disease outbreaks—the court can reject the Article 13(b) exception but keep the child in the State of refuge until it is safe for him or her to travel.<sup>121</sup>

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<sup>114</sup> *Id.* at 15.

<sup>115</sup> *Id.* at 15–16.

<sup>116</sup> *Id.* at 15.

<sup>117</sup> *Id.* at 15 n.49.

<sup>118</sup> *Id.* at 16.

<sup>119</sup> *Id.*

<sup>120</sup> *BK v. NK* [2016] EWHC (Fam) 2496, [45] (explaining the holding in *Re E (Children)* (Abduction: Custody Appeal) [2011] 2 FLR 758), <https://perma.cc/B9XL-FTSX>.

<sup>121</sup> *See, e.g., Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*8 (W.D. Tex. Apr. 30, 2020) (“However, IT IS FURTHER ORDERED that the effective date of this Order is stayed, indefinitely, until such time as the Court and the parties can be reasonably confident that the

If a court finds that the abductor has successfully established a grave risk of harm defense, the judge is faced with a decision. Article 13(b) provides that even if the court does find that the exception applies, the judge still has the ability to exercise his or her discretion to return the child notwithstanding the fact that the abductor has met his or her burden to show a grave risk of harm.<sup>122</sup> A judge in the High Court of the Hong Kong Special Administrative Region Court of Appeal explained under what circumstances judges should exercise their discretion:

It may be that *highly unusual* or *exceptional* circumstances might justify the exercise of the discretion to return the child notwithstanding the grave risk shown to exist although it is difficult to conceive of such situations. Even so, this could not and should not be done without the judge being fully satisfied that adequate and sufficient practical measures are in place to ensure that the child would not be exposed to any risk of harm.<sup>123</sup>

In some States Party, courts are required to exercise their judicial discretion by considering protective measures that would, notwithstanding a grave risk of harm, allow the child to be returned to his or her habitual residence. Some U.S. courts are also required to consider such measures. The Second, Third, Sixth, Seventh, and Ninth Circuits have all held that before denying return based on the grave risk of harm exception, courts should consider protective measures that would allow the child's return while still providing for the child's protection.<sup>124</sup>

In most countries, protective measures take the form of voluntary undertakings, which are promises made by the left-behind parent to the court to do (or not do) certain things in conjuncture with the child's return order. According to the Guide,

[a]n undertaking is a voluntary promise, commitment or assurance given by a natural person – in general, the left-behind parent – to a court to do, or not to do, certain things. Courts in certain jurisdictions will accept, or even require, undertakings from the left-behind parent in relation to the return of a child. An undertaking formally given to a court in the requested jurisdiction in the context of return proceedings may or may not be enforceable in the State to which the child will be returned.<sup>125</sup>

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COVID-19 pandemic no longer renders international travel unsafe and widespread social distancing practices are no longer necessary . . . The Court will schedule status conferences as necessary to determine the precise date and the logistics of Y.E.G.'s return, involving the Mexican Consulate when appropriate and keeping in mind the need to ensure Y.E.G.'s return is both 'prompt' and 'safe.'").

<sup>122</sup> The Hague Convention, *supra* note 14, art. 13.

<sup>123</sup> D. v. G. [2001] 1179 H.K.C. 1, 5 (C.F.A.) (H.K.), <https://perma.cc/QSH8-DPB2> (emphasis added).

<sup>124</sup> See generally Tracy Bateman Farrell, Annotation, *Construction and Application of Grave Risk of Harm Exception in Hague Convention on the Civil Aspects of International Child Abduction as Implemented in International Child Abduction Remedies Act*, 42 U.S.C.A. § 11603(e)(2)(A), 56 A.L.R. Fed. 2d 163 (2011).

<sup>125</sup> HCCH, ARTICLE 13(B) GUIDE, *supra* note 113, at 8.

The Guide adds that such voluntary undertakings are not easily enforceable and therefore “should be used with caution, especially in cases [where the grave risk involves] domestic violence.”<sup>126</sup> The court may also be able to give legal effect to a protective measure via a mirror order in the state of habitual residence if possible and available.<sup>127</sup> However, the court “cannot make orders that would exceed its jurisdiction or that are not required to mitigate an established grave risk.”<sup>128</sup>

If a “grave risk” *is* found—and if the judge declines to exercise his or her discretion to return the child notwithstanding the successfully mounted defense—the consequences for the abducted child are fairly permanent: the left-behind parent’s petition will be denied, and the court will order the child to remain in the physical custody of the abductor. The left-behind parent can appeal the decision according the civil procedure rules of the court. After the left-behind parent exhausts the appeals process, however, the child’s custody status can only change if other forms of adjudication intercede—if, for example, a family court resolved the underlying custody dispute in a way that is averse to the abductor. The odds, however, of a favorable custody outcome for the left-behind parent in this situation are miserably low. The Pérez-Vera Report, explains why:

It frequently happens that the person retaining the child tries to obtain a judicial or administrative decision in the State of refuge, which would legalize the factual situation which he has just brought about. However, if he is uncertain about the way in which the decision will go, he is just as likely to opt for inaction, leaving it up to the dispossessed party to take the initiative. Now, even if the latter acts quickly, that is to say manages to avoid the consolidation through lapse of time of the situation brought about by the removal of the child, the abductor will hold the advantage, since it is he who has chosen the forum in which the case is to be decided, a forum which, in principle, he regards as more favourable to his own claims. . . . In fact, resorting to this expedient, an individual can change the applicable law and obtain a judicial decision favourable to him. Admittedly, such a decision . . . will enjoy only a limited geographical validity, but in any event it bears a legal title sufficient to 'legalize' a factual situation which none of the legal systems involved wished to see brought about.<sup>129</sup>

As discussed in Section II(A), the Hague Convention’s *raison d'être* is to ensure that the left-behind parent does not face the forum and logistical disadvantages inherent in being forced to litigate the underlying custody dispute in a foreign country chosen by the abductor. If the left-behind parent’s petition is denied because of a successful grave risk of harm defense, the left-behind parent, after exhausting the appeals process, is essentially left to fend for his or herself. When a left-behind parent emerges from the Hague Convention process empty-

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<sup>126</sup> *Id.* at 21.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> The Pérez-Vera Report, *supra* note 43, at 429.

handed like this, it is more likely than not that the abductor will prevail in retaining the abducted child long-term.

## V. COVID-19'S IMPACT ON HAGUE CONVENTION CASES

COVID-19 originated in China in 2019 but quickly spread around the globe, dramatically altering daily life everywhere.<sup>130</sup> The virus is highly contagious and spreads from person to person among those in close contact through respiratory droplets.<sup>131</sup> When an infected person coughs, sneezes, or talks, they release droplets which are in turn inhaled by people within about six feet, or two meters, of the contagious person.<sup>132</sup> Common symptoms include fever, cough, and tiredness, and the severity of symptoms range from mild to severe.<sup>133</sup> In the early days of the outbreak, several hotspots emerged, including Wuhan, China; Iran; northern Italy; Spain; and New York.<sup>134</sup> As the global outbreak unfolded, the geographical concentrations of COVID shifted. Even a year after the outbreak, the number of new cases was growing faster than ever.<sup>135</sup> By January 1, 2021, the virus had infected at least 84.2 million people, claiming 1.8 million lives worldwide.<sup>136</sup> Eleven months after the outbreak started, more than 500,000 new cases of COVID-19 were reported globally per day.<sup>137</sup> COVID-19 prompted worldwide school closures, workplace closures, and travel bans. This Section discusses how the global pandemic impacted Hague Convention litigation both logistically and substantively.

### A. Logistical Obstacles to the Administration of Proceedings

It goes without saying that the administration of international child abduction cases—like the administration of all judicial proceedings, particularly those with an international dimension—was complicated by the COVID-19 pandemic. When lockdowns began in March 2020, a member of the International Secretariat of the Association of Judges of Brazil began compiling information from colleagues in different countries to draft a global survey of measures taken

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<sup>130</sup> *Covid World Map: Tracking the Global Outbreak*, N.Y. TIMES, <https://perma.cc/8RQD-53RL>.

<sup>131</sup> *Coronavirus Disease 2019 (COVID-19)*, MAYO CLINIC (Nov. 6, 2020), <https://perma.cc/U5JH-BC7V>.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Covid World Map*, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

to suspend judicial activity.<sup>138</sup> The informal report showed that, over the course of just ten days in March, the suspension of judicial activity spread at an unprecedented rate across the globe. On March 22, 2020, the member wrote:

The world faces an invisible army that carries death and disease wherever it goes. Scientists struggle against time in search of a vaccine against the virus or a cure for the disease. Governments adopt extreme contact restriction measures, with unpredictable economic consequences. . . . In this extreme scenario, the Judiciary in the world is forced to adapt. Presential activities are severely restricted in the most affected countries, but not only there. Remote work is widely adopted. Virtual audiences are encouraged.<sup>139</sup>

And yet, despite the challenges presented by COVID-19, the wheels of justice continued turning—“[t]he Judiciary adapts, but does not stop.”<sup>140</sup>

## B. Guidance from the HCCH

The year that the Hague Convention was signed, 1980, was a triumphant year for global health: it was the year that the World Health Organization (WHO) formally declared the global eradication of smallpox.<sup>141</sup> Smallpox had plagued humans for millennia and killed one third of infected patients.<sup>142</sup> The WHO’s formal declaration followed a nearly two-decade-long global vaccination campaign, which was seen as a culmination of advances in the science of vaccinations. “Polio vaccines, which were introduced in the 1950s and 1960s lead to similar success globally.”<sup>143</sup> In the decades leading up to the signing of the Hague Convention, several epidemics impacted the global community. The Asian Flu pandemic killed more than one million people worldwide between 1957 and 1958.<sup>144</sup> In 1961, “a cholera pandemic originating in Indonesia spread[] to other parts of Asia, the Middle East, and Africa.”<sup>145</sup> In 1968, the Hong Kong Flu pandemic killed an estimated one million people, about half of them residents of Hong Kong.<sup>146</sup> The Hague Convention was signed a year before the Centers for

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<sup>138</sup> *Report on World’s Judicial Activity During the Coronavirus Pandemic*, INT’L ASS’N OF JUDGES (Mar. 26, 2020), <https://perma.cc/9EJT-3XXQ>.

<sup>139</sup> PAULO ROBERTO DORNELLES JUNIOR, INT’L ASS’N OF JUDGES, *REPORT ON WORLD’S JUDICIAL ACTIVITY DURING THE CORONAVIRUS PANDEMIC* 12–13 (2020), <https://perma.cc/Q443-EQZ7>.

<sup>140</sup> *Id.* at 13.

<sup>141</sup> *Timeline: Major Epidemics of the Modern Era 1899–2021*, COUNCIL ON FOREIGN REL. (Apr. 1, 2021) <http://perma.cc/KSL3-SXXF>.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

Disease Control and Prevention (CDC) first reported “a rare form of pneumonia later identified as Acquired Immunodeficiency Syndrome, or AIDS.”<sup>147</sup>

Although the signing of the Hague Convention coincided with a revolutionary achievement in the realm of global health—and although it can safely be assumed that most, if not all, of the drafters were savvy to the existence of recent outbreaks of smallpox, cholera, and Hong Kong Flu—there is no evidence that the drafters discussed the potential impact of infectious disease outbreaks on international child abduction cases.<sup>148</sup> The Hague Convention was intended to address a very specific type of cross-border, peacetime cooperation; it was not designed with a global health crisis or accompanying lockdowns and judicial suspensions in mind.

In July 2020, the HCCH released an emergency toolkit to help guide courts amidst the pandemic.<sup>149</sup> The toolkit advises that cases should be considered on an ad hoc basis and assures courts that “[t]he Convention continues to be effectively applied in times of COVID-19 through contact and cooperation with, and the sharing of resources between, Central Authorities.”<sup>150</sup> The toolkit encourages courts to “[f]ocus on the child” by “[s]ecuring the safe and prompt return of the child to the State of habitual residence” and “[e]nsuring continuing and suitable contact between [the left-behind] parent and child.”<sup>151</sup> The Permanent Bureau urges States Party to employ mediation, embrace technology, safeguard equality in access to the courts, and communicate “among members of the judiciary across borders through direct judicial communications or the International Hague Network of Judges.”<sup>152</sup> The toolkit acknowledges that “[t]he current restrictions on international travel pose challenges to the enforcement of return orders under the Convention.”<sup>153</sup>

In courts around the world, judges responded to the new practical obstacles facing Hague Convention proceedings. These proceedings are voluminous; in 2015, at least 2,997 children were involved in 2,270 return of child petitions.<sup>154</sup>

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<sup>147</sup> *Id.*

<sup>148</sup> There is no evidence of any discussion of infectious disease in the Hague Convention’s explanatory documents. *See* The Pérez-Vera Report, *supra* note 43; ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION TOME III: ENLÈVEMENT D’ENFANTS (le Bureau Permanent de la Conférence ed., 1980) <https://perma.cc/XB6H-J7C7>.

<sup>149</sup> HAGUE CONF. ON PRIV. INT’L L., TOOLKIT FOR THE 1980 CHILD ABDUCTION CONVENTION IN TIMES OF COVID-19 (July 3, 2020), <https://perma.cc/3Z22-2XJJ>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> NIGEL LOWE & VICTORIA STEPHENS, HAGUE CONF. ON PRIV. INT’L L., PART I – A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2015 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980

Many judges held their Hague Convention proceedings remotely.<sup>155</sup> In Hague Convention cases where the left-behind parent prevailed, courts have been faced with the realities of enforcing return orders in the middle of a global pandemic. Citing the Convention's requirement that the return of the child be "prompt,"<sup>156</sup> many courts have chosen to enforce return orders without delay, despite the risks of travel.<sup>157</sup> Other courts have temporarily stayed the return of the child,<sup>158</sup> citing travel bans, the risks associated with travel during the pandemic, and the Convention's requirement that children's returns be "safe."<sup>159</sup>

### C. Article 13(b) Issues

As more Hague Convention cases grapple with infectious disease as the basis for Article 13(b) defenses, three major questions will likely emerge. First, does international travel generally—and air travel specifically—pose a "grave risk of harm" during an infectious disease outbreak? Since the start of the pandemic, the vast majority of governments have issued stay-at-home requirements or household lockdowns.<sup>160</sup> In January 2021, the majority of governments had either 1) an active stay-at-home order, recommending citizens refrain from leaving their homes or 2) an active stay-at-home order with exceptions for daily exercise, grocery shopping, and other essential errands.<sup>161</sup> Additionally, many countries had active travel bans.<sup>162</sup> Both of these types of government responses were designed

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ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 3 (2018), <https://perma.cc/HA27-L9DV>.

<sup>155</sup> See, e.g., *KR v. HH*, [2020] EWHC (Fam) 834 (Eng.).

<sup>156</sup> The Hague Convention, *supra* note 14, art. 1.

<sup>157</sup> See, e.g., *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*15 (M.D.N.C. Aug. 26, 2020) ("[T]he minor child, Z.R., shall be returned forthwith to the Country of Jamaica. Respondent shall arrange for Z.R. to be returned to Jamaica on or before September 4, 2020."); Thüringer Oberlandesgericht [OLGZ] [Higher Regional Court of Thuringia] Mar. 17, 2020, 1 UF 11/20 (Ger.) ("In its letter dated March 16, 2020, the Youth Welfare Office applied to have enforcement of the return order issued by Jena Local Court—Family Court—deferred for a limited period due to the current coronavirus pandemic. . . . The application made by the Youth Welfare Office is to be rejected.").

<sup>158</sup> See, e.g., *Gallegos v. Garcia Soto*, No. 1:20-CV-92-RP, 2020 WL 2086554, at \*8 (W.D. Tex. Apr. 30, 2020) ("However, IT IS FURTHER ORDERED that the effective date of this Order is stayed, indefinitely, until such time as the Court and the parties can be reasonably confident that the COVID-19 pandemic no longer renders international travel unsafe and widespread social distancing practices are no longer necessary . . . The Court will schedule status conferences as necessary to determine the precise date and the logistics of Y.E.G.'s return, involving the Mexican Consulate when appropriate and keeping in mind the need to ensure Y.E.G.'s return is both "prompt" and "safe.").

<sup>159</sup> The Hague Convention, *supra* note 14, art. 7.

<sup>160</sup> *Policy Responses to the Coronavirus Pandemic*, OUR WORLD IN DATA, <https://perma.cc/NQ8R-EDX9>.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

to slow the spread of the virus. Most governments strongly discouraged international travel and air travel. In the case outlined in the Introduction, *KR v. HH*, the judge acknowledged that “international travel at this time potentially carries with it a higher prospect of infection than remaining in self-isolation.”<sup>163</sup>

Second, can one country’s infectious disease outbreak pose a “grave risk of harm” relative to another country’s outbreak? This line of inquiry acknowledges the ubiquity of the pandemic but also pits the infection rates of the child’s habitual residence against those in the State of refuge. It may also compare the prudence and efficacy of different government responses and public health policies or assert predictions about how a certain government’s responses and policies will impact future infection rates in that country. Judges typically appear reluctant to engage in this type of comparative analysis. The judge in *KR v. HH* refused to make a finding as to relative risk between England and Spain and simply concluded that there was “a genuine risk that PT could contract the virus whether she remains in England or returns to Spain.”<sup>164</sup>

Third, does a child—or do children in general—face a grave risk of *illness* after being infected by the infectious disease? Instead of evaluating the risk of exposure that a child’s return will entail and the likelihood that a child will contract the virus, this line of inquiry assesses the relative risk of the symptoms the child would experience should he or she contract the virus. Although many people only experience mild symptoms once they become infected with COVID, others face serious illness and complications like pneumonia, organ failure, blot clots, and/or death.<sup>165</sup> Data shows that older adults have a higher risk of serious illness and complications from COVID-19;<sup>166</sup> when compared to this vulnerable age group, children may not face a grave risk of illness. Similarly, if a child has an existing chronic medical condition known to put people at greater risk of becoming seriously ill with COVID-19, such as sickle cell disease, severe obesity, or serious heart disease, he or she may face a grave risk of illness.<sup>167</sup> In *KR v. HH*, the judge made a point of noting that neither PT nor her parents were elderly or had preexisting health concerns.<sup>168</sup> Ultimately, the judge incorporated this fact into his ultimate finding by reasoning that although “the travel associated with a return is likely to increase the risk that PT could contract coronavirus . . . I do not consider such a risk, when considered *in the context of the likely harm that would be suffered by PT*

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<sup>163</sup> *KR v. HH* [2020] EWHC (Fam) 834, [47] (Eng.).

<sup>164</sup> *Id.*

<sup>165</sup> *Coronavirus disease 2019 (COVID-19)*, *supra* note 131. As noted *supra*, note 1, the COVID-19 pandemic is ongoing at the time of writing. There may be risks and side-effects that are presently unknown to the author.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *KR v. HH*, at [47].



*should she contract the virus*, is sufficient to amount to the ‘grave risk’ of physical harm required by Art[icle] 13(b).<sup>169</sup>

Recently, a number of these issues were raised in *The Father v. The Mother*,<sup>170</sup> a Hague Convention case in a family court in Tel Aviv. In that case, the mother (abductor) opposed her daughter’s return to the U.S. from Israel, arguing that “[t]here is a real health danger to the Minor, and each day worsens and increases the risk of damage should she fly. According to the experts, the epidemic in the United States is not under control at this point.”<sup>171</sup> The mother pointed to news articles to bolster her position, including one entitled “More than China: The United States is first in the number of corona patients.”<sup>172</sup> When asked to respond, the father wrote, “[t]he corona situation as you know is a problematic situation worldwide,” adding that “the situation in Israel is worse than the situation in California.”<sup>173</sup> Additionally, he argued that his daughter had health insurance in the U.S. but not in Israel—“If, God forbid, something happens to her, then [California] is the place where she should be.”<sup>174</sup> The father noted that “children are hardly at risk, the risk is marginal or non-existent.”<sup>175</sup>

The court concluded that the child would be safer in the U.S. “in light of the insurance coverage there” and held that because COVID-19 was not related to the child’s health condition, the mother had not demonstrated that the child would face a grave risk of harm.<sup>176</sup> In its opinion, the court highlighted the mother’s COVID-19 Article 13(b) defense, writing:

There is extreme importance that precisely in times of great uncertainty it is heard loud and clear that Minors’ rights are not an anarchy and the emergency situation cannot be exploited for change status de-facto [sic] disregarding the Minor’s right, her Father’s rights and ignore [sic] the provisions under International Conventions designed for ensuring minors’ rights and intended to settle complex legal and urgent situations between countries.<sup>177</sup>

The court also rejected the mother’s requests to delay the ruling in the case and prohibit the return of the child until the travel restrictions put in place by Israel’s Ministry of Health and the WHO had been lifted.<sup>178</sup>

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<sup>169</sup> *Id.* (emphasis added).

<sup>170</sup> FamC (FC TA) 52595-02-20 *The Father v. The Mother* (Apr. 5, 2020) (Isr.), <https://perma.cc/E8NN-HEZS>.

<sup>171</sup> *Id.* at 56.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 58.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 59.

<sup>177</sup> *Id.* at 55.

<sup>178</sup> *Id.* at 54.

## VI. ANALOGIZING INFECTIOUS DISEASE TO EXISTING PRECEDENT

Surprisingly, legal scholars have never evaluated the propriety of an Article 13(b) defense predicated on the risks of an infectious disease, even though “disease” is one of the three zones enumerated by the *Friedrich* framework. Despite outbreaks of Ebola, cholera, SARS, and Zika over the last decade,<sup>179</sup> COVID-19-era litigation is the first to bring to light the potential applicability of the Article 13(b) exception to instances of infectious disease outbreaks. First, this Section will establish the dearth of “zone of disease” caselaw. Next, it will turn to the most robust category of “zone of” caselaw—“zone of war” cases—and reflect again on the narrow parameters of Article 13(b) and courts’ preferences for showings of particularized risk. Throughout this Section, the COVID-19 fact patterns serve as a touchstone to discuss the broader issue of Article 13(b) exceptions predicated on the risks of infectious diseases.

## A. The Illusive “Zone of Disease”

The “zone of disease” construction of the Article 13(b) defense is rarely raised by abductors and, when it is, it is typically raised halfheartedly and as part of a broader argument about conditions in the child’s habitual residence. In *Tavarez v. Jarrett*,<sup>180</sup> for example, the abductor argued that Mexico posed a grave risk of harm to the child “due to inadequate medical care, risk of disease, high rates of criminal activity, and abuse.”<sup>181</sup> The court found that there was no evidence offered to support the “zone of disease” defense other than the testimony of the abductor’s counsel that “there is no mosquito control [in Mexico].”<sup>182</sup>

Sometimes, courts characterize the defenses, that couch these weak “zone of disease” arguments, as poverty defenses. Typically, courts are unsympathetic to poverty defenses in the Hague Convention context, sensing the possibility of their abuse by abductors who are more affluent than their taking parent counterparts. For example, in *Cuellar v. Joyce*, the Ninth Circuit assessed a grave risk of harm defense brought by the father, claiming that the mother’s home in Panama lacked running water, air conditioning, or refrigeration and that the child was not given a proper diet, had reoccurring ear infections, and had unexplained burns behind her ears.<sup>183</sup> The father also asserted that the child had suffered a head trauma in an accident that could have been prevented had the mother been attentive.<sup>184</sup> The

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<sup>179</sup> *Disease Outbreaks*, WORLD HEALTH ORG., <https://perma.cc/A7E7-2ZMZ>.

<sup>180</sup> *Tavarez v. Jarrett*, 252 F. Supp. 3d 629 (S.D. Tex. 2017).

<sup>181</sup> *Id.* at 638–39.

<sup>182</sup> *Id.* at 640.

<sup>183</sup> *Cuellar v. Joyce*, 596 F.3d 505, 509–10 (9th Cir. 2010).

<sup>184</sup> *Id.*

court noted that “[b]illions of people live in circumstances similar to those described . . . . If that amounted to a grave risk of harm, parents in more developed countries would have unchecked power to abduct children from countries with a lower standard of living.”<sup>185</sup> The Ninth Circuit held that the claims made by the father did not amount to a “grave risk of harm” and ordered the return of the child to Panama.<sup>186</sup>

Unlike the concerns raised by the father in *Cuellar*, the risks associated with the global pandemic have much less to do with the wealth of a country or the financial stability of the left-behind parent. While there is evidence that poverty may heighten the risk of infection and complications from COVID-19, the pandemic clearly affects populations across socioeconomic lines.<sup>187</sup> Thus, a court could not dismiss a COVID-19 “zone of disease” defense on the grounds that it constituted a poverty defense. However, it is possible that a future infectious disease outbreak could have a socioeconomic dimension that is not borne out by COVID-19. The Ninth Circuit’s statement that “[b]illions of people live in similar circumstances to those described” does apply to the current situation. Thus, the fact that the pandemic is ubiquitous may undermine its utility as the basis for an Article 13(b) defense. On the other hand, if a future infectious disease outbreak were less ubiquitous and more localized, this aspect of the inquiry might cut the other way.

In *C v. G*<sup>188</sup> the Republic of Ireland’s Court of Appeal tackled the “zone of disease” defense head on. The Court of Appeal overturned a High Court decision to refuse the return of a seven-year-old boy to Poland on the grounds that international travel during COVID-19 posed a grave risk to his physical safety.<sup>189</sup> The Court of Appeal held that the risks posed by COVID-19 were insufficient to establish an Article 13(b) defense alone.<sup>190</sup> The court noted that *Friedrich*’s “zone of disease” formulation would be rendered moot by this application, since every country in the world had been affected by the pandemic.<sup>191</sup> Allowing a “zone of disease” defense in this case would, “essentially, involve the suspension of the operation of the Convention.”<sup>192</sup> The court went on to note that the “zone of

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<sup>185</sup> *Id.* at 509.

<sup>186</sup> *Id.* at 512.

<sup>187</sup> COLUM. UNIV. IRVING MED. CTR., *Crowded Homes, Poor Neighborhoods Linked to COVID-19*, SCIENCE DAILY (Jun. 18, 2020), <https://perma.cc/4CU4-PAXN> (“A study of nearly 400 pregnant women in New York City is among the first to show that lower neighborhood socioeconomic status and greater household crowding increase the risk of becoming infected with SARS-CoV-2, the virus that causes COVID-19.”).

<sup>188</sup> *C v. G* [2020] IECA 223 (Ir.), <https://perma.cc/529T-AFS2>.

<sup>189</sup> *Id.* at [149].

<sup>190</sup> *Id.* at [120].

<sup>191</sup> *Id.* at [84].

<sup>192</sup> *Id.*

disease” formulation should be understood in the context of its inclusion with “war” and “famine”—suggesting that the “zone of disease” formulation should be limited as well.<sup>193</sup> The application of the “zone of disease” defense in *C v. G* aligns with the trend in *Friedrich* caselaw towards narrow construction and with the general thrust of *Cuellar*.

The HCCH’s Guide to Good Practice acknowledges that health risks could constitute an Article 13(b) exception. First, the Guide advises that “[i]n cases involving assertions associated with the child’s health, the grave risk analysis should focus on the availability of treatment in the State of habitual residence, and not on a comparison between the relative quality of care in each State.”<sup>194</sup> In analogizing to the infectious disease outbreak fact pattern, this guidance suggests that, provided there are adequate government public health precautions and medical facilities available in the child’s country of habitual residence, courts should resist comparing the healthcare systems of the two countries. The Guide’s resistance to comparison may also suggest, more broadly, that courts should avoid comparing the relative risk of infection in the two countries. Second, the Guide advises that “[a] grave risk will typically be established only in situations where a treatment is or would be needed urgently and it is not available or accessible in the State of habitual residence, or where the child’s health does not allow for travel back to this State at all.”<sup>195</sup>

In *State Central Authority v. Maynard*, the Family Court of Australia held that return to England would expose a child to an Article 13(b) grave risk where extensive medical records demonstrated that the child’s epileptic seizures meant that “travel could result in significant and serious damage to [the child] or her death.”<sup>196</sup> On the other hand, the court rejected the abductor’s arguments comparing the English medical system to the Australian medical system.<sup>197</sup>

Here, there is a clear parallel to the risk of international travel presented by an infectious disease outbreak and the arguments echo those raised by the abductor in *The Father v. The Mother*. However, in *State Central Authority*, the child had a specific, demonstrable, pre-existing medical condition that created a particularized serious health risk incident to travel. This distinction suggests that while the Guide and cases like *State Central Authority* may encourage courts to consider the risks of travel in terms of how an infectious disease may interact with a child’s pre-existing medical condition, these authorities would not necessarily extend that consideration to every child during an infectious disease outbreak. It

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<sup>193</sup> *Id.*

<sup>194</sup> HCCH, ARTICLE 13(B) GUIDE, *supra* note 113, at 27.

<sup>195</sup> *Id.*

<sup>196</sup> *State Central Authority v Maynard* (Unreported, Family Court of Australia at Melbourne, Kay J, 9 March 2003) [27] (Austl.).

<sup>197</sup> *Id.* at [30].

is likely that the generalized health risks associated with international travel during COVID-19 do not fall within the purview of this guidance.

## B. Zone of War

Although, the zone of war caselaw is more fleshed out than other aspects of the *Friedrich* framework, the existing precedent mostly serves to confirm and reinforce the limitations of the Article 13(b) “zone of” exceptions. Commensurate with other areas of *Friedrich* caselaw, the zone of war formulation is construed “extremely narrow[ly]” by courts and rarely, if ever, succeeds.<sup>198</sup> In *Silverman v. Silverman*, for example, the Eighth Circuit held that Israel did not constitute a zone of war, despite intense regional violence, including suicide bombings.<sup>199</sup> As previously mentioned in Section III, the U.S. is not alone—courts in Argentina, Australia, Belgium, Canada, Denmark, the U.K., France, and Germany have all found that the conditions in Israel did not constitute a grave risk of harm within the meaning of Article 13(b).<sup>200</sup> In reaching its decision the Eighth Circuit reasoned that the situation “threaten[ed] everyone in Israel,” bolstering the idea that a generalized risk may be insufficient to show a grave risk.<sup>201</sup> This reasoning is awkward because, almost by definition, a zone of war creates a dangerous situation for the general public. If general regional violence that “threaten[s] everyone” is insufficient to demonstrate a grave risk of harm under *Friedrich*, is the zone of war framework obsolete? Likely, under *Silverman*’s logic, the risk of an infectious disease outbreak does not rise to the level of grave risk imagined by Article 13(b). Indisputably, the pandemic “threaten[s] everyone.” This generalization is even more true in the COVID-19 context because the threat of the pandemic cannot be conceptually severed from its global nature—whereas the violence in *Silverman* only extended to the broader Middle East/North Africa region. And, crucially, the risks are equally extreme: death is the worst-case scenario of living in a war zone or being infected by a disease.

The *Silverman* opinion points to a district court case with more concrete zone of war criteria.<sup>202</sup> *Freier v. Freier* evaluates another a grave risk of harm defense predicated on the 1996 violence in Israel, finding it similarly insufficient to the defense raised in *Silverman*.<sup>203</sup> But unlike the Eighth Circuit in *Silverman*, in reaching its decision in *Freier*, the district court provided specific reasoning. The court held

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<sup>198</sup> Cleary, *supra* note 103, at 2645.

<sup>199</sup> *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003).

<sup>200</sup> See McEleavy, *Habitual Residence Case Law Analysis*, *supra* note 107.

<sup>201</sup> *Silverman*, 338 F.3d at 901.

<sup>202</sup> *Id.* at 900–01.

<sup>203</sup> *Freier v. Freier*, 969 F. Supp. 436, 443 (E.D. Mich. 1996), (“The Court would agree that at this time Israel is experiencing some unrest and that this unrest may be in relative proximity to the family’s residence. However, the Court does not find sufficient evidence in this record for Israel to be the ‘zone of war’ contemplated by the Sixth Circuit or the Hague Convention.”).

that Israel did not qualify as a zone of war because schools and businesses were open and the petitioner was able to leave the country.<sup>204</sup> Additionally, the court noted that “the fighting is limited to certain areas and does not directly involve the city where the child resides.”<sup>205</sup>

Analogizing from this logic, COVID-19 would most likely have constituted a grave risk of harm in some countries at certain points during the course of the pandemic. First, school closures were widespread due to the pandemic. According to UNESCO, on April 2, 2020, 84.5% of total learners enrolled at pre-primary, primary, lower-secondary, upper-secondary, and tertiary education levels were impacted by COVID-19 school closures worldwide.<sup>206</sup> Almost 1.5 billion learners were affected, and 172 countries had implemented nationwide school closures.<sup>207</sup> By September 2020, those numbers had fallen, but 49.6% of total learners were still impacted by closures worldwide.<sup>208</sup> More than 850 million children were still affected, and there were 50 country-wide school closures still in effect.<sup>209</sup>

Second, many countries had workplace closures as a result of the pandemic. In some countries, including China, Brazil, Chile, and Indonesia, workplace closures were still in effect in September 2020 for all but essential workplaces such as grocery stores and medical facilities.<sup>210</sup> By contrast, in countries like Canada, Mexico, India, and Russia workplace closures were only in effect for select sectors or categories of workers as of fall 2020.<sup>211</sup> Globally, workplace closures shifted with the tides of infection rates and public policy calculations as the markets reacted to the cost of forced closures and laborers reevaluated health risks against growing financial pressure to return to work.

Third, many countries put in place travel bans to stem the flow of the pandemic. For example, in April 2020, more than 7.1 billion people worldwide lived in countries with travel bans.<sup>212</sup> “Roughly 3 billion people . . . live[ed] in countries with borders completely closed to noncitizens and nonresidents.”<sup>213</sup> On March 28, China closed its borders to foreigners with the exception of “some diplomatic and scientific personnel.”<sup>214</sup> At the start of the pandemic India “closed

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *COVID-19—Education: From Disruption to Recovery*, UNESCO, <https://perma.cc/7QJP-QPMC>.

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Policy Responses to the Coronavirus Pandemic*, *supra* note 160.

<sup>211</sup> *Id.*

<sup>212</sup> Phillip Connor, *More Than Nine-in-ten People Worldwide Live in Countries with Travel Restrictions Amid COVID-19*, PEW RES. CTR. (Apr. 1, 2020), <https://perma.cc/68SP-2DVY>.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

its borders by suspending visas and requiring a two-week quarantine for all arrivals regardless of citizenship.”<sup>215</sup> Since the beginning of the outbreak, governments slowly lifted or amended travel bans, but many countries continued to enforce travel restrictions in some form or another, especially for noncitizens.<sup>216</sup> In September 2020, 70 countries were completely closed and 55 countries had no travel restrictions.<sup>217</sup>

Thus, according to the three metrics posited by *Freier*, COVID-19 may have presented a grave risk of harm to some children in certain countries at certain times during the pandemic. However, the analysis above highlights the fickle nature of *Freier*'s standards in this context, as the impacts of infectious diseases are constantly in flux. The *Freier* framework may be administrable in the context of a protracted war, but in terms of an infectious disease outbreak, where the landscape of risk and government responses change daily, these metrics would likely prove unmanageable. Additionally, *Freier*'s reasoning has a very limited sphere of influence. Not only does it lack appellate authority, the opinion also employs this criterion to reach an unfavorable decision for the abductor on the Article 13(b) defense. The likelihood that *Freier* could be used to successfully argue an Article 13(b) defense predicated on the risks posed by the pandemic or another infectious disease outbreak is slim. This likelihood is weakened by a stark fact raised in *Silverman*: “there does not appear to be [any] case that finds any country a ‘zone of war’ under the Convention.”<sup>218</sup>

## VII. SUGGESTIONS

This Comment recommends that, generally, courts should reject Article 13(b) defenses predicated on infectious disease outbreaks like COVID-19. Instead, courts should adopt a rebuttable presumption that the risk of exposure to an infectious disease does not constitute a grave risk of harm to the child within the meaning of the Hague Convention. If States Party decline to adopt such a rebuttable presumption, they should, at the very least, provide left-behind parents with an equitable relief doctrine in cases where the abductor has already put the child at risk of infection.

### A. The Rebuttable Presumption

This Comment advocates for a rebuttable presumption against “zone of disease” defenses. Under this rule, the abductor would be able to rebut the presumption against the “zone of disease” defense by demonstrating that the child

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<sup>215</sup> *Id.*

<sup>216</sup> *Travel Restrictions by Country*, KAYAK, <https://perma.cc/NXS2-YC28>.

<sup>217</sup> *Id.*

<sup>218</sup> *Silverman v. Silverman*, 338 F.3d 886, 901 (8th Cir. 2003).

faces a particularized risk of serious complications incident to infection. As demonstrated in Sections III and VI, States Party have generally understood the Article 13(b) exception to be applicable in situations of particularized, rather than generalized, risk. A particularized risk of serious complications would require a showing that the child is more at risk of serious complications like serious injury or death than the general population. Evidence such as the extensive medical records presented by the abductor in *State Central Authority*<sup>219</sup> demonstrating her child's epileptic seizure condition, would be persuasive. Courts should weigh heavily medical records and reports from credible health institutions (such as the WHO or the CDC) showing that the child is part of a particularly vulnerable population. Testimony from the child's medical provider would also be cogent. In rare cases, a showing of generalized risk may be sufficient if the abductor could show that the child still faced a substantial risk of serious injury or death even absent a particular vulnerability. For example, such an exception would have applied to a disease like smallpox, which had a mortality rate of over thirty percent.<sup>220</sup>

In situations where a particularized risk is found, the court should hold that the child faces a "grave risk of harm" within the meaning of the Hague Convention. However, if there are reasonable voluntary undertakings the court could impose to neutralize the particularized risk, the court should exercise its discretion to return the child despite the finding that the abductor had met his or her burden under the Article 13(b) exception. Courts should elicit voluntary undertakings from left-behind parents to place customized safety precautions on return orders. These voluntary undertakings could include promises to help the child practice social distancing, mask-wearing, and quarantine and promises to comply with certain travel recommendations, including recommendations regarding the timing of travel plans and modes of transportation. Similarly, the court should consider issuing a return order, but staying the order until the particularized threat to the child is neutralized.

In cases where no particularized risk to the child is found and the taking parent has failed to meet his or her Article 13(b) burden, the judge must return the child to his or her habitual residence. However, even absent a showing of particularized harm, the court should take precautions to protect the safety of the child. If the infectious disease poses a serious public health risk, the court should adopt reasonable protective measures and consider temporarily staying the order for the child's return.

A rebuttable presumption against the "zone of disease" defense is an appropriate solution to the risks posed by infectious diseases for several reasons.

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<sup>219</sup> *State Central Authority v Maynard* (Unreported, Family Court of Australia at Melbourne, Kay J, 9 March 2003) (Austl.).

<sup>220</sup> *Timeline: Major Epidemics of the Modern Era 1899–2021*, *supra* note 141.



First, as discussed in Section IV, while an infectious disease outbreak is, by definition, a temporary occurrence, the consequences of a court finding a grave risk to the child can effectively finalize the child's custody arrangement by making it nearly impossible for a left-behind parent to retrieve their child if they are unsuccessful in appealing the trial court's judgment. If the court finds a grave risk of harm to the child, the judge must deny the Hague petition and refuse the return of the child unless the judge decides to exercise his or her discretion to grant the return of the child notwithstanding the established grave risk. While this judicial discretion exists in theory, some judges feel that such measures are only justified in "highly unusual or exceptional circumstances" and remark that "it is difficult to conceive of such situations."<sup>221</sup> Instead of relying on judges to exercise their discretion when erroneous "zone of disease" defenses are successfully raised, States Party should build the preferred outcome into their reading of the law itself by creating a rebuttable presumption against such defenses.

Moreover, the Convention drafters intended that the exceptions to return to be narrowly drawn, and thus a rebuttable presumption effectuates the original understanding of the grave risk of harm defense. As discussed in Sections II(A) and IV, the purpose of the Convention is to neutralize the artificial legal and logistical advantages enjoyed by the taking parent as a result of international child abduction. The drafters feared that "a systemic invocation of the [Convention's] exceptions, substituting the forum chosen by the abductors for that of the child's [habitual] residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration."<sup>222</sup> A rebuttable presumption bolsters a narrow construction of this defense, avoiding a "systemic invocation" of the Article 13(b) exception, while providing for the safety of the child via protective measures and stays.

Finally, a rebuttable presumption against "zone of disease" defenses upholds the foundational principle of the Convention. "[T]he Convention as a whole," wrote Pérez-Vera, "rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition."<sup>223</sup> A rebuttable presumption ensures that all children who can be safely returned to their habitual residence are returned as soon as possible. A child victim of international child abduction "suffers from the sudden upsetting of his stability, the traumatic loss of contact with the parent who has been in charge of his upbringing, the uncertainty and frustration which come with the necessity to adapt to a strange language, unfamiliar cultural conditions and unknown teaches and

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<sup>221</sup> D. v. G. [2001] 1179 H.K.C. 1, 5 (C.F.A.) (H.K.), <https://perma.cc/QSH8-DPB2>.

<sup>222</sup> The Pérez-Vera Report, *supra* note 43, at 435.

<sup>223</sup> *Id.* at 434.

relatives.”<sup>224</sup> In addition to these uncomfortable and frightening experiences of destabilization, children may face long-term mental health struggles as a result of their abduction. Studies have shown that “[c]hildren who have been psychologically violated and maltreated through the act of abduction, are more likely to exhibit a variety of psychological and social handicaps.”<sup>225</sup> Abducted children suffer from depression, excessive fearfulness, helplessness, anger, disruption in identity formation, and fear of abandonment—conditions which may persist lifelong.<sup>226</sup> Overall, a rebuttable presumption against “zone of disease” defenses increases the likelihood that a child will be returned to his or her habitual residence and lessens the length of time a child spends away from home as a victim of international child abduction.

## B. The Unclean Hands Doctrine

Lastly, if States Party decline to adopt such a rebuttable presumption, they should, at the very least, provide left-behind parents with an equitable relief doctrine in cases where the abductor has already put the child at risk of infection. If an abductor has abducted a child during an infectious disease outbreak and is now insisting that the child cannot be returned because of that outbreak, the abductor has “unclean hands.”

Traditionally, the doctrine of unclean hands is understood for the equitable maxim that “he who comes into equity must come with clean hands.”<sup>227</sup> It is a “self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the mater in which he seeks relief, however improper may have been the behavior of the defendant.”<sup>228</sup> Historically, U.S. courts have declined to apply the doctrine in Hague Convention cases. In *Karpenko v. Leendertz*, for example, the Third Circuit held that the mother’s interference with the father’s custody rights did not bar return after the father’s wrongful removal of the child and concluded that the “application of the unclean hands doctrine would undermine the Hague Convention’s goal of protecting the well-being of the child.”<sup>229</sup> However, this rejection of the unclean hands doctrine should be reconsidered in light of the peculiar fact dynamics at play in a “zone of disease” defense.

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<sup>224</sup> *Id.* at 432 (quoting M. Adair Dyer, *Questionnaire and Report on International Child abduction by One Parent*, Preliminary Doc. No. 1 (Aug. 1978)).

<sup>225</sup> Nancy Faulkner, Report Presented to U.N. Convention on Child Rights in Special Session, *Parental Child Abductio is Child Abuse* (June 9, 1999), <https://perma.cc/XQ83-CX2U>.

<sup>226</sup> *Id.*

<sup>227</sup> *Karpenko v. Leendertz*, 619 F.3d 259, 265 (3d Cir. 2010).

<sup>228</sup> *Id.* (quoting *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945)).

<sup>229</sup> *Id.* at 265.

In the context of the “zone of disease” defense, the unclean hands doctrine would preclude the use of the Article 13(b) exception by abductors who had already exposed their children to the infectious disease at issue. A family court in London recently heard a case in which such a doctrine could be applied. In *Re N (a child)*,<sup>230</sup> the mother took her child to the Greek island of Paros on March 20, 2020, three days before the Prime Minister announced a national lockdown in the U.K.<sup>231</sup> The mother claimed that her intention in traveling to Paros was to escape the dangers of the pandemic:

[T]he main reason that I have come to Greece is that I am very afraid of the coronavirus and I want to do whatever I can to keep N (and me) safe from it. The small Greek island where my mother lives, where N and I are now staying with her, is naturally isolated from the mainland and has its own medical facilities. It is absolutely safe for until now there were zero (0) incidents of corona virus contamination. I believe that it is a much safer place to be for us than the much more densely populated area of Barking / outskirts of London.<sup>232</sup>

The court held that while the mother may be correct that the COVID-19 infection rate was lower in Greece at the time, “that does not justify, in the slightest, what was a wrongful removal of N from the place of his habitual residence.”<sup>233</sup> Ultimately the court did not reach the merits of the petition,<sup>234</sup> but the facts of *Re N (a child)* nevertheless raise a thought-provoking hypothetical: what if the abductor in *Re N (a child)* had levied a “zone of disease” defense to the child’s return to Barking?

Common sense dictates that an abductor who traveled with her child during the pandemic—albeit early in the outbreak (March 20)—should be precluded from arguing that her child would face a “grave risk of harm” were the child ordered to return to the U.K. Essentially, the abductor has already exposed the child to the same “grave risk.” Recently, a U.S. district court agreed, quickly disposing of the abductor’s Article 13(b) defense. Without specifically naming the unclean hands doctrine, the judge reasoned with similar logic:

Finally, Respondent argues that the risk from COVID-19 is so great that he should not be required to return Z.R. to Jamaica. The court does not find this testimony persuasive. Respondent testified that he recently brought his six-year-old daughter from Jamaica to stay with him in the U.S.; he will be taking her back later this month.<sup>235</sup>

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<sup>230</sup> *Re N (a child)* [2020] EWFC (Fam) 35, [16] (Eng.).

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* at [25].

<sup>233</sup> *Id.* at [16].

<sup>234</sup> *Id.* at [26]–[27].

<sup>235</sup> *Chambers v. Russell*, No. 1:20CV498, 2020 WL 5044036, at \*14 (M.D.N.C. Aug. 26, 2020).

An equitable relief doctrine akin to the unclean hands doctrine would provide left-behind parents a necessary safety net in jurisdictions that decline to adopt a rebuttable presumption against “zone of disease” defenses.

### VIII. CONCLUSION

The COVID-19 pandemic has exposed troubling gaps in Article 13(b) caselaw and guidelines. During the global health crisis, abductors have carved out a new iteration of the grave risk of harm defense predicated on the risks posed by an infectious disease outbreak. It is essential that States Party put forward a united response to this “zone of disease” defense. A rebuttable presumption against the “zone of disease” defense would correctly balance the Hague Convention’s goal of restoring the legal status quo between parties while preserving the important “safety valve” function Article 13(b) is meant to provide. Doubtless, these cases present courts with an unenviable task. Future scholarship may speculate on the ethical pitfalls of entrusting judges with risk assessments that necessarily draw on an emerging and ever-evolving body of public health news and medical research. In the meantime, courts should continue to combat the scourge of international child abduction by securing the prompt and safe return of abducted children, reminding abductors “that Minors’ rights are not an anarchy and the emergency situation cannot be exploited.”<sup>236</sup>

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<sup>236</sup> FamC (DC TA) 52595-02-20 *The Father v. The Mother*, 16 (Apr. 5, 2020) (Isr.), <https://perma.cc/E8NN-HEZS>.

# How Hackers of Submarine Cables May Be Held Liable Under the Law of the Sea

Jason Petty\*

## Abstract

*Submarine internet cables play a vital role in the modern economy and transmit almost all global internet connections between countries. These cables, however, are vulnerable to interference or hacking by foreign states who seek to obtain the valuable data that passes through them. Because these cables are located on the high seas, however, no country has legal jurisdiction over large portions of them allowing for any number of states or private actors to hack into them and steal valuable information. This Comment evaluates whether states have any legal recourse under public international law against entities that hack into submarine cables. To answer this question, this Comment explores the development of public international law with respect to the high seas and evaluates public international norms for hacking and cyber operations. This Comment then argues, given the weakness of current domestic regimes with respect to submarine cable protections, the International Tribunal of the Law of the Sea can assert jurisdiction over disputes related to submarine hacking. This Comment further makes the novel argument that states can assert damage done to cables through hacking or violations of citizens' rights to privacy through hacking present potential legal avenues to pursue liability against submarine hacking.*

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## Table of Contents

I. Introduction.....	262
II. Technical Primer on Hacking and Submarine Cables .....	264
III. The Shifting Dialogue Around Submarine Cable Hacking .....	267
IV. International Laws Regulating Submarine Cables.....	270
A. The 1884 Convention for the Protection of Submarine Telegraph Cables .....	270
B. Intermediary Treaties and the U.N. Convention on the Law of the Sea..	272
V. International Norms With Respect to Hacking.....	277
A. General Cyber Operations on the High Seas .....	277
B. Incidental Effects of Submarine Cable Hacking: Cable Damage .....	279
C. Incidental Effects of Submarine Cable Hacking: Violations of the International Right to Privacy .....	280
VI. The Lay of the Land of Current Scholarship .....	283
VII. Using ITLOS to Trigger Dispute Resolution: Damage and Privacy Solutions for Hacking.....	286
A. Jurisdiction Under ITLOS.....	286
B. Using ITLOS to Protect Against Cable Damage .....	289
C. Using ITLOS to Protect Against Violations of the Right to Privacy.....	291
VIII. Conclusion.....	297

## I. INTRODUCTION

Contrary to popular belief, the global internet is largely comprised of a network of data cables linking states and continents and not satellite links propelling data through the air.<sup>1</sup> In communications between continents, approximately 99% of all telecommunications is transmitted via a network of around 400 underwater, submarine cables.<sup>2</sup> For example, to send an email from Boston to Dublin, the GTT Atlantic Cable would route your message under the Atlantic Ocean through Nova Scotia, Northern Ireland, and London before arriving in Dublin.<sup>3</sup> This process would take place nearly instantaneously but traverse hundreds of miles of fiber optic cable under the Atlantic Ocean.

These undersea cables are only about the size of a garden hose but represent billions of dollars of productivity and information. If a ship were to drop anchor in the wrong location and sever a cable, internet service could be cut to an entire country.<sup>4</sup> If a rogue agent elected to cut the cables to the United States, an estimated \$10 trillion in daily financial transfers and vast amounts of data would be clogged up.<sup>5</sup> Because damage to submarine cables is so devastating, the international community has devised a number of conventions and domestic protections to protect against cable damage.

More insidiously, however, these cables are also at risk of hacking and intelligence gathering because so much data flows through them. States can use submarines to make small slits in submarine cables and insert listening and data collection devices.<sup>6</sup> These spying states then collect all the information that flows through the cables: every overseas telephone call, email, financial transfer, or data upload that passes through the internet from one country to another is collected.<sup>7</sup> Encryption of information that passes through these cables somewhat protects against intelligence gathering, but sophisticated operators can often break encryption and can nevertheless obtain useful information through the metadata

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<sup>1</sup> See, generally Edward Malecki & Hu Wei, *A Wired World: The Evolving Geography of Submarine Cables and the Shift to Asia*, 99 ANNALS ASS'N AM. GEOGRAPHERS 360 (2009).

<sup>2</sup> Greg Miller, *Undersea Internet Cables are Surprisingly Vulnerable*, WIRED (Oct. 29, 2015), <https://perma.cc/X53J-XMHA>.

<sup>3</sup> *Submarine Cable Map*, TELEGEOGRAPHY, <https://perma.cc/S2SR-FL66> (2021).

<sup>4</sup> Chris Baynes, *Entire Country Taken Offline for Two Days After Undersea Internet Cable Cut*, INDEP. (Apr 11, 2018), <https://perma.cc/26LE-P6QD>.

<sup>5</sup> Tim Johnson McClatchy, *Undersea Cables: Too Valuable to Leave Vulnerable*, GOV'T TECH. (Dec. 12, 2017), <https://perma.cc/AH3X-TPMX>.

<sup>6</sup> Christopher Drew, *Divers Say Net Tied Submarine to Listening Device*, N.Y. TIMES (Aug. 9, 2005), <https://perma.cc/YXS8-ACXT>.

<sup>7</sup> Sophia Ankel, *Russian Intelligence Agents Reportedly Went to Ireland to Inspect Undersea Cables, and It's Reigniting Fears They Could Cut Them and Take Entire Countries Offline*, BUS. INSIDER (Feb. 17, 2020), <https://perma.cc/8CE7-V38L>.

embedded in encrypted transmissions.<sup>8</sup> This massive amount of information provides valuable military, economic, and personal information to the hacking country. This hacking, however, is also a violation of citizens' privacy and a violation of the hacked states' economic and military interests.

Out of concern for this sort of hacking, in 2020 the U.S. blocked Google and Facebook from turning on a submarine cable linking the U.S. and Hong Kong.<sup>9</sup> Although the 8,000 mile cable had already been laid and hundreds of millions of dollars were spent on its development, the U.S. was too concerned about potential Chinese intelligence pilfering to let the cable go live.<sup>10</sup> The decision dramatically demonstrates the U.S.'s fears around submarine cable hacking have grown to exceptional new heights. And the U.S. government's fears are not misplaced. In 2013, the British spy agency the Government Communications Headquarters (GCHQ) was found to secretly have tapped into undersea cables to gather information.<sup>11</sup> In 2015, U.S. sensors detected Russian submarines near undersea cables raising concerns.<sup>12</sup> And during the Cold War, the U.S. tapped into Soviet undersea cables and gathered critical intelligence as part of Operation Ivy Bells.<sup>13</sup>

As the world becomes increasingly interconnected and states increasingly rely on the internet economically, hacking into internet infrastructure becomes a greater threat. The U.S., for example, has undertaken expensive and extensive efforts to remove Huawei from its domestic telecommunication infrastructure to prevent the Chinese government from spying domestically.<sup>14</sup> Undersea cables, however, are not so easily protected. Undersea cables are expensive to lay,<sup>15</sup>

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<sup>8</sup> DOUG BRAKE, INFO. TECH. & INNOVATION FOUND., SUBMARINE CABLES: CRITICAL INFRASTRUCTURE FOR GLOBAL COMMUNICATIONS (2019), <https://perma.cc/8YQ8-T9TL>.

<sup>9</sup> Anthony Spadafora, *Google, Facebook Undersea Web Cable Will No Longer Connect US and Hong Kong*, TECHRADAR (Aug. 31, 2020), <https://perma.cc/U8YZ-FXXS>.

<sup>10</sup> Justin Sherman, *The US-China Battle over the Internet Goes Under the Sea*, WIRED (June 24, 2020), <https://perma.cc/5X8K-8FY4>.

<sup>11</sup> Ewen MacAskill, Julian Borger, Nick Hopkins, Nick Davis & James Ball, *GCHQ Taps Fibre-optic Cables for Secret Access to the World's Telecommunications*, THE GUARDIAN (June 21, 2013), <https://perma.cc/4DGD-HRN5>.

<sup>12</sup> Barbara Starr, *U.S. Sensors Detect Russian Submarines Near Underwater Cables*, CNN (Oct. 28, 2015), <https://perma.cc/RL96-QV9L>.

<sup>13</sup> Olga Khazan, *The Creepy, Long-Standing Practice of Undersea Cable Tapping*, THE ATLANTIC (July 16, 2013), <https://perma.cc/W8GY-F5R2>.

<sup>14</sup> David McCabe, *F.C.C. Designates Huawei and ZTE as National Security Threats*, N.Y. TIMES (June 30, 2020), <https://perma.cc/PW37-6Z2Y>.

<sup>15</sup> Tim Hornyak, *Here's What It Takes to Lay Google's 9,000km Undersea Cable*, COMPUTERWORLD (July 13, 2015), <https://perma.cc/EHL6-GSMX> (approximately \$300 million for a cable between the U.S. and Japan).



difficult to replace, and often traverse international waters over which states do not have exclusive domain.<sup>16</sup>

Even with such a large threat, there is an open question as to whether states can protect against submarine cable hacking. The fundamental question this Comment seeks to answer is whether states have any recourse or protections against submarine cable hacking by foreign states under public international law. This Comment argues the increasingly recognized international right to privacy can provide grounds for protecting against submarine cable hacking and that states can enforce this right through dispute resolution mechanisms for the high seas.

This Comment proceeds in five sections to develop this answer. Section II provides a brief overview of the technology behind submarine cables and the methods used in hacking these cables. Section III evaluates current attitudes in the international community with respect to submarine cable hacking and explains why norms around privacy, combined with the incredible resources required to protect cables from hacking, may lead to a shift in states' treatment of submarine cable hacking.

Section IV explores the history of international treaties and conventions surrounding submarine cables and the high seas. Section V summarizes current public international law related to cyber operations and hacking and discusses the emergence of a newly recognized international right to privacy with respect to telecommunications and personal data. Section VI discusses current scholarly responses to submarine cable hacking to situate this Comment's solution in present scholarship. And in Section VII, I propose a novel solution addressing the problem of submarine cable hacking using the international right to privacy adjudicated through dispute resolution mechanisms developed for the high seas. The use of the international right to privacy and this dispute resolution body is presently underdiscussed by scholars. This solution further advances the right to privacy as integral to protect against submarine cable hacking and describes how shifts in attitudes toward privacy may contribute to the creation of norms against surveillance hacking.

## II. TECHNICAL PRIMER ON HACKING AND SUBMARINE CABLES

This Section describes the network of submarine cables that makes up the modern internet, the technical elements of modern submarine cable hacking techniques, and the possibility of damage by submarine cable hacking. This information is relevant to subsequent possible solutions around submarine cable

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<sup>16</sup> James Griffiths, *The Global Internet Is Powered by Vast Undersea Cables. But They're Vulnerable*, CNN (July 26, 2019), <https://perma.cc/3VJM-LQQD>.

hacking because international treaties require some protections against incidental or intentional damage to submarine cables, as discussed in Section IV.

Most of the internet is formed through a network of undersea submarine cables.<sup>17</sup> About the size of a garden hose, these cables are buried just under the ocean floor by submarine-cable laying ships and transmit internet data between countries.<sup>18</sup> While there are some legacy cables that transmit primarily telephone or telegraph information, the majority of modern cables are fiber optic cables that can transmit dozens of Terabytes of data per second.<sup>19</sup> While some cables are specially created for military and intelligence transmission purposes, the majority of cables are general in use and transmit commercial, government, and private commercial correspondence simultaneously.<sup>20</sup>

Because laying and operating a cable across large bodies of water is so costly, most cables were historically financed, laid, and operated by a consortium of multiple owners. For example, the U.S., Japan, and Australia agreed in 2020 to jointly finance a cable link to the Pacific island nation of Palau at a cost of \$30 billion.<sup>21</sup> Despite this history, individual companies or governments increasingly financed and laid submarine cables.<sup>22</sup> For example, in 2020 Google announced it was financing and constructing its own cable linking the U.S., the United Kingdom, and Spain.<sup>23</sup>

Once laid, cables are maintained and operated by the financing consortium or the private company financing the cable project. These cable operators are responsible for maintenance and repairs for any damage to the cable. Due to their length, most modern cables are outfitted with fault monitoring systems that can detect cable breaks or points of damage for repair.<sup>24</sup>

States are capable of spying on submarine cables. As discussed below, because the hacking of cables requires specialized equipment including submarines, most experts are concerned with government-sponsored hacking

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<sup>17</sup> *Id.*

<sup>18</sup> Stewart Ash, *The Development of Submarine Cables*, in *SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY* 19 (Douglas R. Burnett, Robert C. Beckman & Tara C. Davenport eds., 2014).

<sup>19</sup> Klint Finley, *How Google Is Cramming More Data into Its New Atlantic Cable*, *WIRED* (Apr. 5, 2019), <https://perma.cc/D49P-23GW>.

<sup>20</sup> H.I. Sutton, *How Russian Spy Submarines Can Interfere with Undersea Internet Cables*, *FORBES* (Aug. 19, 2020), <https://perma.cc/5BXR-4CWT>.

<sup>21</sup> Yohei Hirose, *Japan, US and Australia to Finance Undersea Cable for Palau*, *NIKKEI ASIA* (Oct. 28, 2020), <https://perma.cc/2WXP-FH9D>.

<sup>22</sup> Marissa Alcala et al., *Financing Subsea Cables in Latin America*, *NORTON ROSE FULBRIGHT* (June 16, 2020), <https://perma.cc/QPG9-QKZW>.

<sup>23</sup> Sam Shead, *Google Is Building a Huge Undersea Fiber-Optic Cable to Connect the U.S. to Britain and Spain*, *CNBC* (July 28, 2020), <https://perma.cc/T3GE-N363>.

<sup>24</sup> *See generally* ISAAC GEISLER ET AL., *DEPT OF SYS. ENG'G & OPERATIONS RES., GEO. MASON UNIV., DESIGN OF A TRANSOCEANIC CABLE SYSTEM* (2015), <https://perma.cc/7WPB-HRPE>.

attempts.<sup>25</sup> Third-party and private actors, however, are still considered a risk to submarine cables. When four cables linking Europe and the Middle East were simultaneously damaged, many officials and commercial operators alleged private actors had cut the cables.<sup>26</sup> Although more sophisticated technology is required to hack a cable compared to destroying one, the threat of terrorists hacking a submarine cable remains even if not manifest to date.<sup>27</sup>

In general, the process by which intelligence agencies tap into cables is highly secretive. There are some indications, however, as to how it is done. Some reports indicate states use specially designed submarines equipped with devices to splice into cables. In this “splicing method,” the submarine, having broken through the protective coating, installs listening devices within the fiber optic cable to collect transmitted data.<sup>28</sup> Some commentators, however, cast doubt on this method due to the possibility of a cable operator detecting a break in data transmission through the cable.<sup>29</sup> Some reports nevertheless indicate the techniques are sophisticated enough to not alert cable operators even when external damage to the cable is already done.<sup>30</sup> The possibility of damage to the cable or service interruption through splicing is important in the global regulatory regime for cable protections, as will be discussed at length in Section VI.

Other hacking methods appear less obtrusive. Some intelligence analysts have speculated operators gain access to a cable at landing stations—stations fitted with signal boosting equipment and cable access features—in order to install intercept probes that capture the fiber optic light signal and make a copy of it.<sup>31</sup> This method, and a similar one involving creating a slight curvature within the cable to siphon off data as it passes through the curve, may not alert an operator that hacking has occurred because the cable does not witness a service interruption

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<sup>25</sup> Griffiths, *supra* note 16.

<sup>26</sup> Investigators ultimately determined a ship’s anchor was to blame for at least one of four simultaneously damaged cables connecting the Middle East and Europe, but many at the time alleged the cables were damaged by private actors and conspiracy theories still abound. Lily Hay Newman, *Cut Undersea Cable Plunges Yemen Into Days-Long Internet Outage*, WIRED (Jan. 13, 2020), <https://perma.cc/C4AF-CLBG>; Kim Zetter, *Undersea Cables Cut; 14 Countries Lose Web – Updated*, WIRED (Dec. 19, 2008), <https://perma.cc/3TGK-EUHH>.

<sup>27</sup> MICHAEL SECHRIST, HARV. KENNEDY SCH. BELFER CTR., *NEW THREATS, OLD TECHNOLOGY: VULNERABILITIES IN UNDERSEA COMMUNICATIONS CABLE NETWORK MANAGEMENT SYSTEMS* (2012), <https://perma.cc/953R-MSKW>.

<sup>28</sup> *New Nuclear Sub Is Said to Have Special Eavesdropping Ability*, N.Y. TIMES (Feb. 20, 2005), <https://perma.cc/KDM9-683P>.

<sup>29</sup> See Tara M. Davenport, *Submarine Cables, Cybersecurity & International Law: An Intersectional Analysis*, 24 CATH. U. J.L. & TECH. 57, 103–5 (2015).

<sup>30</sup> Meghan Neal, *How to Hack the Backbone of the Internet*, VICE (Oct. 31, 2013), <https://perma.cc/6MWG-CF3E>.

<sup>31</sup> See Khazan, *supra* note 13.

seen in splicing.<sup>32</sup> While these methods involve some damage to the cable, they may not be easily identified or protected against even by wary states. Generally, while the method used may differ, most methods involve some degree of damage to the submarine cable and some degree of interference with a cable's data transmission.

### III. THE SHIFTING DIALOGUE AROUND SUBMARINE CABLE HACKING

This Section discusses why submarine cable hacking is a pressing and ripe area for solutions within public international law. As noted above, most of the world's global powers, particularly the U.S., China, and Russia, enjoy the ability to hack into one another's cables and may want to reserve that ability. This may indicate few states would be interested in developing norms or international public law against submarine cable hacking. Indeed, the lack of a global convention against peacetime hacking may signal a lack of state interest in curbing this behavior. The ground, however, may be shifting.

First, the volume of information, and in turn sensitive information, that passes through submarine cables is growing. Presently, submarine cables carry 95% of all international communications.<sup>33</sup> As countries continue to develop and as crises like COVID-19 require more work and entertainment to be done remotely, global demand for internet bandwidth rises.<sup>34</sup> In turn, submarine cable use will only increase. Global consumer IP traffic is expected to rise from 212 Exabytes per month in 2020 to 333 Exabytes per month in 2022.<sup>35</sup> Submarine cable bandwidth and traffic are expected to rise by 40% by 2022.<sup>36</sup> In 2020 alone, global submarine cable bandwidth rose by 35%.<sup>37</sup> Correspondingly, the submarine cable market is expected to grow at approximately 11% by year from 2020 to 2025 increasing the market's total value from \$10.3 billion to \$22 billion.<sup>38</sup> The need for cable protection then increases as the value and flow of data increases through submarine cables.

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

<sup>33</sup> *Submarine Cables*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (NOAA), <https://perma.cc/2YKK-DTS3>.

<sup>34</sup> Paul Brodsky, *Let's Just Say Demand Is Thriving in the Global Bandwidth Market*, TELEGEOGRAPHY DIG. (May 1, 2020), <https://perma.cc/B245-M8FE>.

<sup>35</sup> *Data Volume of Global Consumer IP Traffic From 2017 to 2022*, STATISTA (Feb. 2019), <https://perma.cc/FY6S-NVT6>.

<sup>36</sup> Alex Vaxmonsky, *New Subsea Cable Architectures Are Carrying the World's Traffic*, EQUINIX (Mar. 16, 2020), <https://perma.cc/9GHL-WD9A>.

<sup>37</sup> Geoff Bennett, *Subsea Cable Capacity: Where Do We Go Next?*, SUBMARINE TELECOMS F. (Sept. 21, 2020), <https://perma.cc/8P7K-NKJ3>.

<sup>38</sup> *Submarine Cable System Market Worth \$22.0 Billion by 2025*, PR NEWSWIRE (Feb. 27, 2020), <https://perma.cc/7QTT-LM33>.

Second, while covert and secretive, state hacking and cyber operations only appear to be increasing in scope and frequency. In 2013, leaks revealed the British intelligence service the Government Communications Headquarters (GCHQ) was tapping dozens of fiber optic cables processing over 600 million telephone events and 21 Petabytes of data each day.<sup>39</sup> In 2015, American and NATO security forces became concerned with Russian submarines and spy ships increasingly patrolling areas near American submarine cables.<sup>40</sup> And the threat of Russian activity has only increased. Russia has built out its submarine fleet,<sup>41</sup> and a number of these submarines are claimed to be equipped with cable hacking capabilities.<sup>42</sup>

This buildout of state capabilities to hack submarine cables has shifted states' behavior with respect to submarine cables and hacking generally. Out of concern of Chinese hacking attempts, as mentioned above, U.S. regulators prevented the Pacific Light Cable Network connecting the U.S. and Hong Kong from going live.<sup>43</sup> This was seen as a dramatic move because Google and Facebook had already spent over \$300 million to construct the cable.<sup>44</sup> In the commercial context, the U.S. and China agreed in 2015 to halt government support for cyber theft of corporate secrets or business information.<sup>45</sup> In crafting the treaty, the U.S. asserted the two countries would together seek "international rules of the road for appropriate conduct in cyberspace" out of a growing concern around an arms race in cyber operations and hacking.<sup>46</sup> While not the same as submarine cable hacking, the commercial hacking détente between China and the U.S. indicates some shift in behavior around state-sponsored hacking. The international community may be heading toward a similar watershed moment for crafting treaties around submarine cable hacking given the buildout of state hacking capabilities.

Third, citizens and states are increasingly aware of hacking and intelligence gathering conducted through submarine cables. Expressions of outrage against these methods have increased accordingly. After Edward Snowden revealed the extent of spying on U.S. citizens, thousands took to the streets to protest against

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<sup>39</sup> MacAskill et al., *supra* note 11.

<sup>40</sup> David E. Sanger & Eric Schmitt, *Russian Ships Near Data Cables Are Too Close for U.S. Comfort*, N.Y. TIMES (Oct. 25, 2015), <https://perma.cc/WM9H-G9C6>.

<sup>41</sup> Xavier Vavasseur, *Russia's Pacific Fleet to Get 15 New Vessels in 2020*, NAVAL NEWS (May 29, 2020), <https://perma.cc/39VS-4HZD>.

<sup>42</sup> Garrett Hinck, *Evaluating the Russian Threat to Undersea Cables*, LAWFARE (Mar. 5, 2018), <https://perma.cc/5RRD-PSX2>.

<sup>43</sup> Agence-France Presse, *Pacific Data Cable Not Safe from China if Hong Kong Included, Says US*, THE GUARDIAN (June 17, 2020), <https://perma.cc/HWY2-BLAB>.

<sup>44</sup> Mark Harris, *Google and Facebook Turn Their Backs on Undersea Cable to China*, TECHCRUNCH (Feb. 6, 2020), <https://perma.cc/D3YQ-55H8>.

<sup>45</sup> David E. Sanger & Steven Lee Myers, *After a Hiatus, China Accelerates Cyberspying Efforts to Obtain U.S. Technology*, N.Y. TIMES (Nov. 29, 2018), <https://perma.cc/KB46-K7SG>.

<sup>46</sup> *Id.*

government surveillance.<sup>47</sup> Human rights watch groups and the media continue to monitor and critique civilian surveillance and spying efforts, and those criticisms have only increased in recent years. The U.N. Human Rights Office of the High Commissioner has produced annual reports related to the right to privacy in the digital age and has advocated for greater recognition of the right to privacy against broad surveillance.<sup>48</sup> As citizens, NGOs, and political bodies increasingly advocate for protections for the right to privacy, states will increasingly shift their behavior to cooperating around greater privacy protections out of fear of losing the favor of the electorate.

Fourth, cables are not capable of being monitored like other military or commercial assets. Due to their length stretching hundreds of miles in the open ocean and the number of cables traversing the sea, states would need to expend unconscionable resources to patrol for surface ships and submarines that threaten cables. While cable operators are able to observe real-time widespread disruptions in data service, sophisticated hacking agents are supposedly able to splice into submarine cables without alerting cable operators.<sup>49</sup> To intercept cable hacking operators, a state would then need a nearby ship, or perhaps even submarine, capable of detecting and intercepting a hacking submarine. Indeed, it is difficult to fathom the resources required to patrol the 5,000 or so miles from Los Angeles to Tokyo across the Pacific for one cable let alone dozens of cables. Accordingly, spying attempts on cables are likely to succeed. NATO and British intelligence officers have acknowledged fears of Russian cable hacking in the Atlantic have grown because states cannot constantly patrol for hacking attempts.<sup>50</sup>

Because states are unable to fully patrol against submarine hacking attempts, states may want additional tools in their foreign policy toolbox to address possible hacking attempts. As the danger posed by hacking grows and because the resources required to patrol against hacking are so immense, states will need to explore alternative means to protect cables and their sensitive data, which may include recognizing liability for hacking. By recognizing grounds for liability against submarine cable hacking, states can obtain a tool for enforcement against rogue actors when the costs and benefits are in their favor.

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<sup>47</sup> Jim Newell, *Thousands Gather in Washington for Anti-NSA 'Stop Watching Us' Rally*, THE GUARDIAN (Oct. 26, 2013), <https://perma.cc/VWF5-AFSN>.

<sup>48</sup> *The Right to Privacy in the Digital Age*, U.N. HUM. RTS. OFF. HIGH COMM'R, <https://perma.cc/PH43-KGJY>.

<sup>49</sup> For attempts to solve this problem and a description of the technical requirements involved, see Lijuan Zhao et al., *On-Line Monitoring System of 110 kV Submarine Cable Based on BOTDR*, 216 SENSORS & ACTUATORS 28 (2014); Ye Yincan et al., *Submarine Cable Project Management and Maintenance Monitoring Information System*, in SUBMARINE OPTICAL CABLE ENGINEERING 259 (Ye Yincan, Jiang Xinmin, Pan Guofu, Jiang Wei eds., 2018).

<sup>50</sup> *Could Russia Cut Undersea Communication Cables?*, BBC (Dec. 15, 2017), <https://perma.cc/XX95-7X7M>.

Fifth, while the U.S., China, and Russia, among others, may want to continue participating in hacking operations, not all states participate in hacking and not all states will want to continue to allow hacking to persist on the global stage. Landlocked states and states with less robust submarine military presences do not have the same incentives to allow submarine hacking to continue because they cannot as easily participate. Further, these states may be incidentally damaged by hacking attempts against U.S. or Russian submarine cables because their information flows through those same cables to other states.<sup>51</sup> These states may then want protections against submarine hacking regardless of whether global powers, like the U.S. and China, want the practice to continue.

The geopolitical landscape and incentives around protections against cable hacking thus appear to be shifting. Accordingly, this Comment turns to international public law as a potential way to curb hacking behavior. In the following Section, this Comment examines the protections currently afforded to cables under public international law. Subsequently, this Comment evaluates current scholarly thought on solutions within the public international legal system before proposing a novel solution to the problem of submarine cable hacking.

#### IV. INTERNATIONAL LAWS REGULATING SUBMARINE CABLES

This Section offers an overview of the history of submarine cable protections and an overview of current submarine cable protections in public international law. The history of submarine cable protection offers strong insight into how current protections were developed. By understanding how cable protections changed over time, this Comment helps better understand the norms around cables outside of the language of international conventions. Further, the history of submarine cables can inform our understanding of the protections dispute resolution bodies are willing to extend to cables when evaluating international law.

##### A. The 1884 Convention for the Protection of Submarine Telegraph Cables

International protections for submarine cables began, surprisingly enough, in the 1880s with the dawn of undersea telegraph wires. Due to threats from fishermen and pirates who accidentally or intentionally severed telegraph cables,<sup>52</sup> 27 states joined together to create the 1884 Convention for the Protection of

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<sup>51</sup> Adam Satariano, *How the Internet Travels Across Oceans*, N.Y. TIMES (Mar. 10, 2019), <https://perma.cc/KVR3-WD5N>.

<sup>52</sup> For example, the first submarine cable crossing the English Channel was cut by a fisherman who thought he discovered a new species of seaweed. Eric Wagner, *Submarine Cables and Protections Provided by the Law of the Sea*, 19 MARINE POLICY 127, 128 (1995).

Submarine Telegraph Cables.<sup>53</sup> Principally, the 1884 Convention was designed to protect cables against willful or negligent damage to cables that may interrupt or obstruct telegraph signals.<sup>54</sup>

The 1884 Convention, however, was limited in scope and application. Rather than develop a comprehensive international court to handle submarine cable disputes or violations of the convention, the 1884 Convention required states to create their own national regulations to protect submarine cables.<sup>55</sup> Many signatory states, such as Canada, never implemented national laws in accordance with the Convention. Other participating states, like China, never signed the Convention and similarly have not developed comprehensive domestic laws in accordance with the Convention's requirements.<sup>56</sup> Where states did implement domestic laws under their Convention obligations, those protections were generally piecemeal and weak. For example, the U.S. enacted the 1888 Submarine Cable Act<sup>57</sup> in response to the 1884 Convention, but fines under the statute are so small the U.S. Coast Guard does not pursue violators. There is not a single record of a criminal charge under the statute and civil fines are capped at \$5,000.<sup>58</sup>

The signing countries in 1884 could not have anticipated the emergence of internet submarine cables or hacking into these cables to pilfer vital information. The 1884 Convention, however, may offer some recourse for this sort of misbehavior. Article II provides it is a punishable offense to "break or injure a submarine cable, willfully or by culpable negligence, in such manner as might interrupt or obstruct telegraphic communication."<sup>59</sup> Splicing or tapping into submarine cables requires some damage to the cable and some degree of service interruption to intercept transmitted data. Article II may then apply to submarine cable hacking.

Nevertheless, the 1884 Convention may be limited in its protective ability. First, the Convention requires states to implement domestic regimes protecting cables. Because domestic jurisdiction over foreign nationals is limited, especially on the high seas as will be discussed, these protections are limited in reach.

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<sup>53</sup> Convention for the Protection of Submarine Telegraph Cables, Mar. 14, 1884 [hereinafter 1884 Convention].

<sup>54</sup> *Id.* art. II ("It is a punishable offence to break or injure a submarine cable, willfully or by culpable negligence, in such manner as might interrupt or obstruct telegraphic communication, either wholly or partially, such punishment being without prejudice to any civil action for damages.").

<sup>55</sup> *Id.* art. XII ("The High Contracting Parties engage to take or to propose to their respective legislatures the necessary measures for insuring the execution of the present Convention, and especially for punishing, by either fine or imprisonment, or both, those who contravene the provisions of Articles II, V and VI.").

<sup>56</sup> *Id.* art. 17.

<sup>57</sup> 47 USC § 21 *et seq.*

<sup>58</sup> Wagner, *supra* note 52, at 135.

<sup>59</sup> 1884 Convention, *supra* note 53, art. II.



Further, because Article II is limited solely to “telegraphic wires,” it is not clear whether damage to submarine internet cables portends liability under the Convention. While many modern cables have the ability to transmit telegraphs, most are fiber optic cables and therefore may be outside the convention’s scope. And unlike subsequent conventions, the 1884 Convention did not create a tribunal or dispute resolution body to handle these issues. States then are reliant on other states’ domestic regulations for protecting submarine cables. Regardless of its limited applicability to hacking, however, the 1884 Convention pioneered protections for submarine cables, the spirit of which have since been largely incorporated in modern treaties dealing with the high seas.

## B. Intermediary Treaties and the U.N. Convention on the Law of the Sea

Following the 1884 Convention, the international community incorporated further protections for submarine cables in broader treaties related to the high seas. In 1958, the Geneva Conventions on the Continental Shelf and the 1958 Convention on the High Seas incorporated portions of the 1884 Convention. Namely, protections of cables from willful or culpably negligent damage and indemnification obligations for other cable owners were incorporated in these later conventions from the 1884 Convention.<sup>60</sup>

Notably, the 1958 High Seas Convention additionally codified the freedom to lay cables as a high seas freedom, expanding the protections offered by the 1884 Convention.<sup>61</sup> Specifically, Article II holds “the high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty” and the “freedom to lay submarine cables” is one such recognized right.<sup>62</sup> Article XXVI further affirms “States shall be entitled to lay submarine cables and pipelines on the bed of the high seas.”<sup>63</sup> This Convention also introduced more limited rights on the continental shelf and territorial waters, a distinction to be discussed at length.<sup>64</sup> This Convention was the first to establish a general freedom to lay submarine cables which has become central to modern treaty obligations with respect to submarine cables.

Following these intermediary conventions, in 1982 the U.N. Convention on the Law of the Sea (UNCLOS), the contemporary convention for the law of the

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<sup>60</sup> See *id.* arts. II, IV, VII; see also Douglas Burnett, Tara Davenport & Robert Beckman, *Overview of the International Legal Regime*, in *SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY* 63, 71–72 (Douglas R. Burnett, Robert C. Beckman & Tara M. Davenport eds., 2014).

<sup>61</sup> Convention on the High Seas, Apr. 29, 1958, 450 U.N.T.S. 82.

<sup>62</sup> *Id.* art. II.

<sup>63</sup> *Id.* art. XXVI.

<sup>64</sup> *Id.*

sea, was created.<sup>65</sup> UNCLOS was devised over extensive negotiations to replace the 1958 conventions with a more comprehensive framework of laws and obligations.<sup>66</sup> Generally speaking, UNCLOS divides the seas into three sections, each corresponding to distinct rights and duties of states: territorial seas, the exclusive economic zones (EEZ) and continental shelves, and the high seas. UNCLOS incorporated many of the same rights and duties with respect to submarine cables as the 1884 Convention and the 1958 conventions. To understand the rights of states under UNCLOS, this Comment will review states' rights with respect to submarine cables in each of these three territorial zones.

A state's territorial seas are the sea, including its bed and subsoil, for the area up to 12 miles from a state's shores.<sup>67</sup> States maintain sovereignty over the territorial sea and can impose their own laws over this area, including with respect to submarine cables.<sup>68</sup> If foreign actors break the coastal state's laws in its territorial waters, those actors would be subject to the coastal state's jurisdiction under UNCLOS. If a foreign state hacked into or damaged the coastal state's submarine cables within its territorial waters, those foreign hackers would be subject to the coastal state's laws against submarine cable hacking or damage to submarine cables. For this reason, among others, states do not engage in hacking in other states' territorial waters. Even if they did, however, most states have not crafted any protections or regulations on submarine cables within their territorial waters.<sup>69</sup> Where states have crafted protections for intentional or negligent damage to cables, those protections are rarely enforced and are often quite weak.<sup>70</sup>

In the second zone, coastal states can claim the EEZ and continental shelf up to 200 nautical miles past the borders of the state's territorial seas.<sup>71</sup> The delimiting of the precise boundaries of this zone is somewhat complicated however.<sup>72</sup> Within this area, states enjoy certain rights to exploit natural resources or explore.<sup>73</sup> Regardless of these rights, other states maintain general rights to

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<sup>65</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter referred to as UNCLOS].

<sup>66</sup> UNCLOS, INT'L UNION FOR CONSERVATION OF NATURE, <https://perma.cc/K8ZT-2UXV>. For more information on the development of UNCLOS, see generally Myron H. Nordquist, et al., UNCLOS 1982 COMMENTARY (Myron H Nordquist et al. eds., 2012).

<sup>67</sup> UNCLOS, *supra* note 65, art. II.

<sup>68</sup> *Id.* art. XXI; Burnett et al., *supra* note 60, at 76.

<sup>69</sup> Robert Beckman, *Protecting Submarine Cables from Intentional Damage*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY 281, 287 (Douglas R. Burnett, Robert C. Beckman & Tara M. Davenport eds., 2014).

<sup>70</sup> *Id.* at 287.

<sup>71</sup> UNCLOS, *supra* note 65, art. LVII.

<sup>72</sup> *Id.* See generally Kenneth W. Swenson, *A Stitch in Time: The Continental Shelf, Environmental Ethics, and Federalism*, 60 S. CAL. L. REV. 851 (1987).

<sup>73</sup> UNCLOS, *supra* note 65, art. LVI.

“other internationally lawful uses of the seas related to those freedoms” which can extend to submarine cables.<sup>74</sup> UNCLOS also extends particular freedoms around submarine cables including the ability to lay submarine cables and pipelines.<sup>75</sup> While not explicitly mentioned, this freedom likely also includes the ability to operate, repair, and inspect previously laid submarine cables.<sup>76</sup>

States, however, do not have unfettered access to the EEZ and the continental shelf in the name of cable installation or repair. UNCLOS requires states exercising these rights to “comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law.”<sup>77</sup> While this language is broad, this allowance permits coastal states to restrict foreign states’ activities in furtherance of their right to exploit natural resources in the EEZ or continental shelf or their right to explore the area. In practice, however, this allowance is largely curtailed, and states broadly enjoy States therefore broadly enjoy the freedom to lay submarine cables in the EEZ.

UNCLOS provides similar protections for submarine cables in the EEZ as in territorial waters, though jurisdiction is less clear. Again, similar to territorial waters, while states are required to “adopt the laws and regulations necessary to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done willfully or through culpable negligence... be a punishable offense,”<sup>78</sup> most states have not done so.<sup>79</sup> Unlike territorial waters, however, coastal states’ regulations in the EEZ or the continental shelf do not apply to foreign nationals who intentionally break or damage cables.<sup>80</sup> This means states in the EEZ and the continental shelf can only hold their own citizens that injure cables liable under their domestic laws. While some states have made novel legal arguments about submarine cables as being in a protected zone of exploitation,<sup>81</sup> the majority of states accept domestic jurisdiction does not extend to cables in the EEZ.<sup>82</sup> In the instance of hacking, this would mean coastal states could only address domestic hackers, which, while

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

<sup>75</sup> *Id.* art. LXXXVIII.

<sup>76</sup> *See id.* art. LXXIX (referring to the “laying or maintenance” of submarine cables and “repairing” existing cables.); *see also* Burnett et al., *supra* note 60, at 81.

<sup>77</sup> UNCLOS, *supra* note 65, art. LVIII.

<sup>78</sup> *Id.* art. LXIII.

<sup>79</sup> Beckman, *supra* note 69, at 288.

<sup>80</sup> *Id.*

<sup>81</sup> *Zone to Protect Perth Submarine Cables*, AUSTRALIAN COMM’N & MEDIA AUTH., <https://perma.cc/R6RS-Q6G3>.

<sup>82</sup> Beckman, *supra* note 69, at 288.

potentially useful for private actors, does not likely apply to the majority of hacking incidents, which are largely committed by foreign governments.

The high seas are the third zone described by UNCLOS. The high seas are defined as “all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State.”<sup>83</sup> The high seas are canonically regarded as beyond the reach of states’ national jurisdiction.<sup>84</sup> Accordingly, the high seas are the largest sea area and do not offer any domestic protections against hacking attempts.

The high seas, although beyond the reach of any state, are subject to applicable international treaties including UNCLOS. Broadly, the high seas are reserved for “peaceful purposes.”<sup>85</sup> If hacking was considered an act of aggression, states would not enjoy that freedom on the high seas. Similarly, acts considered illegal under international treaties or conventions, like slave trading for example, would not be a permissible use of the high seas. Presently, as discussed in Section V, submarine cable hacking is considered a peaceful activity and not illegal under any international convention.

UNCLOS does not offer many protections for submarine cables on the high seas. Under UNCLOS, states maintain the freedom to lay submarine cables<sup>86</sup> but must exercise this freedom in recognition of other states’ exercise of high seas freedoms.<sup>87</sup> Similar to requirements for the EEZ, states are obligated under UNCLOS to craft laws and regulations that require their citizens to compensate cable owners for damage they caused to cables or pipelines.<sup>88</sup> Many states have not designed laws to meet this obligation and those that have generally involve paltry compensatory payments.<sup>89</sup> Again, like the EEZ, these regulations would not extend to foreign nationals on the high seas under UNCLOS.

Unlike the 1884 Convention, UNCLOS included a dispute resolution framework for conflicts between states. The International Tribunal for the Law of the Sea (ITLOS) serves as a binding dispute resolution mechanism where states are unable to reach a peaceful settlement. ITLOS has jurisdiction over “any dispute concerning the interpretation or application of this Convention which is submitted to it in accordance with this Part” including failing to comply with

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<sup>83</sup> UNCLOS, *supra* note 65, art. LXXXVI.

<sup>84</sup> *Id.* art. LXXXIX (“No state may validly purport to subject any part of the high seas to its sovereignty.”).

<sup>85</sup> *Id.* art. LXXXVIII..

<sup>86</sup> *Id.* art. CXII..

<sup>87</sup> *Id.* art. LXXXVII.

<sup>88</sup> UNCLOS, *supra* note 65, art. CXIII.

<sup>89</sup> Beckman, *supra* note 69, at 288; *see also* Wagner, *supra* note 52, at 135.

convention obligations.<sup>90</sup> Where states have not implemented their treaty obligations, ITLOS can compel states to specifically perform or craft regulations under their UNCLOS requirements.

States are able to select ITLOS for the settlement of disputes at any time through means of written declaration;<sup>91</sup> however, states must fully exhaust domestic remedies before applying for resolution through ITLOS.<sup>92</sup> Therefore, if a foreign state hacks into a state's submarine cable in its territorial waters, the injured state must seek liability under its domestic laws first where available.

ITLOS can apply the international law under UNCLOS or "other rules of international law not incompatible with this Convention."<sup>93</sup> This extends to other human rights treaties or accepted international conventions. Generally, ITLOS handles cases involving foreign sailors held without cause,<sup>94</sup> but the Tribunal has exerted its jurisdiction over any number of maritime issues.<sup>95</sup> As discussed in Section VII, ITLOS may be a useful vehicle for arbitrating disputes between states around submarine cable hacking and the international right to privacy.

Because UNCLOS does not offer explicit protections for cables from hacking on the high seas, the puzzle then is how to create enforcement mechanisms and norms against hacking. Because domestic jurisdiction can only be asserted in territorial waters and most states do not have robust domestic laws, trying to enforce cable protections through national laws seems impractical. Indeed, as will be discussed, scholars have consistently decried the absence of domestic protections for submarine cables. In the following Section, this Comment will explore whether other conventions in international law, rather than solely the laws of the sea, protect against submarine cable hacking. This Comment then explores possible solutions to this problem of liability using ITLOS as a possible avenue for liability.

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<sup>90</sup> UNCLOS, *supra* note 65, art. CCLXXXVII. See generally Tullio Treves, *Human Rights and the Law of the Sea*, 28 BERKELEY J. INT'L. L. 1 (2010).

<sup>91</sup> UNCLOS, *supra* note 65, art. CCLXXXVII.

<sup>92</sup> *Id.* art. CCXCV.

<sup>93</sup> *Id.* art. CCLXXXVIII.

<sup>94</sup> *List of Cases*, INTERNATIONAL TRIBUNAL FOR THE LAW OF THE SEA, <https://perma.cc/ZW45-Y548>.

<sup>95</sup> For example, ITLOS adjudicated the maritime boundary between Mauritius and Maldives in the Indian Ocean. See *Dispute Concerning Delimitation of the Maritime Boundary Between Mauritius and Maldives in the Indian Ocean (Mauritius v. Maldives)*, Case No. 28, Special Agreement and Notification of 24 September 2019. In another case, ITLOS provided an advisory opinion for the minimum access conditions and exploitation of fishery resources for the Sub-Regional Fisheries Commission. See *Request for Advisory Opinion Submitted by the Sub-Regional Fisheries Commission, Advisory Opinion*, 2 April 2015, ITLOS Reports 2015, Case No. 21.

## V. INTERNATIONAL NORMS WITH RESPECT TO HACKING

This Section describes the international conventions and framework with respect to cyber operations and hacking. Generally, hacking and cyber surveillance are regarded as peacetime activities and are not limited by any international treaties or conventions. The methods employed in pursuit of these goals, however, may be deemed problematic by various conventions. This Section explores the limits of hacking techniques and cyber surveillance and discusses how shifting norms around the right to privacy may change international consensus on the viability of some surveillance tactics.

At present, there is no international framework for hacking offenses or cyber operations. While previous conventions like the Budapest Convention on Cybercrime<sup>96</sup> tried to harmonize national laws with respect to cyber operations and provide for mutual assistance in investigating and prosecuting cyber operations,<sup>97</sup> there is no international legal framework for cyber offenses or hacking.<sup>98</sup>

In response to lacking a global framework, a group of preeminent international law scholars and practitioners created the Tallinn Manual<sup>99</sup> to describe the legal norms and regulations around cyber operations and hacking.<sup>100</sup> The Tallinn Manual is not an international convention and is not binding. Rather, the document serves as an expression of opinion of various experts versed in these topics. Accordingly, it should be considered a reflection of the law at the time of writing and not a limiting or normative statement of the law. The Tallinn Manual is also limited in scope and incorporates public, but not private or domestic, international law.<sup>101</sup> The document, however, can provide a general insight into how the international community views current restrictions on cyber operations on the high seas and whether hacking is indeed a “peaceful use” of international waters.

### A. General Cyber Operations on the High Seas

According to the Tallinn Manual, the primary basis for liability for cyber activities is territorial. Much like a state has jurisdiction over damage to cables in

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<sup>96</sup> Convention on Cybercrime, Nov. 23, 2001, E.T.S. No. 185.

<sup>97</sup> Amalie M. Weber, *The Council of Europe’s Convention on Cybercrime*, 18 BERKELEY TECH. L.J. 425, 426–30 (2003).

<sup>98</sup> *Id.* at 428–30.

<sup>99</sup> NATO COOPERATIVE CYBER DEF. CTR. OF EXCELLENCE, TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS (Michael N. Schmitt ed., 2d ed. 2017) [hereinafter TALLINN MANUAL].

<sup>100</sup> *Id.* at 2.

<sup>101</sup> *Id.* at 4.

its territorial seas, states have jurisdiction over cyber activities or hacking that occur within their territory or their territorial waters.<sup>102</sup> The experts note tapping a state's submarine cables in its territorial waters violated its sovereignty.<sup>103</sup> States then have jurisdiction over hacking attempts within their territorial waters.

Tapping or hacking activities outside of a state's territorial waters do not offer the same legal recourse. Like cable damage under UNCLOS, the EEZ and the continental shelf is subject to a complicated legal framework for cyber operations jurisdiction. Generally, if cyber operations are carried out for "peaceful purposes" and maintain "due regard to that State's rights and duties in the zone," they are permitted in the EEZ.<sup>104</sup> And so long as these operations do not violate "other international legal norms... governing the circumstances," they do not constitute a violation of state sovereignty in the EEZ.<sup>105</sup> Hacking therefore in the EEZ, when it does not violate other international legal norms, is permissible.

On the high seas, states have even fewer rights or protections against hacking. Cable hacking attempts on the high seas do not constitute a violation of the hacked state's sovereignty.<sup>106</sup> Indeed, background intelligence gathering on the high seas during peacetime has long been considered legal without much debate in the international community.<sup>107</sup> While hacking or tapping constitute more invasive techniques than radio or sonar surveillance, which have both been long accepted, most scholars believe there is no difference by conducting more "active" intelligence gathering via hacking.<sup>108</sup> As in the EEZ, however, human rights violations that occur during cyber operations on the high seas are not permissible according to the Tallinn Manual.

As typified by the above, norms around cyber operations have either not solidified or are highly permissive of cyber operations on the high seas. Because these norms are absent, there is insufficient state practice and public international

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<sup>102</sup> *Id.* at 51.

<sup>103</sup> *Id.* at 257.

<sup>104</sup> *Id.* at 233 ("In particular, employing a submarine or unmanned underwater vehicle to tap in territorial or archipelagic waters is inconsistent with the navigational regime of innocent passage as submarines are required to transit on the surface.")

<sup>105</sup> *Id.* at 257.

<sup>106</sup> See Oliver J. Lissitzyn & Charles H. Stockton, *Electronic Reconnaissance From the High Seas and International Law*, 22 NAVAL WAR COLL. REV. 26, 28 (1970).

<sup>107</sup> See, e.g., Roger D. Scott, *Territorially Intrusive Intelligence Collection and International Law*, 46 A.F. L. REV. 217, 219 (1999). See also Davenport, *supra* note 29, at 105.

<sup>108</sup> TALLINN MANUAL, *supra* note 99 at 257. But see Davenport, *supra* note 29, at 105 ("Whether UNCLOS can be used to address the mass surveillance carried out through the tapping of undersea cables is not entirely clear . . . Such surveillance does not fall within conventional perceptions of military activities/intelligence gathering at sea, which as mentioned above, is targeted, and aims at enhancing knowledge of the marine environment and/or the military capabilities of other State's navies.").

law to conclude cyber espionage is per se banned.<sup>109</sup> Experts, however, agree that cyber operations or hacking may be carried out in a manner that is unlawful.<sup>110</sup> Accordingly, this Comment turns to the consequences of hacking and review whether or not these effects may constitute some form of illegal or prohibited activity under public international law.

## B. Incidental Effects of Submarine Cable Hacking: Cable Damage

One incidental effect of submarine cable hacking is damage to the submarine cables as a result of splicing into the cable or damaging the cable in the installation of surveillance devices. As noted above, UNCLOS mandates states craft laws to hold their citizens liable for intentional or negligent damage to submarine cables. These laws, however, are limited in jurisdiction to territorial waters. Experts notably have split as to whether the mere act of tapping cables that results in damage renders it a violation of public international law regardless of location.<sup>111</sup> The majority of experts agreed states engage in these activities at their own risk and can incur liability for incidental damage. Separately, a handful of experts argued that unforeseeable damage from tapping operations would not incur liability. These experts note there is no settled case law as to whether incidental damage from cyber operations would be deemed foreseeable or intentional.<sup>112</sup>

This question of liability for damage is nonetheless important. By being able to hold foreign states liable for damage incurred as a result of hacking, states can shift the cost-benefit calculus of hacking attempts by requesting damages. While this may not wholly eliminate submarine cable hacking, potential liability for damage may reduce overall hacking activity levels. It typically costs millions of dollars to repair damage to the actual cable.<sup>113</sup> The economic costs associated with a down cable are hard to estimate but the losses can be extraordinary. Somalia lost internet access for three weeks due to cable damage at a cost of \$130 million.<sup>114</sup> Even without a total internet outage, increased bandwidth demand and slower data speed as a result of cable interference can wreak huge productivity losses. If a state was held liable for repair costs, or lost productivity, the possible costs

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<sup>109</sup> TALLINN MANUAL, *supra* note 99, at 169.

<sup>110</sup> *Id.* at 170.

<sup>111</sup> *Id.* at 257.

<sup>112</sup> *Id.*

<sup>113</sup> For example, a cable fault in the Pacific in 2007 cost \$8 million to repair the cable. Michael Matis, *The Protection of Undersea Cables: A Global Security Threat*, U.S. ARMY WAR COLLEGE (2012), <https://perma.cc/34Y8-VLX3>.

<sup>114</sup> *The Economic Impact of Submarine Cable Outages Can Still be Enormous*, SUBCABLE WORLD (Aug. 21, 2017), <https://perma.cc/TF2F-QQ7R>.



associated with hacking would rise and overall hacking activity levels may fall in turn.

### C. Incidental Effects of Submarine Cable Hacking: Violations of the International Right to Privacy

A second incidental effect of submarine cable hacking is the violation of citizens' privacy by harvesting electronic data. Because hacking operators cannot control what data they siphon off, hackers will inevitably intercept citizens' private communications and data in their operations, unless the cable is a dedicated military cable. This violation of privacy is significant because, as the Tallinn Manual experts noted, cyber operations may not be conducted in an unlawful manner.<sup>115</sup> While controversial, the international right to privacy would likely be violated by these operations. Accordingly, this Comment next reviews the international right to privacy, its implications for submarine hacking, and the debate around its scope.

A number of conventions have enumerated an international right to privacy.<sup>116</sup> The Universal Declaration of Human Rights introduced this principle in Article 12 that "no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence."<sup>117</sup> The International Covenant on Civil and Political Rights (ICCPR) enumerated this right in Article 17 that "no one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence."<sup>118</sup> At its core, this right protects a "private sphere" of autonomous liberty and development that cannot be intruded on without permission by state actors, individuals, or corporations.<sup>119</sup> This right has been extended to include protection of personal communications and data.<sup>120</sup> The scope of this right is clear for intelligence gathering or hacking within the territory of a state. Any arbitrary electronic interception that takes place within a nation's borders or involves that nation's citizens violates the international right to privacy.<sup>121</sup>

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<sup>115</sup> TALLINN MANUAL, *supra* note 99, at 170.

<sup>116</sup> Universal Declaration of Human Rights, Dec. 12, 1948, G.A. Res. 217A, U.N. Doc. A/810 art. 12; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Rep. 102-23, 999 U.N.T.S. 171, art. 17 [hereinafter ICCPR]; Convention on the Rights of the Child, 20 Nov. 1989, 1577 U.N.T.S. 3 art. 16; Convention on the Rights of Persons with Disabilities, 3 May 2008, 2515 U.N.T.S. 3 art. 22; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990, 2220 U.N.T.S. 39481 art. 14.

<sup>117</sup> Universal Declaration of Human Rights, *supra* note 116, art. 12.

<sup>118</sup> ICCPR, *supra* note 116, art. 17.

<sup>119</sup> Francesca Bignami, *Human Rights Extraterritoriality: The Right to Privacy and National Security Surveillance*, GWU Law School Public Law Research Paper No. 2017-67 (2017).

<sup>120</sup> *See, e.g.*, G.A. Res. 71/199, The Right to Privacy in the Digital Age (Dec. 19, 2016).

<sup>121</sup> Ashley Deeks, *An International Legal Framework for Surveillance*, 55 VA. J. INT'L L. 291, 311 (2015).

The scope of this right is less clear for intelligence gathering on foreign states or foreign nationals. The U.S. has presented the most limited interpretation of the right to privacy in this context. According to the U.S., the right only attaches to citizens within a state's territory and subject to its jurisdiction.<sup>122</sup> Therefore, foreigners and citizens located abroad do not enjoy the right to privacy for U.S. surveillance activities. In the context of U.S. submarine cable hacking, this implies only U.S. citizens enjoy the right to privacy, and they only enjoy this right for submarine cable hacking conducted in the U.S.'s territorial waters. The majority of states in the international community hold the right is broader. According to the majority opinion, states "respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party."<sup>123</sup> While the precise contours of the ICCPR are still debated, a number of international bodies have coalesced around the principle that a state's obligations are maintained for foreigners and citizens alike.<sup>124</sup> Under this interpretation, citizens enjoy the right to privacy for submarine cable hacking regardless of where the hacking takes place or what state conducts the hacking.

The debate around the scope of this right centers on whether a state exercises "effective control" over a person or territory in determining jurisdiction. As discussed earlier, the high seas are beyond the territorial reach of any particular state. Therefore, questions of "effective control" become more pressing as scholars consider whether a state exercises effective control over cyberspace through cables located on the high seas. This question is hotly debated. Some scholars have noted limiting effective control to solely physical territory may result in illogical results as it is not clear where cyber communications are physically located when conducted over the internet.<sup>125</sup> Other scholars have argued a "virtual control," where states are liable for those citizens whose communications it has control over, is more appropriate.<sup>126</sup> In the context of submarine cables, this may be a more appropriate approach as it would ensure the equal treatment of individuals regardless of physical location, which matches the traversing and multi-state nature of submarine cables.

An international right to privacy nevertheless remains controversial. Some scholars insist an application of a universal right to privacy may undermine

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<sup>122</sup> Bignami, *supra* note 119, at 4.

<sup>123</sup> Hum. Rts. Comm., General Comment no. 31, Nature of the General Legal Obligation on State Parties to the Covenant, ¶ 10, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 26, 2004).

<sup>124</sup> Kristian P. Humble, *International Law, Surveillance and the Protection of Privacy*, INT'L J. HUM. RTS. (2020) 1, 5.

<sup>125</sup> Bignami, *supra* note 119, at 5.

<sup>126</sup> Humble, *supra* note 124, at 13.

domestic protections against surveillance currently in place.<sup>127</sup> These scholars argue a more universal definition may reduce the obligations afforded domestic citizens under current cyber privacy laws.<sup>128</sup> Other scholars have argued the right to privacy is socially defined and therefore changes from context to context or society to society.<sup>129</sup> Accordingly, the scope of the right at issue may not extend to protections against state surveillance for defense purposes depending on the social definition and context.

Regardless of the ongoing debate, the recognition and scope of the right to privacy appears to be shifting, as discussed in Section III, toward a greater recognition of the right to privacy. Scholars have noted international human rights cases increasingly find states' human rights obligations follow them in acting abroad.<sup>130</sup> As this recognition expands, mass surveillance is increasingly considered "arbitrary" and in contravention of the ICCPR.<sup>131</sup> In a 2015 groundbreaking case, ten U.K. NGOs filed an action with the European Court of Human Rights (ECtHR) arguing the U.K.'s mass surveillance system violated the right to privacy.<sup>132</sup> The ECtHR agreed noting the surveillance scheme's arbitrary intelligence collection violated the right to privacy under the European Convention on Human Rights.<sup>133</sup> This case is significant because it specifically addressed bulk surveillance conducted through fiber optic cables.<sup>134</sup> On appeal, the ECtHR dismissed the case for failing to seek appropriate domestic remedies.<sup>135</sup> Nevertheless, the court's initial ruling reflects a concerted shift in behavior toward greater privacy rights recognition. Similarly, in 2020, the Court of Justice of the European Union (CJEU) held indiscriminate government mass surveillance

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<sup>127</sup> Stephen J. Schulhofer, *An International Right to Privacy? Be Careful What You Wish for*, 14 INT'L J. CONST. L. 238 (2016).

<sup>128</sup> Asaf Lubin, *We Only Spy on Foreigners: The Myth of a Universal Right to Privacy and the Practice of Foreign Mass Surveillance*, 18 CHI. J. INT'L L. 502 (2018).

<sup>129</sup> Ronald J. Krotoszynski, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 39 DUKE L.J. 1398, 1401–02 (1990) (where privacy is defined as "a realm of individual autonomy in recognized and accepted social contexts" that is "defined in relation to a particular society at a particular point in time").

<sup>130</sup> Beth Van Schaack, *The United States' Position on the Extraterritorial Application of Human Rights Obligations: Now Is the Time for Change*, 90 INT'L L. STUD. SER. US NAVAL WAR COL. 20, 32 (2014).

<sup>131</sup> *Id.* at 31–52.

<sup>132</sup> *10 Human Rights Organisations v. United Kingdom*, PRIVACY INTERNATIONAL (July 10, 2019), <https://perma.cc/L3YH-VDZX>.

<sup>133</sup> Cynthia O'Donoghue & Nona Keyhani, *ECtHR Rules on UK Mass Surveillance Under RiPA*, REED SMITH TECHNOLOGY LAW DISPATCH (Oct. 25, 2018), <https://perma.cc/7EXY-UCLJ>.

<sup>134</sup> *10 Human Rights Organisations v. United Kingdom*, *supra* note 132.

<sup>135</sup> *PI's Statement on the ECtHR Decision in Privacy International v. UK*, PRIVACY INTERNATIONAL (Sept. 3, 2020), <https://perma.cc/PPD9-NZ2D>.

violated E.U. regulations for privacy and data protection.<sup>136</sup> The CJEU held surveillance should be conducted only for what is strictly necessary for national security purposes.<sup>137</sup> These shifts are representative of general shifts in recognition of the right to privacy.

While cooperation for developing protections and harmonization of definitions for privacy in the internet age is ongoing,<sup>138</sup> it is apparent that the right to privacy exists and is increasingly recognized in international public law. While this Comment cannot cure all the debates around the right to privacy, the solution described in Section VII provides a novel exploration of the right to privacy in cyber space that may help advance discussions elsewhere.

## VI. THE LAY OF THE LAND OF CURRENT SCHOLARSHIP

This Section explores current scholarship on submarine cable protections and submarine cable hacking. This Section serves to provide context for the novelty of the solution offered in Section VII and discuss how scholars interpret currently proposed avenues for liability for submarine hacking. Scholars currently focus on protections for incidental or intentional damage to cables in order to raise the relative costs associated with hacking. Scholars, however, are pessimistic about current domestic protections toward submarine cables and generally accept submarine cable hacking as part of the international landscape. Notably, scholars have previously not used the right to privacy to frame the debate around submarine cable hacking and have not used dispute resolution mechanisms, like ITLOS, for resolving these issues.

As a summary of prior Sections, UNCLOS does not explicitly place restrictions on peacetime intelligence gathering or cyber operations on the high seas or in the EEZ. Because the high seas are not subject to any state's domestic jurisdiction and the EEZ is subject to very limited jurisdiction, domestic laws against hacking or damage to submarine cables do not apply in these areas. Further, there is no international treaty or convention that restricts or bans cyber operations generally. Experts agree that "the bottom line is that there is no clear prohibition against the physical tapping of fiber optic cables in the EEZ [or the high seas] to be found in UNCLOS"<sup>139</sup> or other international treaties.<sup>140</sup>

While states generally have the freedom to conduct cyber operations on the high seas, if the method of those operations violates other international treaties or

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<sup>136</sup> Natasha Lomas, *Europe's Top Court Confirms no Mass Surveillance Without Limits*, TECHCRUNCH (Oct. 6, 2020), <https://perma.cc/4L9U-U4Y6>.

<sup>137</sup> *Id.*

<sup>138</sup> Joel R. Reidenberg, *Resolving Conflicting International Data Privacy Rules in Cyberspace*, 52 STANFORD L. REV. 1315 (2000).

<sup>139</sup> Davenport, *supra* note 29, at 106.

<sup>140</sup> TALLINN MANUAL, *supra* note 99, at 257.

laws, those methods are subject to liability.<sup>141</sup> Scholars have therefore turned to UNCLOS Article 112 and Article 113, which describe the freedom to lay submarine cables and the obligation of states to create domestic protections for cables, as possible protections for cables.<sup>142</sup> In their analyses, these scholars focus on incidental damage to submarine cables, the first indirect effect from cable hacking.

Scholars, however, are pessimistic about using Article 112 or Article 113 to protect submarine cables. While UNCLOS requires states to have domestic laws to punish intentional or negligent damage of undersea cables, most states have not imposed these regulations. For example, Canada does not have any legal protections for cables once laid.<sup>143</sup> While Canadian law requires permits to lay cables and conduct periodic environmental impact reports, cable companies do not have any legal recourse under Canadian law for cables damaged by other parties. The U.N. General Assembly has even called on states to implement protections under Article 113 due to the paucity of available domestic protections against damage to cables.<sup>144</sup>

And where states do have regulations, those protections are generally weak and rarely enforced. For example, U.S. federal law states parties who intentionally damage cables are subject to a maximum fine of \$5,000.<sup>145</sup> Repair costs far exceed this figure.<sup>146</sup> Other states similarly have weak enforcement regimes. In Australia, the penalty for intentional damage of submarine cables is AUS\$2,000 or imprisonment for 12 months while the penalty for negligent damage is AUS\$1,000 or imprisonment for 3 months.<sup>147</sup> With such insignificant protections, there are few incentives for cable owners or regulators to seek enforcement. Accordingly, there are no documented instances of prosecution under either the U.S. or Australian laws.

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<sup>141</sup> Davenport, *supra* note 29, at 106 (“Within the EEZ, the discussion above on the controversy surrounding the legality of intelligence gathering activities would also apply—the bottom line is that there is no clear prohibition against the physical tapping of fiber optic cables in the EEZ to be found in UNCLOS.”); TALLINN MANUAL, *supra* note 99, at 257 (minding “prejudice to the application of other international legal norms,” cable tapping is not per se illegal on the high seas).

<sup>142</sup> TALLINN MANUAL, *supra* note 99, at 257.

<sup>143</sup> Scott Coffen-Smout & Glen J. Herbert, *Submarine Cables: A Challenge for Ocean Management*, 24 MARINE POL’Y 441, 444 (2000).

<sup>144</sup> See G.A. Res. 66/231, ¶ 12 (Apr. 5, 2012); G.A. Res. 67/78, ¶ 131 (Dec. 11, 2012).

<sup>145</sup> Coffe-Smout & Herbert, *supra* note 143, at 444.

<sup>146</sup> Tara Davenport, *Submarine Communications Cables and Law of the Sea: Problems in Law and Practice*, 43 OCEAN DEV. & INT’L L. 201 (2012).

<sup>147</sup> Robert Wargo & Tara Davenport, *Protecting Submarine Cables from Competing Uses*, in SUBMARINE CABLES: THE HANDBOOK OF LAW AND POLICY 255, 263 (eds. Douglas R. Burnett, Robert C. Beckman & Tara M. Davenport) (2014).

Scholars and advocates have argued strengthening these domestic protections may offer some relief against hacking. As discussed in the previous Section, by increasing the costs associated with a hacking operation, the associated cost-benefit analysis shifts. Scholars have focused on increasing these protections in the absence of a new international framework against hacking. Tara Davenport noted Article 113 of UNCLOS would apply to damage done through cable tapping but that domestic protections against submarine cable damage are “woefully inadequate” and “not commensurate with the damage resulting from intentional interference.”<sup>148</sup> Zoe Scanlon likewise recognized despite the “assumption underpinning UNCLOS that coastal states would recognize their clear interest in protecting submarine cables,” most states have not enacted legislation protecting cables.<sup>149</sup> This contributes to an ineffective legal regime against cable damage and hacking.

While there is some appetite for bolstering domestic protections,<sup>150</sup> doing so is an incomplete solution. First, the associated penalties would have to be severe in order to change the calculus of hacking states and compensate the injured cable owners. High penalties, however, may result in expensive liability for negligent, non-hacking agents like ship owners who incidentally drop anchor on a cable—the most common cable injury.<sup>151</sup> High penalties may also incentivize states to cheat by refusing to pay damages or prosecute their citizens. Further, these domestic regulations could only assert jurisdiction over the citizens and ships of the regulating state or in offenses committed in its territorial waters. While hacking is easiest closest to land,<sup>152</sup> the activities at issue most often do not occur in territorial waters and most commonly involve foreign actors or states as discussed in Section II.

Scholars, in recognition of these weaknesses, have generally accepted submarine cable hacking as part of the international landscape until further protections can be crafted or norms around cyber operations crystallize against mass surveillance.<sup>153</sup> Scholars, however, have overlooked the second indirect effect of cyber operations on submarine cables: privacy violations. The following section offers a novel solution to the problem of submarine cable hacking by

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<sup>148</sup> Davenport, *supra* note 29, at 84, 106.

<sup>149</sup> Zoe Scanlon, *Addressing the Pitfalls of Exclusive Flag State Jurisdiction: Improving the Legal Regime for the Protection of Submarine Cables*, 48 J. MAR. L. & COM. 295, 299 (2017).

<sup>150</sup> Davenport, *supra* note 29, at 84, 106; *see also* Nadia Schadow & Brayden Helwig, *Protecting Undersea Cables Must be Made a National Security Priority*, DEF. NEWS (July 1, 2020), <https://perma.cc/BP65-LGX4>.

<sup>151</sup> Wargo & Davenport, *supra* note 147, at 256.

<sup>152</sup> Griffiths, *supra* note 16.

<sup>153</sup> TALLINN MANUAL, *supra* note 99, at 257; *see also*, Davenport, *supra* note 29.

combining the dispute resolution framework under UNCLOS with other sources of public international law using privacy as grounds for liability.

## VII. USING ITLOS TO TRIGGER DISPUTE RESOLUTION: DAMAGE AND PRIVACY SOLUTIONS FOR HACKING

This Section describes the novel solution offered by this Comment with respect to submarine cable hacking. The Section first describes how the binding dispute resolution system under the International Tribunal for the Law of the Sea (ITLOS) likely has jurisdiction over submarine hacking attempts. This Section further argues, contrary to prior scholarly work, the lack of domestic protections for submarine cable hacking benefits the creation of international norms and a regime against cable hacking. This Section then proposes two solutions using ITLOS. First, ITLOS can be used to create an international regime protecting against submarine cable damage. This in turn raises the costs of submarine cable hacking and may lower hacking activity levels. Second, ITLOS can serve as a forum to argue hacking violates the international right to privacy and therefore should not be permitted even on the high seas. This analysis of the right to privacy with respect to submarine cables is novel in current scholarship and contributes to the ongoing debate about the limits of bulk surveillance collection and surveillance protections generally.

### A. Jurisdiction Under ITLOS

As a preliminary matter, ITLOS likely has jurisdiction over alleged submarine hacking disputes. As referenced above, under UNCLOS, ITLOS serves as a dispute resolution mechanism between states. The jurisdiction of ITLOS is broad, encompassing “all disputes and all applications submitted to it in accordance with [UNCLOS].”<sup>154</sup> To confer jurisdiction, therefore, states must have a viable link between hacking attempts and UNCLOS.

Under UNCLOS Articles 112 and 113, states have two arguments as to why ITLOS has jurisdiction over submarine cable hacking. First, states can use ITLOS for dispute resolution where other states are not abiding by their obligations to UNCLOS. Article 113 provides states must adopt laws and regulations to punish “breaking or injury” of submarine cables on the high seas “in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications.”<sup>155</sup> States therefore must create domestic liability schemes to hold its citizens liable for damage to or interruption of submarine cables on the high seas. If, for example, a state has not met its UNCLOS Article 113 obligations to have domestic

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<sup>154</sup> UNCLOS, *supra* note 65, Annex VI, art. XXI. *See generally* Treves, *supra* note 90.

<sup>155</sup> UNCLOS, *supra* note 65, art. CXIII. While fiber optic cables are not strictly telephonic, they are generally presumed to fall under Article 113.

regulations and a foreign state's cable is damaged, the foreign state can invoke ITLOS to determine the breaching state's cable liability. Generally, disputes between states about how to handle cable damage would sufficiently link to UNCLOS to confer jurisdiction.<sup>156</sup>

Second, states can present arguments that protections for cables under UNCLOS are broader than the right to merely lay cables. Article 112 codifies the right for all states "to lay submarine cables and pipelines on the bed of the high seas beyond the continental shelf."<sup>157</sup> While not stated, it can be assumed states have the freedom to operate these cables on the high seas. If a foreign state were to violate this assumed right of operation, through hacking or cable signal disruption, an injured state may then have grounds for liability under UNCLOS. ITLOS would be a suitable body to address the violation of this right because the tribunal adjudicates the rights and responsibilities of states on the high seas.

Even if Articles 112 and 113 are not compelling enough to justify jurisdiction, ITLOS also has jurisdiction over "any dispute concerning the interpretation or application of an international agreement related to the purposes of [UNCLOS]."<sup>158</sup> This broad language allows ITLOS to exert jurisdiction over any international treaty that affects or interacts with UNCLOS. While broad, ITLOS usually declines, however, jurisdiction absent some connection to the high seas or a subject matter of UNCLOS. Scholars have noted the specialized nature of ITLOS means the "subject matter of any agreement providing for jurisdiction of ITLOS would probably relate closely to the law of the sea, given the expertise of the judges of ITLOS."<sup>159</sup>

For example, in a case involving detained sailors, ITLOS asserted international human rights under other international conventions were at issue. Plaintiffs, however, had to first assert a jurisdictional link to these rights by noting that the detention that led to these violations was sanctioned under UNCLOS.<sup>160</sup> Similarly, Italy invoked the ICCPR in its complaint to ITLOS to free Italian sailors detained by the Indian government. Italy did not invoke a stand-alone argument for release under the ICCPR but rather paired it with UNCLOS provisions against "prejudice."<sup>161</sup> States can similarly invoke ITLOS to clarify the obligations of states to the international right to privacy, as articulated by a number of international

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<sup>156</sup> For discussion of the general jurisdictional requirements of ITLOS, see generally Treves, *supra* note 90.

<sup>157</sup> UNCLOS, *supra* note 65, art. CXII.

<sup>158</sup> *Id.* art. CCLXXXVIII.

<sup>159</sup> John E. Noyes, *The International Tribunal for the Law of the Sea*, 32 CORNELL INT'L L.J. 109, 133 (1999).

<sup>160</sup> Anna Petrig & Marta Bo, *The International Tribunal for the Law of the Sea and Human Rights*, in HUMAN RIGHTS NORMS IN 'OTHER' INTERNATIONAL COURTS 353, 386 (Martin Scheinin ed., 2019).

<sup>161</sup> *Id.* at 386–91.



conventions, with respect to UNCLOS. States should then be able to obtain ITLOS jurisdiction under this more general human rights framework.

Before reaching these questions of ITLOS jurisdiction, however, ITLOS may only resolve disputes under UNCLOS “after local remedies have been exhausted where this is required by international law.”<sup>162</sup> Subsequently, states subject to hacking must have exhausted domestic remedies before looking to ITLOS. As mentioned above, scholars have frequently noted the paucity of domestic regulations against submarine cable hacking. Many states have not implemented any domestic regulations concerning submarine cable damage, let alone hacking.<sup>163</sup> And where those domestic protections do exist, they are often weak relative to the potential damage done by hacking attempts to a cable’s constitution.<sup>164</sup> Because domestic protections are not typically available or are insufficient where they are available, states have generally exhausted all domestic remedies.<sup>165</sup>

And while scholars have criticized the weakness of these domestic protections and frequently recommended instituting stronger domestic regulations, the absence of these regulations actually *strengthens* the argument for jurisdiction under ITLOS. If domestic regulations were available, states would be obligated to pursue liability under those regulations. Because states have not implemented these regulations or have incredibly weak domestic protections, this domestic remedy is likely not available.<sup>166</sup> Because states have therefore not complied with their requirements under UNCLOS, ITLOS has a strong case for jurisdiction as the appropriate body to handle disputes associated with these unfulfilled obligations. In this respect, the overwhelming weakness of domestic protections actually *benefits* states in arguing for jurisdiction before ITLOS. This observation is in contravention to scholars’ criticism of domestic cable protections.<sup>167</sup>

Once jurisdiction has been established, states can then turn to the two indirect effects of hacking—cable damage and violations of the right to privacy—to seek liability against hacking states.

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<sup>162</sup> UNCLOS, *supra* note 65, art. CCLXXXV.

<sup>163</sup> Coffen-Smout & Herbert, *supra* note 143, at 444.

<sup>164</sup> *Id.*; Davenport, *supra* note 29, at 84.

<sup>165</sup> There is some question as to whether weak enforcement regimes, as in Australia or the United States, would be sufficient to evade ITLOS jurisdiction. States, however, can likely still obtain jurisdiction over this question.

<sup>166</sup> Davenport, *supra* note 29, at 106.

<sup>167</sup> *Id.* at 84, 106.

## B. Using ITLOS to Protect Against Cable Damage

States can use ITLOS to protect against hacking by enforcing liability for damages incurred from hacking. Using Articles 112 and 113 of UNCLOS, injured states can argue the offending states are not abiding by their UNCLOS requirements to create a domestic regime to punish cable damagers. Injured states can further argue offending states violate the freedom to lay and operate submarine cables. In the first instance, an injured state may use ITLOS to force the offending state to punish its wrongdoers under its own domestic jurisdiction. ITLOS can bind states to craft and administer regimes protecting cables against damage by their citizens. This may in turn increase prospective economic costs of hacking and reduce overall hacking activity levels. While states may have an incentive to cheat, the political costs from breaking with its required enforcement regime will only increase under a binding dispute resolution order from ITLOS.

States can further argue domestic protections as required under UNCLOS may not wholly protect this articulated right. If the cost of damage to cables is so expensive<sup>168</sup> and the economic value of internet access is so great,<sup>169</sup> states can argue the domestic regimes formulated and required under UNCLOS may not adequately protect their rights to be free from damage or interference. Accordingly, states may argue ITLOS should assert some damages or compensation requirement for intentional damage to cables from hacking.

In the second instance, states may argue the freedom to lay and operate cables under UNCLOS extends to protections against interference by foreign states on the high seas. While UNCLOS only protects against “damage” to cables,<sup>170</sup> states can reasonably argue the UNCLOS protections are an outgrowth of a history of protecting general use and operation of cables. Because the 1884 Convention protected against interference of cable operation, which was subsequently codified in the intervening conventions, states can reasonably claim UNCLOS’s more general cable freedoms extend to freedom from arbitrary interference by foreign states. Because hacking interferes with a cable’s signal and likely requires repair by the operator, states can then argue hacking falls under this sphere of prohibited activities.

ITLOS would likely be receptive to this argument. ITLOS has a history of extending greater protections to states than is precisely articulated in the language of UNCLOS. In *MV/Saiga*, ITLOS held Guinea violated the prohibition against the excessive use of force in detaining ships, although prohibitions against the

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<sup>168</sup> Matis, *supra* note 113.

<sup>169</sup> *The Economic Impact of Submarine Cable Outages Can Still Be Enormous*, *supra* note 114.

<sup>170</sup> UNCLOS, *supra* note 65, art. CXIII.

excessive use of force are not expressly articulated by UNCLOS.<sup>171</sup> And in *Guyana v. Suriname*, ITLOS held Suriname used unlawful force against a Canadian vessel licensed by Guyana even without a prohibition on the use of force against foreign vessels under UNCLOS.<sup>172</sup> These cases indicate ITLOS's willingness to extend more general international law protections beyond UNCLOS. These cases further demonstrate ITLOS is willing to extend protections to states beyond the text of UNCLOS using the history and subtext of the treaty. Accordingly, ITLOS may be receptive to the argument that freedom from damage or interference has long been historically recognized.

This solution is novel as it resolves the lack of enforcement mechanism scholars criticized by scholars with respect to domestic cable regimes. Because ITLOS can require states to abide by their treaty obligations, ITLOS can then mandate states create domestic regulations to protect cables. Further, this solution allows ITLOS to hear arguments about more general freedoms related to submarine cable use. Because ITLOS can hear arguments related to other binding treaties and agreements,<sup>173</sup> states can argue the 1884 Convention or intervening law of the sea conventions established the freedom to lay and operate cables includes freedom from unnecessary cable interference.

This solution carries with it a handful of potential caveats. First, ITLOS will most likely require the offending country to hold violators domestically liable. This follows because Articles 112 and 113 of UNCLOS only require a domestic cable protection scheme. The offending country is likely to impose minimal penalties or elect not to impose penalties. This strategy may then not raise costs associated with hacking to lower overall activity levels. This outcome, however, does not fully undermine the solution described above. If countries' domestic regimes continue to be weak or weakly enforced, ITLOS is more likely to extend greater protections to cables than are required under UNCLOS. This would be similar to the extension of greater rights than necessary in *Guyana v. Suriname*.<sup>174</sup> Further, continued refusal to hold violators domestically liable will cause ITLOS to hold contravening states accountable for failing to uphold their UNCLOS responsibilities. This may in turn increase the costs associated with hacking and lower activity levels.

Second, arguments about more general rights to cable protections, such as the freedom of cable operation, may be weak because not many states signed onto the 1884 Convention or the intervening conventions of the laws of the sea. Without a convention to point to, ITLOS would then be relying on general norms

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<sup>171</sup> M/V Saiga (No. 2) (St. Vincent v. Guinea), Case No. 2, Memorial of St. Vincent of June 19, 1998, 2 ITLOS Rep. 13, ¶ 95.

<sup>172</sup> *Guyana v. Suriname*, 47 I.L.M. 166, ¶ 405 (Perm. Ct. Arb. 2007).

<sup>173</sup> UNCLOS, *supra* note 65, art. CCLXXXIII.

<sup>174</sup> *Suriname*, 47 I.L.M. 166.

of international law in creating a liability regime for cable damage. ITLOS may be reticent to do that for fear of overstepping its bounds and of countries not participating in dispute resolution. Once such refusal occurred in *Arctic Sunrise* when Russia refused to appear in front of ITLOS.<sup>175</sup>

Third, not all hacking attempts end in damage to submarine cables. If a cable was not damaged during a hacking attempt, this regime may not apply. Accordingly, states must turn to other norms or rights to protect against submarine hacking. The following Section presents a solution to submarine cable hacking that centers on the right to privacy and does not rely on damage to the underlying cable to provide liability.

### C. Using ITLOS to Protect Against Violations of the Right to Privacy

States can also use ITLOS to pursue violations to the international right to privacy committed by hacking. ITLOS is able to apply UNCLOS law and “other rules of international law not incompatible with” UNCLOS including the Universal Declaration of Human Rights and the ICCPR.<sup>176</sup> States subject to hacking can use these conventions and other international human rights to argue against hacking once they have jurisdiction under ITLOS.

States can argue hacking contravenes the right to privacy embedded in numerous human rights treaties. As discussed in Section V, citizens enjoy a right to privacy under many international conventions. ITLOS can enforce violations of the ICCPR and other treaties as they relate to the right to privacy. While submarine cable hackers may be attempting to access sensitive government information, the hacking of undersea cables almost inevitably includes access to private citizens’ internet traffic because states cannot pick and choose what information they obtain.<sup>177</sup> Such a broad sweeping may therefore be considered “arbitrary” and in contravention of the international right to privacy.

While litigation around the right to privacy is relatively new, there is a trend among international bodies toward recognizing a universal right to privacy. As discussed in Section V, the ECtHR previously held the U.K.’s bulk surveillance program through fiber optic cables violated the right to privacy but subsequently dismissed the case on appeal for failure to pursue all domestic remedies.<sup>178</sup> In October 2020, the CJEU held indiscriminate mass surveillance violated E.U.

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<sup>175</sup> Chao Zhang, *Russian Absence at the Arctic Sunrise Case: A Comparison with the Chinese Position in the South China Sea Arbitration*, 8 J. E. ASIA & INT’L L. 413, 414 (2015).

<sup>176</sup> UNCLOS, *supra* note 65, art. CCLXXXIII; Noyes, *supra* note 159, at 124.

<sup>177</sup> Mark Harris, *How US National Security Agencies Hold the Internet Hostage*, TECHCRUNCH (July 18, 2019), <https://perma.cc/J4UV-HNNM>.

<sup>178</sup> *10 Human Rights Organisations v. United Kingdom*, *supra* note 132.

privacy and data protections.<sup>179</sup> And the German Constitutional Court held Germany's constitutional protections against indiscriminate surveillance and data collection extended to foreigners living abroad.<sup>180</sup> Beyond these court rulings, the International Court of Justice (ICJ) has affirmed the rights under the Universal Declaration of Human Rights and the ICCPR apply globally.<sup>181</sup> And while the ICJ has not affirmed a right to privacy against all indiscriminate surveillance, the Court did not denounce such an argument in two prior cases involving surveillance on private communications.<sup>182</sup> This matches a trend in international bodies toward greater recognition of the right to privacy in recent years.<sup>183</sup>

Rights under the ICCPR and the Universal Declaration of Human Rights have previously been protected by ITLOS.<sup>184</sup> While ITLOS has not taken on cases involving privacy, ITLOS precedent indicates a keen and demonstrated interest in protecting other human rights outside of those codified by UNCLOS. For example, ITLOS in its 1999 *MV Saiga Nr. 2* judgment,<sup>185</sup> for a case involving seized vessels, referred to “considerations of humanity” that “must apply to the Law of the Sea as they do in other areas of international law.”<sup>186</sup> The ITLOS decisions in *Arctic Sunrise* and *Enrica Lexie* further indicate an increasing willingness by ITLOS to consider human rights concerns, either implicitly in the case of *Enrica Lexie* or explicitly as in *Arctic Sunrise*.<sup>187</sup>

These cases demonstrate “a pattern of increased willingness on the part of States to invoke (universal) human rights instruments (i.e., the ICCPR)—and, in this case, even the views of human rights bodies (i.e., the Human Rights Committee) — in provisional measures proceedings before ITLOS.”<sup>188</sup> Scholars have observed ITLOS increasingly incorporates “considerations of humanity” in

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<sup>179</sup> Lomas, *supra* note 136.

<sup>180</sup> Melissa Eddy, *Right to Privacy Extends to Foreign Internet Users, German Court Rules*, N.Y. TIMES (May 19, 2020), <https://perma.cc/GVU4-X7L5>.

<sup>181</sup> Frederic Gilles Sourgens, *The Privacy Principle*, 42 YALE J. INT'L L. 345, 354 (2017); *see also* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

<sup>182</sup> United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. 3, 35 (May 24) (finding expulsion of the spying diplomat was the proper remedy); *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Preliminary Issues, 143 (June 23, 2008) (finding states can intercept communications as part of lawful criminal investigations).

<sup>183</sup> Van Schaack, *supra* note 130, at 32.

<sup>184</sup> *See generally* Petrig & Bo, *supra* note 160.

<sup>185</sup> *M/V Saiga (No.2)* (St. Vincent v. Guinea), Judgment of July 1, 1999, ITLOS Rep., 10.

<sup>186</sup> *Id.* ¶ 15; *see also* Treves, *supra* note 90, at 5.

<sup>187</sup> Petrig & Bo, *supra* note 160, at 382–85, 386–91.

<sup>188</sup> *Id.* at 391.

its decision-making.<sup>189</sup> And, as discussed in Section V, the international right to privacy would fall into such considerations.

ITLOS is further likely to invoke the right to privacy under the ICCPR or the Universal Declaration of Human Rights because privacy is so closely linked to the subject of the proceeding on the merits. ITLOS requires “the relief sought (and the rights to be protected by the relief) must be closely related to the rights subject to the proceedings on the merits.”<sup>190</sup> The freedom to lay cables under UNCLOS impugns some respect for those cables, their use, and their content. Because hacking violates the use and content of these cables, the right to privacy seems closely associated with hacking and capable of being invoked in proceedings.

This solution is novel for a handful of reasons. First, this solution uses a supposed weakness in international protections for submarine cables—lack of domestic protections—as the jurisdictional hook for liability. Although scholars have critiqued the weakness of these regimes,<sup>191</sup> the lack of an effective or a largely weak framework is actually a *strength* in creating a secondary method to pursue violators. Further, if domestic protections were stronger, ITLOS complaints may be superseded by domestic and local remedies. Because domestic remedies are limited in application and minimal at best, the dispute resolution system offered by ITLOS has broader application and ability to impose necessary penalties.

Second, this solution avoids questions of the peacetime legitimacy of state intelligence gathering more generally. As discussed in the Tallinn Manual, cyber operations may not be conducted in an unlawful manner.<sup>192</sup> If submarine cable hacking is considered a violation of the international right to privacy, this particular method of collecting surveillance would be deemed unlawful. States still preserve the ability to gather intelligence or surveillance through other, less arbitrary, means. This solution is therefore more tailored than other debates around peacetime intelligence gathering writ large.

While a novel method of solution, the use of ITLOS to make claims against the international right to privacy is not without caveats. While the caveats discussed below are not fatal to the solution described, they do present questions about the potential scope of the solution asserted and how controversies around the international right to privacy and international legal obligations generally bleed into the conversation around submarine cables.

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<sup>189</sup> See generally Francesca Delfino, ‘Considerations of Humanity’ in the Jurisprudence of ITLOS and UNCLOS Arbitral Tribunals, in INTERPRETATIONS OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA BY INTERNATIONAL COURTS AND TRIBUNALS 421 (Angela Del Vecchio & Roberto Virzo eds., 2019).

<sup>190</sup> Petrig & Bo, *supra* note 160, at 380.

<sup>191</sup> See Davenport, *supra* note 29, at 84; Scanlon, *supra* note 149, at 299–301.

<sup>192</sup> TALLINN MANUAL, *supra* note 99, at 170.

First, not all states are signatories to UNCLOS or the human rights conventions that describe the international right to privacy. Prominently, for example, the U.S. has not ratified its participation in UNCLOS, although it is a signatory.<sup>193</sup> While making some claims against other states under UNCLOS, it is not clear the U.S. can invoke UNCLOS or be subject to liability under UNCLOS for claims made by other states.<sup>194</sup> Non-signatory parties could voluntarily agree to arbitration under ITLOS but doing so does not seem to be in their rational self-interest. Because not all states are then bound to ITLOS as a dispute resolution mechanism, the solution offered above may not be universal in application.

Second, even if a decision is binding, it is not clear how ITLOS would enforce its arbitration decisions if parties do not comply.<sup>195</sup> For example, in the *Arctic Sunrise* arbitration, Russia refused to appear before ITLOS or abide by the tribunal's ruling.<sup>196</sup> ITLOS does not have a security force to implement rulings and does not have the ability to levy sanctions or restrict access to seaways if states do not comply with their rulings. States would therefore still need to consent to whatever ruling ITLOS makes, even if their rulings are technically "binding." This critique, however, could likely be levied with any international legal enforcement mechanism as truly bad actors can continue to evade judgments.

Third, if the injured state and the hacking state have reasonably robust domestic cable protection schemes, ITLOS may not have jurisdiction. As discussed above, ITLOS requires states to exercise local remedies before appealing to ITLOS for dispute resolution. If the offending state has domestic protections, the injured state can appeal to that state to subject the offenders to domestic protections. This would result in the offending state being responsible for enforcing a regime which its citizens, and quite probably state agents, have violated. The incentives for the offending state to do so are minimal.

This possibility, however, is not fatal to the above solution mechanism. States can still appeal to UNCLOS for greater clarity for states' responsibilities for cable protections on the high seas under Articles 112 and 113 of UNCLOS. States can further dispute the domestic proceedings as insufficient to compensate the injured party for potential cable damage or the stolen information. And states can likely still make claims related to the international right to privacy not addressed by domestic protections. While this last claim may raise issues around whether ITLOS is the proper body to hear these complaints, because the conduct occurs at sea, ITLOS still has a viable claim to jurisdiction.

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<sup>193</sup> Will Schrepferman, *Hypocri-Sea: The United States' Failure to Join the UN Convention on the Law of the Sea*, HARV INT'L R. (Oct. 31, 2019), <https://perma.cc/DG73-SR5A>.

<sup>194</sup> *Id.*

<sup>195</sup> Noyes, *supra* note 159, at 154.

<sup>196</sup> Craig H. Allen, *ITLOS Orders Russia to Release ARCTIC SUNRISE and Its Greenpeace Protestors*, OPINIOJURIS (Nov. 25, 2013), <https://perma.cc/RZ7S-SQPT>.

Fourth, relatedly, the most probable avenue to obtain jurisdiction under ITLOS involves damage to submarine cables as a result of hacking. If hacking technologies are sufficiently sophisticated, they may cause no harm to submarine cables. Accordingly, states would need to develop alternative reasons to obtain ITLOS jurisdiction. As discussed above, states can argue for dispute resolution for interfering with cable operation under Articles 112 or 113. More generally, states can argue ITLOS's broad jurisdiction gives them standing, but this also seems weak.

Alternatively, states can make claims using the more general wording of the 1884 Convention. The 1884 Convention prevents "interference" with telegraph cables. Because hacking necessarily involves some degree of signal interference of fiber optic cables, hacking would likely fall into this broader "interference" category. And because the 1884 Convention does not have a body for dispute resolution related to obligations under the Convention, states can reasonably argue ITLOS is the most proper forum to hear disputes.

This argument does not guarantee jurisdiction either. Foremost, the 1884 Convention addresses telegraph cables. While it seems reasonable to extend these protections to fiber optic or internet cables given the spirit of the Convention, the 1884 Convention is then limited in scope. Further, "interference" is harder to prove as compared to external damage to cables in hacking attempts. It is more difficult for signal operators to observe momentary gaps in service as compared to external cable damage, and maintaining a record showing this interference is both costly and difficult. Additionally, not many states are parties to the 1884 Convention as compared to UNCLOS. While many of the power players likely to engage in hacking are parties to both, including Russia and the U.K., some states are parties only to UNCLOS, like China, or party only to the 1884 Convention, like the U.S. Finally, the 1884 Convention, like UNCLOS, only presents obligations for states to create domestic protective schemes for submarine cables. The 1884 Convention does not have any enforcement mechanisms against this bad behavior which makes ITLOS's jurisdiction more specious. And claims related to U.N. human rights obligations using the 1884 Convention to confer jurisdiction seem weak.

Fifth, claims of the right to privacy are relatively novel for international courts and the limits of this right have not been clearly defined. ITLOS, in turn, may not make sweeping decisions related to hacking for these types of cases without further clarity on the scope of the right to privacy. ITLOS may instead resolve the dispute by requiring greater compensatory damages or greater domestic protections for damage to cables without resolving the issue of hacking. This result may incidentally reduce hacking by raising the possible costs associated with hacking attempts, but states may still find the possible damages as reasonable to the perceived intelligence gains from hacking. Accordingly, privacy suits may



need to wait for greater international consensus on the limits of the right to privacy.

This solution, however, can build on changing norms around the right to privacy. As discussed in Section V, the international right to privacy is increasingly recognized on the global stage. This solution presents novel questions within this ongoing debate. The recognition of the right to privacy depends largely on “effective control” of the persons or territory involved in the surveillance.<sup>197</sup> Submarine cables present novel questions around this effective control as it is nearly certain that at least some of a state’s citizens’ communications will be obtained through a submarine cable hack. Is this incidental acquisition enough to violate standards against countries surveilling their own citizens arbitrarily?

Further, submarine cables are simultaneously a protected and necessary state resource and located on the high seas. Cables may then be a useful framing to consider how much control and sovereignty states have over their cyber space. Are cables more like physical territory or more like ephemeral cyber space in considering sovereignty and does the distinction ultimately matter with respect to privacy rights? This Comment is unable to answer these questions fully, but the Comment’s solution opens novel avenues for argument around these themes and may help advance the dialogue with respect to privacy rights.

Sixth, some states may not want to pursue creating a regime against submarine cable hacking. As discussed in Section II, many global powers, including the U.S., China, the U.K., and Russia, engage in submarine cable hacking. States, particularly those with robust submarine military presences, may want to preserve the ability to surveil other states using submarine cable hacking. These states would therefore not invoke ITLOS or the right to privacy against submarine cable hacking. This may be a particularly onerous challenge because these powerful states often develop and enforce global norms.

As discussed in Section III, however, this criticism may not necessarily be fatal to the solution offered above. Norms with respect to submarine cables and hacking in general appear to be shifting. Smaller states or landlocked states that do not engage in submarine cable hacking have incentives to further develop these norms to protect their citizens’ privacy and governmental data without the counterincentive of preserving the right to hack other states. While this shift may take time to play out, the momentum is in favor of increased recognition of privacy rights as discussed in Section V. Regardless, as hacking increases and as the associated damage from hacking rises, international legal solutions may be more cost effective than patrolling the seas against hacking attempts. Accordingly, states may decide international norms are a more cost-effective way of reducing hacking activity levels.

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<sup>197</sup> Bignami, *supra* note 119, at 5.

Seventh, if states elect not to pursue a hacking complaint against another state for geopolitical reasons, the injured cable operator may not be able to use ITLOS to seek a suitable remedy. In most cases, the injured party is likely a corporation. Due to the terrific costs in laying submarine cables, the majority of modern-day cables are owned and laid by private companies and collectives. For example, Google has backed at least 14 cables globally and other tech firms have similarly pursued their own submarine cable systems.<sup>198</sup> Accordingly, corporations often foot the bill for cable damage or privacy concerns.<sup>199</sup>

ITLOS jurisdiction over corporations is somewhat ambiguous but appears limited. Article 20 of the ITLOS charter provides non-state entities can access to the Tribunal for cases where other agreements accepted by all parties in the case confer jurisdiction to ITLOS.<sup>200</sup> It is highly unlikely the corporation and the hacking party will have agreed to dispute resolution by ITLOS in the case of hacking. Accordingly, when the corporation's home country elects not to pursue dispute resolution, ITLOS may not be a viable solution.

This, however, does not entirely eliminate the possibility of enforcing an anti-hacking regime through corporate action. Depending on the jurisdictional limits of the corporation's home country, corporations can pursue private civil suits against foreign states.<sup>201</sup> These actions are generally not taken due to geopolitical concerns, concerns about comity, and questions about where the alleged tort occurred.<sup>202</sup> The possibility of these suits, however, raises the specter of private action against hacking malfactors, which may be worth considering in subsequent analyses beyond the scope of this Comment.

## VIII. CONCLUSION

This Comment examined whether states had any recourse under public international law when foreign states hacked into submarine cables. In so doing, this Comment explored public international law around submarine cables (Section IV) and public international law with respect to hacking (Section V) to conclude states can use the International Tribunal of the Law of the Sea (ITLOS) invoke liability (Section VI). This Comment argued ITLOS would have proper

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<sup>198</sup> Winston Qiu, *Complete List of Google's Subsea Cable Investments*, SUBMARINE CABLE NETWORKS (July 9, 2019), <https://perma.cc/3KL8-T4PK>.

<sup>199</sup> Many corporations form cable cooperatives to share repair and installation costs. See, for example, the Atlantic Cable Maintenance & Repair Agreement. *About*, ACMA, <https://perma.cc/DXF6-NPFM>.

<sup>200</sup> Noyes, *supra* note 159, at 132.

<sup>201</sup> See, generally Rebecca Crootof, *International Cybertorts: Expanding State Accountability in Cyberspace*, 103 CORNELL L. REV. 565 (2018).

<sup>202</sup> See generally Samantha N. Sergent, *Extinguishing the Firewall: Addressing the Jurisdictional Challenges to Bringing the Cyber Tort Suits Against Foreign Sovereigns*, 72 VAND. L. REV. 391 (2019).

jurisdiction over submarine hacking claims and would be a suitable body to address these complaints due to the weakness of domestic cable protections. This Comment argued states have two avenues for establishing liability through ITLOS: damage to cables or violations of the international right to privacy. This Comment thus invokes broader discussion of how states can seek legal recourse against submarine cable hacking while norms and conventions addressing hacking and submarine cables continue to develop.

# Applying the United Nations Trafficking Protocol in the Context of Climate Change

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## Abstract

*Climate change will increasingly lead to widespread environmental degradation which will in turn spur large-scale vulnerability, displacement, and migration. This phenomenon is now well recognized in the literature, although causal pathways continue to be debated. However, scholars and practitioners have so far largely neglected to examine the related ways in which climate change will significantly impact the scale and scope of global trafficking in persons. This Comment responds to a lack of scholarship on the climate change-human trafficking nexus by exploring the predicted impacts of climate change on human trafficking. In light of these forecasted developments, this Comment argues that the United Nations Trafficking Protocol contains a textual basis through which states may recognize people who have been made vulnerable to trafficking by climate change. Finally, this Comment asserts that any apparent or actual consent by those who are trafficked is irrelevant within the framework of the Protocol.*

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## Table of Contents

I. Introduction.....	301
II. The International Law of Human Trafficking.....	306
A. The Trafficking Protocol.....	307
1. The Role of Consent .....	310
B. The Smuggling-Trafficking Binary .....	313
III. The Climate Change-Human Trafficking Nexus.....	318
A. Environmental Mechanisms Impacting Human Trafficking .....	320
1. Sudden Onset Disasters .....	320
2. Slow Onset Disasters.....	322
3. Cycles of Causality .....	324
B. Predicted Impacts .....	325
1. Increased Number of People Impacted by Trafficking.....	325
2. Altered Methods of Trafficking .....	326
IV. The Trafficking Protocol Applies to Victims of Climate Change.....	327
A. Victims of Climate Change are in a Position of Vulnerability .....	328
B. Consent is Not Dispositive .....	330
V. Conclusion.....	333

## I. INTRODUCTION

In a 2019 speech on World Day Against Trafficking in Persons, U.N. Secretary-General António Guterres recognized climate change as a phenomenon that “exacerbate[s] the vulnerabilities and desperation that enable [human] trafficking to flourish.”<sup>1</sup> Human trafficking, also called trafficking in persons, occurs when a person (the trafficker) has a purpose of exploitation and recruits, transports, or harbors another person (the victim) through means such as force, coercion, fraud, or abuse of [the victim’s] position of vulnerability.<sup>2</sup> Exploitation in trafficking may take a variety of forms; prevalent examples include forced labor, sexual exploitation, and organ removal.<sup>3</sup> All forms of human trafficking have been prohibited under international law since 2003, when the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) entered into force.<sup>4</sup>

This Comment addresses instances where a victim has been made vulnerable to trafficking through climate change-related processes of environmental degradation. This relationship is referred to as the climate change-human trafficking nexus, a term that describes the multicausal and multidirectional intersection between environmental phenomena spurred by global warming and developments in global and regional patterns of trafficking in persons. The nexus will be elaborated upon in Section III, but a brief overview may serve to indicate where the discussion is headed: in short, climate change will increase natural disasters and forced migration. Both of these factors will increasingly make it a daunting and complex task to prevent human trafficking and protect vulnerable people from exploitative and coercive situations.

For example, a 2007 study conducted in Bangladesh after Cyclone Sidr found that:

criminal networks began to operate in the disaster-affected region, preying on widows, men desperate to cross [an international border] to find employment and income, and sometimes entire families. Victims of trafficking were forced into prostitution and hard labour, some working in sweatshops. . . . Some disaster-affected families also began to collude with the traffickers in order to

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<sup>1</sup> *Conflict, Climate Change Among Factors that Increase ‘Desperation that Enables Human Trafficking to Flourish,’ Says UN Chief*, U.N. NEWS (July 31, 2019), <https://perma.cc/9QEN-U7EC>.

<sup>2</sup> United Nations Office on Drugs and Crime (UNODC), *What is Human Trafficking*, UNODC, <https://perma.cc/QD7G-RCUG>.

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

<sup>4</sup> United Nations Convention Against Transnational Organized Crime, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, art. 2, opened for signature Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Sept. 29, 2003) [hereinafter Trafficking Protocol].

earn money. . . . Women-headed households were identified as especially vulnerable to human trafficking and the associated forms of exploitation.<sup>5</sup>

Research performed in countries such as Bangladesh, the Philippines, Nepal, Pakistan, and Cambodia has documented similar post-disaster patterns.<sup>6</sup> Although much of the available research concentrates on post-disaster upticks in trafficking on the Asia-Pacific region,<sup>7</sup> this phenomenon occurs all over the world, including in the U.S.<sup>8</sup>

Many of the cases arising from the climate change-human trafficking nexus may lack the level of coercion or force traditionally associated with trafficking cases.<sup>9</sup> Rather, the victims may have implicitly or explicitly consented to a trafficking situation as the least bad choice after a climate-related natural disaster.<sup>10</sup> The lack of full-scale coercion and potential presence of consent raise concerns of a protection gap: victims of climate change will remain in exploitative situations without the possibility of gaining a protective legal status as a victim of trafficking. To address this protection gap, this Comment sets forth a textual argument for the inclusion of victims of the climate change-human trafficking nexus under the Trafficking Protocol.

The goal of this argument is to prevent the harm caused by human trafficking without vitiating the definition contained within the Trafficking Protocol. This is the central tension underpinning this Comment: extending legal protection to people who are trafficked as a result of climate change while maintaining some limiting factor to reassure administrative agents that this solution is, at least in theory, feasible.

Human trafficking is a massive industry that impacts a significant number of people and carries tangible financial repercussions. According to 2017 estimates, at any given time, 24.9 million victims of human trafficking are enduring modern slavery.<sup>11</sup> Sixty-four percent of trafficking victims are in forced labor situations,

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<sup>5</sup> Sabira Coelho et al., *The Climate Change–Human Trafficking Nexus* (citing Alice Poncelet et al., *A Country Made for Disasters: Environmental Vulnerability and Forced Migration in Bangladesh*, in ENV'T, FORCED MIGRATION & SOC. VULNERABILITY 211–22 (Tamer Afifi & Jill Jäger, eds.)), at 6 INT'L ORG. FOR MIGRATION (2016).

<sup>6</sup> *See generally id.*

<sup>7</sup> For good reason, the Asia-Pacific region will be most impacted by the climate change-human trafficking nexus. The region already has a high rate of irregular migration and “extreme vulnerability to climate change” due to its “diverse topography.” *Id.* at 5.

<sup>8</sup> *See, e.g.*, Jasmine Garsd, *Human Trafficking is a Hidden Aftermath of Natural Disasters*, PUB. RADIO INT'L (Oct. 5, 2017), <https://perma.cc/X97W-RH7D>.

<sup>9</sup> *See generally id.*

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

<sup>11</sup> This is likely a conservative estimate. *See Human Trafficking by the Numbers*, HUMAN RIGHTS FIRST (Jan. 2, 2017), <https://perma.cc/274N-BJL8>; Anna Stephens, *Climate Change and Human Trafficking: An Investigation into how Climate Change and Natural Disasters Increase the Risk of Human Trafficking and How it Can be Intercepted in the Future*, LUND UNIV. CTR. FOR SUSTAINABILITY STUD. 9 (2019).

spanning sectors such as construction and manufacturing, domestic care, and agriculture.<sup>12</sup> Globally, human traffickers earn roughly 150 billion USD, per year.<sup>13</sup> Sexual exploitation is a disproportionate source of financial benefit, making up sixty-six percent of the industry's financial earnings, although only nineteen percent of victims are trafficked for sexual exploitation.<sup>14</sup>

Despite these staggering statistics, human trafficking is a growing problem, and there is little reason to think this will change anytime soon.<sup>15</sup> The rate of successful prosecutions of human traffickers is extremely low,<sup>16</sup> and very few victims of trafficking are ever detected, offered protection, or provided with the services they need to extricate themselves from coercive situations.<sup>17</sup>

Climate change likely exacerbates these trends. The planet's warming results in more numerous, severe, and unpredictable natural disasters.<sup>18</sup> These disasters fall into two categories: sudden onset disasters, such as cyclones, and slow onset events, such as sea level rise.<sup>19</sup> Both types of environmental disasters commonly result in loss of home and livelihood for people in the area.<sup>20</sup>

Those with fewer resources initially are especially likely to be impacted and face severely limited options for survival post-disaster.<sup>21</sup> As a result, they become easy targets for recruitment by traffickers.<sup>22</sup> Recruitment can take a variety of forms, ranging from widespread online advertisements to targeted physical approaches.<sup>23</sup> Such interactions generally involve promises of easy money, housing, or food, with few or no details about the work to be performed in exchange.<sup>24</sup> This recruitment may occur almost immediately after a natural disaster,<sup>25</sup> or it may be a more distant result as, for example, when people begin

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<sup>12</sup> HUMAN RIGHTS FIRST, *supra* note 11.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> UNODC, *Global Report on Trafficking in Persons 2018*, 41 (Dec. 2018).

<sup>16</sup> HUMAN RIGHTS FIRST, *supra* note 11.

<sup>17</sup> UNODC, *supra* note 15.

<sup>18</sup> Coelho et al., *supra* note 5, at 3–4.

<sup>19</sup> Denise Chow, 'Time is Fast Running Out': World Meteorological Organization Warns Climate Efforts are Falling Short, NBC NEWS (Mar. 10, 2020), <https://perma.cc/W8ES-LJJ2>.

<sup>20</sup> Coelho et al., *supra* note 5, at 3–4.

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

<sup>22</sup> KOKO WARNER ET AL., IN SEARCH OF SHELTER: MAPPING THE EFFECTS OF CLIMATE CHANGE ON HUMAN MIGRATION AND DISPLACEMENT, iv, 2 (2009).

<sup>23</sup> Garsd, *supra* note 8.

<sup>24</sup> *Id.*

<sup>25</sup> As with the well-documented increase in trafficking that occurs after sudden onset disasters, see WARNER ET AL., *supra* note 22; see Part III.A.1.



migration journeys as a form of proactive climate change adaptation.<sup>26</sup> In this way, climate change compounds existing vulnerabilities and will likely increase the situations in which people succumb to coercive situations due to a lack of intervening options or support.

Human migration is another important facet of the climate change-human trafficking nexus. The International Organization for Migration (IOM) estimates that by 2050 the world will have over 200 million forced migrants, largely due to environmental degradation.<sup>27</sup> The IOM acknowledges that this may be a conservative number. Yet, it is already more than twice the current number of displaced people worldwide (79.5 million).<sup>28</sup> While estimates vary, top scholars in the field confidently assert that the “scope and scale [of migration] could vastly exceed anything that has occurred before.”<sup>29</sup>

Of course, it is difficult to accurately estimate what number of these migrants might become trafficking victims.<sup>30</sup> Data about the prevalence of trafficking among forced migrants is not yet available.<sup>31</sup> But the predicted rise of forced migration means that even relatively low rates could have a big impact on global rates of human trafficking. For example, if one in four forced migrants became trafficked, this would more than double the current number of global human trafficking victims. Additionally, climate change may alter the means that traffickers use and the type of trafficking that people experience through, for example, the increased prevalence of debt bondage.<sup>32</sup> Each of these impacts has enormous significance for advocates and practitioners.

A great deal of this migration will be intrastate, with many people moving from rural agricultural areas to urban slums, where traffickers often recruit.<sup>33</sup> However, migration across international borders is also likely to increase significantly due to climate change.<sup>34</sup> As the effects of climate change intensify and combine with pre-existing factors, such as violent conflict or a dearth of resources, people will travel greater and greater distances in search of safety and

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<sup>26</sup> Coelho et al., *supra* note 5, at 3–4.

<sup>27</sup> WARNER ET AL., *supra* note 22.

<sup>28</sup> *Figures at a Glance*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR) (June 18, 2020), <https://perma.cc/8B2Y-LSMB>.

<sup>29</sup> WARNER ET AL., *supra* note 22.

<sup>30</sup> *Human Trafficking*, MIGRATION DATA PORTAL (July 3, 2020), <https://perma.cc/QXG3-Q7XM>.

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

<sup>32</sup> David Brown et al., *Modern Slavery, Environmental Degradation and Climate Change: Fisheries, Field, Forests and Factories*, 0 NATURE AND SPACE 1, 6 (2019).

<sup>33</sup> Coelho et al., *supra* note 5, at 4.

<sup>34</sup> WARNER ET AL., *supra* note 22.

opportunity.<sup>35</sup> In the face of global populist sentiment and lack of political will to support legal international migration, people will increasingly enlist the services of human smugglers to make these journeys, thereby increasing the likelihood of eventual trafficking.<sup>36</sup> Whatever the relative proportions of differing types of migration, the effect is the same: increased vulnerability to human trafficking as a result of environmental displacement that has disrupted livelihoods and systems of support.

Despite the urgency and significance of the climate crisis for efforts to eradicate sexual exploitation and forced labor, the climate change-human trafficking nexus has received relatively little attention from policymakers and academics.<sup>37</sup> Secretary-General Guterres is one of just a handful of public figures who has sought to increase awareness of the climate change-human trafficking nexus.<sup>38</sup> The IOM is one of the few international organizations that has formally begun to publish on the nexus, and their work so far encompasses just one publication.<sup>39</sup>

The climate change-human trafficking nexus also continues to be largely ignored by the U.N. Office on Drugs and Crime (UNODC), the U.N. agency tasked with addressing human trafficking through research and policy development. For example, in 2018, the UNODC's 88-page biannual report on global human trafficking contained no mention of or reference to climate change or the environment.<sup>40</sup>

Agencies focused on responding to climate change and natural disasters have similarly neglected to address trafficking as a consequence of environmental events, despite substantial evidence that supports a positive correlation between natural disasters and increased rates of trafficking.<sup>41</sup> A thorough review of the disaster response and emergency preparedness documents of various U.N. agencies, the American Red Cross, and Federal Emergency Management Agency

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<sup>35</sup> John Podesta, *The Climate Crisis, Migration, and Refugees*, BROOKINGS (July 25, 2019), <https://perma.cc/224G-85FM>.

<sup>36</sup> Brown et al., *supra* note 32.

<sup>37</sup> Coelho et al., *supra* note 5. The Vatican is one of the first and only entities to situate its work on human trafficking within the context of environmental issues. In 2015, the Vatican convened over seventy city mayors to issue a declaration . . . that committed to “reduc[e] exposure [of the poor] to climate-related extreme events . . . which foster human trafficking and dangerous forced migration.” *Id.*; *Modern Slavery and Climate Change: The Commitment of the Cities*, PONTIFICIA ACADEMIA SCIENTIARUM, at 6 (July 21, 2015).

<sup>38</sup> Coelho et al., *supra* note 5, at 3.

<sup>39</sup> *Id.*

<sup>40</sup> UNODC, *supra* note 15.

<sup>41</sup> Stephens, *supra* note 11, at 27.

yielded zero documents that mentioned human trafficking as a potential post-disaster phenomenon.<sup>42</sup>

This Comment proceeds in Section II by examining the current international legal regime governing human trafficking and interrogating the smuggling-trafficking binary that currently exists in international law. Section III analyzes the mechanisms and predicted impacts that are central to the climate change-human trafficking nexus, with a focus on identifying the potential challenges for the existing legal regime. Section IV argues that the potential legal protection gap for populations impacted by the climate change-human trafficking nexus is in fact less prominent here, as the international legal regime on human trafficking already contains an existing textual basis to include these types of cases. This Comment concludes by centering this legal solution within broader discussions around the suitability of various political, legal, and social responses to environmental displacement, human trafficking, and modern-day slavery.

## II. THE INTERNATIONAL LAW OF HUMAN TRAFFICKING

No existing international legal tool is explicitly aimed at the climate change-human trafficking nexus. The U.N. Framework Convention on Climate Change (UNFCCC) “is the principal international mechanism for dealing with climate change,” but its focus is almost exclusively on “reducing greenhouse gas emissions.”<sup>43</sup> The UNFCCC does not consider the impact of climate change on displacement and migration, much less on human trafficking. In 2015, at the Conference of the Parties (COP) 21, a formal committee agreed “to develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”<sup>44</sup> But this has not led to tangible impact on international or domestic legal frameworks to support migrants displaced by environmental degradation.<sup>45</sup> There are several advisory, non-governmental groups (such as the Nansen Initiative) that have “propos[ed] procedures for the protection of people displaced by climate change,” but these proposals have not yet resulted in concrete mobilization or action, and none of them address trafficking directly.<sup>46</sup>

Of course, climate change and human trafficking are each individually the subject of numerous legal and policy regimes and academic studies; it is only their nexus that remains widely under-examined. The U.N. has prioritized ending

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<sup>42</sup> *Id.*

<sup>43</sup> Michael B. Gerrard, *Climate Change and Human Trafficking After the Paris Agreement*, 72 U. MIAMI L. REV. 345, 360 (2018).

<sup>44</sup> UNFCCC, *Rep. of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 Nov. to 13 Dec. 2015*, ¶ 49, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

<sup>45</sup> Gerrard, *supra* note 43, at 361.

<sup>46</sup> *Id.*

modern slavery and human trafficking through the 2030 Sustainable Development Goals (SDG), adopted in 2015.<sup>47</sup> SDG Target 8.7 calls for states to take “immediate and effective measures to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour, including recruitment and use of child soldiers, and by 2025 end child labour in all its forms.”<sup>48</sup> SDG 13 emphasizes taking “urgent action to combat climate change and its impacts.”<sup>49</sup>

This Comment argues that the Trafficking Protocol’s definition of trafficking in persons appropriately includes people who are trafficked as a result of climate-related vulnerability. This argument is rooted in a recognition of the significant and wide-ranging consequences of characterizing certain conduct as ‘trafficking.’<sup>50</sup>

First, states are obligated to respond to trafficking with a “range of criminalization and cooperation [efforts] both internally and in relation to other [s]tates.”<sup>51</sup> Second, people whose actions are criminally prosecuted as trafficking are often subject to a different legal regime and face harsher sanctions than if they were determined to not be partaking in trafficking.<sup>52</sup> Finally, and perhaps most critically, people who are victims of trafficking are “entitled to special measures of assistance and protection that [are] unavailable to those who are considered to have not been trafficked.”<sup>53</sup> Importantly, the definition of trafficking contains both political and legal dimensions, such that “the parameters around what constitutes ‘trafficking’ are not yet firmly established.”<sup>54</sup>

## A. The Trafficking Protocol

The primary international legal instrument on human trafficking is the U.N. Trafficking Protocol, adopted by the General Assembly in 2000.<sup>55</sup> The Protocol “is the first global legally binding instrument with an agreed definition on trafficking in persons.”<sup>56</sup> Crucially, the Trafficking Protocol is only binding on

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<sup>47</sup> INTERNATIONAL LABOUR ORGANIZATION (ILO) & WALK FREE FOUNDATION, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, INT’L LABOUR OFFICE 15 (2017).

<sup>48</sup> UNODC, *Sustainable Development Goals*, <https://perma.cc/4QQX-DPPQ>.

<sup>49</sup> *Id.*

<sup>50</sup> UNODC, *Issue Paper: The Role of ‘Consent’ in the Trafficking in Persons Protocol*, UNODC 15 (2014).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, UNODC 8 (2013).

<sup>55</sup> Trafficking Protocol, *supra* note 4.

<sup>56</sup> UNODC, *United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (2004).

ratifying states. As of January 2021, 178 states have ratified and are thus obligated to take steps to fulfill the core purposes of the Trafficking Protocol: the prevention of trafficking, the protection of trafficking victims, and the promotion of international cooperation to meet the first two objectives.<sup>57</sup>

The exact scope and scale of required state action is not set forth in great detail.<sup>58</sup> The Trafficking Protocol is a strong norm-setting instrument and model document, but it leaves implementing states with significant flexibility. Thus, jurisdictional approaches to anti-trafficking legislation and policies vary greatly.<sup>59</sup>

This legal context highlights a significant challenge to the implementation of this Comment's proposed solution. The Trafficking Protocol is a flexible instrument, a feature that simultaneously fuels this Comment's argument and limits its impact. Although the Trafficking Protocol is binding on states, the extent of each state's exact obligations is largely discretionary as a result of relatively non-demanding language used. Thus, the willingness and ability of states to act in accordance with this Comment's analysis and extend protection to victims hinges on the political will and available resources of each state.

These challenges contextualize—rather than invalidate—this Comment's argument, as well as the Trafficking Protocol's role as “an international framework that has impelled a global anti-trafficking movement.”<sup>60</sup> The Trafficking Protocol sought to formalize a global legal definition of “trafficking in persons” in order “to provide some degree of consensus-based standardization of concepts.”<sup>61</sup> This in turn could “support efficient international cooperation in investigating and prosecuting cases,” “giv[e] a clearer global picture of the problem,” and provide global standards for efforts to provide “support and assistance for victims.”<sup>62</sup>

Article 5 of the Trafficking Protocol directs signatories to criminalize the offense of trafficking in persons as defined below, as well as attempting or participating indirectly in trafficking.<sup>63</sup> Under the Trafficking Protocol, the crime of “trafficking in persons” is defined as:

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<sup>57</sup> Trafficking Protocol, *supra* note 4, art. 2.

<sup>58</sup> For example, Article 5 of the Trafficking Protocol obligates states to “adopt such legislative and other measures as may be necessary to establish [participating in trafficking or being an accomplice to trafficking] as criminal offenses.” The details of such measures—including prosecutorial processes, penalties, and assistance for the victims—is largely left to each state's discretion, although the Protocol does direct that all measures be “[s]ubject to the basic concepts of the [the party state's] legal system.” *Id.* art. 5.

<sup>59</sup> Joy Ngozi Ezeilo, *Achievements of the Trafficking Protocol: Perspectives from the Former UN Special Rapporteur on Trafficking in Persons*, 4 ANTI-TRAFFICKING REVIEW 144, 145 (2015).

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

<sup>61</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto* 269 (2004).

<sup>62</sup> *Id.*

<sup>63</sup> Trafficking Protocol, *supra* note 4, art. 5.

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. . . .<sup>64</sup>

The Trafficking Protocol thus sets forth three distinct elements for the crime of trafficking in persons: (1) an act, which can be fulfilled by the recruitment, transportation, transfer, harboring or receipt of persons, (2) a means by which the action occurs or is made possible, and (3) an intent, meaning the purpose behind the action, which is required to be one of exploitation.<sup>65</sup>

Consider the application of these three elements to an example. The following is a description of a 2015 case in the U.S.:

Andras Janos Vass and two others convinced gay Hungarian men, ages 20 to 22, to come to the United States under false promises of jobs with good pay. The defendants then brought the young men to Miami, Florida, where they forced the victims to engage in commercial sex entirely for their own profit, working up to 20 hours a day. The traffickers isolated the victims from each other, confiscated their travel and identification documents, kept them confined to the apartment, and used financial manipulation to keep the victims from leaving or seeking help. The traffickers monitored their communications with family and with others.<sup>66</sup>

The first element, the act, was present from the moment that the defendants recruited the victims. That element was further developed when the defendants, through financial support and encouragement, enabled the victims to come to the U.S. (transportation), and also when they harbored the victims in an apartment. Any of these actions on their own would likely have been enough to fulfill the act element. Similarly, the traffickers used a variety of means (coercion, threat, deception, and fraud), any one of which in isolation would likely have satisfied the second element. Finally, the presence of the intent element is extremely well-supported here. The fact pattern evinces a premeditated and well-planned method of exploitation. As this example shows, analysis of individual cases under the Trafficking Protocol's definition is highly fact specific.

As far as victim protections, the Protocol emphasizes the participation of the victim in criminal proceedings against the trafficker by mandating that "[i]n appropriate cases and to the extent possible under its domestic law," a party state

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<sup>64</sup> Trafficking Protocol, *supra* note 4, art. 3.

<sup>65</sup> UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 24.

<sup>66</sup> NATIONAL HUMAN TRAFFICKING RESOURCE CENTER, TEN YEARS OF SEX TRAFFICKING CASES IN THE UNITED STATES 2 (2016).

shall provide information on court proceedings and allow the victim's "views and concerns to be presented."<sup>67</sup> Article 6 encourages, but does not mandate, states to "consider implementing measures to provide for the physical, psychological and social recovery of victims" through the provision of housing, counseling, legal assistance, medical and material assistance, and employment or educational opportunities.<sup>68</sup>

### 1. The Role of Consent

The Trafficking Protocol specifies that whenever the definition set forth in Article 3 has been fulfilled, then the consent of the person being trafficked "shall be irrelevant."<sup>69</sup> Although this language seems clear on its face, including terms like "abuse of authority" and "abuse of a position of vulnerability" in the means part of the definition of trafficking complicates matters.<sup>70</sup> As a result, interpretive questions remain. In particular, stakeholders continue to debate whether the means must rise to the level of impairing or negating the consent of a particular alleged victim in order to satisfy the definition.<sup>71</sup>

In the U.N. system, the travaux préparatoires are documents that represent the "negotiation, discussions, and drafting of a final treaty text."<sup>72</sup> They are sometimes used to shed light on ambiguous parts of a treaty. Unfortunately, the travaux préparatoires for the Trafficking Protocol are sparse and "do not provide clarity" on unresolved issues related to consent.<sup>73</sup> This is likely because the Protocol's ambiguous stance is the result of disagreement between non-governmental organizations and states during the drafting process over "whether trafficking should be permitted to occur if an individual consents to the process, and, similarly, whether prostitution and sex work are activities to which individuals are (or should be) capable of freely consenting."<sup>74</sup> The language that the drafters settled on is likely intentionally vague so as to allow implementing states to align the Trafficking Protocol to their unique perspective on this issue.<sup>75</sup> But it also

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<sup>67</sup> Trafficking Protocol, *supra* note 4, art. 6.

<sup>68</sup> *Id.* arts. 6–7.

<sup>69</sup> *Id.* art. 3.

<sup>70</sup> Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 477 (2003).

<sup>71</sup> UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 7.

<sup>72</sup> U.N., *What Are Travaux Préparatoires and How Can I Find Them?*, DAG HAMMARSKJÓLD LIBRARY, <https://perma.cc/B6ZX-DRRT>.

<sup>73</sup> UNODC, *The Role of 'Consent' in the Trafficking in Persons Protocol*, *supra* note 50, at 27.

<sup>74</sup> Abramson, *supra* note 70, at 474–75.

<sup>75</sup> *Id.* at 496.

means that the Protocol itself “does little to answer the question of whether consent can be accommodated within the parameters of trafficking activity.”<sup>76</sup>

The role of consent in domestic legislation varies from state to state. Some states emulate the language of the Trafficking Protocol and others implement their own explicit considerations of consent.<sup>77</sup> In surveying states, the UNODC also found frequent differences between what the law says on paper and how law enforcement and judicial actors treat consent in practice.<sup>78</sup>

For example, U.S. domestic trafficking law contains no explicit references to consent, which would seemingly indicate that consent is not meant to play a role in the adjudication of trafficking cases.<sup>79</sup> But surveyed practitioners agreed that issues of consent frequently arise through investigatory and prosecutorial processes, including trials, when trying to determine the trafficker’s intent to coerce.<sup>80</sup> Moreover, practitioners acknowledged that a victim’s clear consent “may present an obstacle to successful prosecution and such cases may not be pursued for that reason, particularly if the exploitation is at the less severe end of the scale.”<sup>81</sup>

Academic studies, too, are suffused with disagreement and confusion on whether consent is relevant to determinations of when someone is trafficked. Depictions of the typical trafficking situation range widely. For some scholars, trafficking encompasses only the most extreme examples of coercive or abusive situations, such as when a child is directly sold into servitude.<sup>82</sup> For others, trafficking is more aptly characterized as “an extended form of migration, spurred by the same economic and political factors that trigger people to seek the services of smugglers.”<sup>83</sup> This faction of scholars tends to view people who are trafficked less as victims and more as “enterprising people who overcame a lack of options at home.”<sup>84</sup>

Perhaps seeking to respond to these debates, in 2009 the UNODC issued a Model Law on Trafficking in Persons, which offers the following guidance on Article 3(b) of the Trafficking Protocol:

[O]nce the elements of the crime of trafficking, including the use of one of the identified means (coercion, deception, etc.), are proven, any defence or allegation that the victim ‘consented’ is irrelevant. . . . While being aware of

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<sup>76</sup> *Id.* at 477.

<sup>77</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50.

<sup>78</sup> *Id.*

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

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> Abramson, *supra* note 70, at 481–82.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 482.



the nature of the work, the person may have been misled as to the conditions of work, which have turned out to be exploitative or coercive. This provision restates existing international legal norms. It is logically and legally impossible to ‘consent’ when one of the means listed in the definition is used. Genuine consent is only possible and legally recognized when all the relevant facts are known and a person exercises free will.<sup>85</sup>

Additionally, growing awareness of the confusion around the role of consent prompted the UNODC in 2014 to publish an issue paper on consent in the Trafficking Protocol.<sup>86</sup> The issue paper’s findings come from surveys of domestic legislature and numerous interviews with practitioners and policymakers in signatory states to identify areas of confusion and promulgate guidance.<sup>87</sup> The paper highlights a general consensus that the consent of an alleged victim “should not be permitted to trump fundamental human and social values such as dignity, freedom, and protection [of the vulnerable]” by preventing prosecution of their trafficker or a victim status determination.<sup>88</sup> However, interviewees disagreed on “what those values are and how they should be understood and applied,” indicating that irrespective of the Trafficking Protocol’s text, the issue of consent is a live one in many jurisdictions.<sup>89</sup>

These ongoing debates over the role of consent must be properly framed. Pragmatist actors arguing for strict exclusion of consenting victims are often concerned with issues of feasibility. The fear is that if the scope of the trafficking definition becomes overly broad, the utility of defining trafficking as a unique crime whose victims are entitled to certain legal protections is diminished. This broadening may lead to exponential growth in the number of cases and victims. This growth will detract from a state’s ability to take anti-trafficking measures and protect victims.

In responding to these “floodgates” concerns about the role of consent, it is worth emphasizing the conceptual distinction between defining human trafficking and effectively responding to human trafficking. Temporal, financial, and political constraints necessarily mean that states have limited resources to prosecute traffickers and offer services to people who have experienced trafficking. But there “is no limit to how many cases may constitute human trafficking” and the applicability of the trafficking definition to one victim’s circumstances do not adversely or positively affect another individual’s case.<sup>90</sup> This Comment is more

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<sup>85</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 27–28.

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

<sup>87</sup> *Id.* at 1.

<sup>88</sup> *Id.* at 9.

<sup>89</sup> *Id.* at 9.

<sup>90</sup> Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bridge Industry*, 51 *VIR. J. INT’L L.* 487, 495 (2010). It is important to note, however, that in many countries this “lack of

concerned with protecting the theoretical application of the Trafficking Protocol to all relevant cases. Questions of enforcement and feasibility are certainly important, but they are somewhat tangential to this Comment's argument.

Under the language of the current Trafficking Protocol, if an act is not carried out by way of one of the articulated means, "the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person," even if the act is accompanied by exploitative intent, then the act is not trafficking.<sup>91</sup> The most critical part of this Comment's argument, then, is that victims of climate change are in a position of vulnerability as defined by the Protocol. The abuse of this position of vulnerability constitutes trafficking, irrespective of the victim's consent. This argument will be elaborated upon in Section IV.

## B. The Smuggling-Trafficking Binary

The international legal system treats human trafficking and smuggling as completely distinct types of crimes, a framework referred to as the smuggling-trafficking binary. This binary is already at odds with what practitioners see on the ground and acts as a legal concept that allows governments to get out of obligations they might otherwise owe to trafficked victims.<sup>92</sup> This Comment's discussion highlights how the binary is especially problematic within the context of the climate change-human trafficking nexus.

As climate change progresses, rates of irregular migration across international borders will increase.<sup>93</sup> In the face of greater border controls, many of these migrants will enlist the services of a human smuggler.<sup>94</sup> A number of factors will cumulatively increase the risk that people who are smuggled ultimately become trafficked.<sup>95</sup> Strict adherence to the binary thus presents an easy out for states. States may categorize many people who are in fact victims of trafficking as

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impact" is only true from a theoretical point of view. Pragmatically, there are finite benefits and resources that countries are willing to extend to victims of trafficking. For example, the U.S. sets a cap on the number of visas that may be given to victims of trafficking per year, thus creating some sense of prioritization between cases. U.S. Dep't of Homeland Security, PM-15-4344: U AND T VISA LAW ENFORCEMENT RESOURCE GUIDE 5 (2020).

<sup>91</sup> Abramson, *supra* note 70, at 477.

<sup>92</sup> See, e.g., THE GLOBAL INITIATIVE AGAINST TRANSNATIONAL ORGANIZED CRIME, UNDERSTANDING CONTEMPORARY HUMAN SMUGGLING AS A VECTOR IN MIGRATION: A FIELD GUIDE FOR MIGRATION MANAGEMENT AND HUMANITARIAN PRACTITIONERS (2018) [hereinafter GLOBAL INITIATIVE].

<sup>93</sup> SCHUYLER NULL & LAUREN HERZER RISI, NAVIGATING COMPLEXITY: CLIMATE, MIGRATION, AND CONFLICT IN A CHANGING WORLD 17–18 (2016).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

people who have been smuggled and are thus deportable and not entitled to protection.

The smuggling of migrants became a crime under international law in 2000 with the adoption of the Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol).<sup>96</sup> The Smuggling Protocol defines human smuggling as:

the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident . . . .<sup>97</sup>

The Smuggling Protocol prohibits states from criminally prosecuting migrants who have been smuggled but goes on to clarify that “[n]othing in this Protocol shall prevent a State Party from taking measures against a person whose conduct constitutes an offence under its domestic law.”<sup>98</sup>

The Smuggling Protocol makes little provision for allowing people who are smuggled to stay in the destination country. Article 18 in fact anticipates automatic deportation by requiring states to “facilitate and accept, without undue or unreasonable delay, the return of a person [who has been smuggled].”<sup>99</sup> The Smuggling Protocol makes clear that each state must “take all appropriate measures to carry out the return in an orderly manner with due regard for the safety and dignity of the person [who has been smuggled].” However, this ambiguous language is very different from the specific references to physical and psychiatric care for victims in the Trafficking Protocol.<sup>100</sup> This difference in protections highlights the stakes of the smuggling-trafficking binary.

In sum, under the current international law framework there are three primary distinctions between smuggling and trafficking. First, smuggling always involves crossing an international border, while human trafficking may consist only of intrastate movement (or, indeed, no movement at all). Second, the intent or purpose of the trafficker is to exploit the victim, while the absence of exploitative intent (or at least, the same degree of exploitative intent) characterizes a smuggler’s actions.<sup>101</sup> Third, “people who have been trafficked are (or should be) treated as victims, [while] people who have been smuggled are regarded as

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<sup>96</sup> United Nations Convention Against Transnational Organized Crime, *Protocol Against the Smuggling of Migrants by Land, Sea and Air*, opened for signature Dec. 15, 2000, T.I.A.S. No. 13127, 2225 U.N.T.S. 209 (entered into force Jan. 28, 2004).

<sup>97</sup> *Id.* art. 3.

<sup>98</sup> *Id.* arts. 5–6.

<sup>99</sup> *Id.* art. 18.

<sup>100</sup> *Id.*

<sup>101</sup> GLOBAL INITIATIVE, *supra* note 92, at 5.

criminals.”<sup>102</sup> This is key to this Comment’s discussion of the binary: the fact that “in the case of smuggling, the victim is the state rather than the person who is smuggled, whereas, in trafficking, the crime is against the victim of trafficking.”<sup>103</sup>

The third distinction is especially problematic within the context of the climate change-human trafficking nexus. Increased rates of irregular migration and greater barriers to cross-border migration will lead to higher rates of smuggling.<sup>104</sup> And data suggests that those who enlist the services of smugglers will be increasingly desperate and willing to exchange labor in the destination country as a way to pay the smuggling fee.<sup>105</sup> This makes it especially likely that human trafficking will result from a smuggling situation.<sup>106</sup> Where an individual falls on both sides of the smuggling-trafficking binary, states may focus on the fact that they were smuggled in—and are thus deportable—instead of the fact that the individual is a trafficking victim, and therefore entitled to protection under international law.

As with so many other areas of international law,<sup>107</sup> the disparate approaches presented in the trafficking-smuggling binary are also heavily influenced by gendered notions of vulnerability and choice. The prototypical trafficking victim is a vulnerable and desperate woman who is coerced into sexual servitude or forced labor, while the Smuggling Protocol generally envisions reaching “a male economic migrant who has weighed his options and chosen to migrate for better economic opportunities.”<sup>108</sup> In reality, the line between trafficking and smuggling is often blurred, and people of all genders may fall under one or both definitions.

Moreover, the smuggling-trafficking binary encourages states to engage in a securitized response towards human smuggling, which likely perpetuates and increases rates of violent and exploitative smuggling that more frequently lead to human trafficking—a counter-productive result.<sup>109</sup> To understand this process, consider the different types of barriers that may compel people to seek the services of human smugglers: physical barriers, such as crossing a sea, desert, or border fence; political barriers, like navigating a violent conflict zone, a heavily militarized border, or an impenetrable visa regime; and cultural barriers, such as language

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<sup>102</sup> Gerrard, *supra* note 43, at 366 (citing Britta S. Loftus, *Coordinating U.S. Law on Immigration and Human Trafficking: Lifting the Lamp to Victims*, 43 COLUM. HUM. RTS. L. REV. 143, 166 (2011) and TAINA BIEN-AIMÉ, A RIGHT NOT TO BE TRAFFICKED, N.Y. ST. B. ASS’N. J. 22, 23–24 (2017)).

<sup>103</sup> GLOBAL INITIATIVE, *supra* note 92.

<sup>104</sup> Brown et al., *supra* note 104, at 6.

<sup>105</sup> GLOBAL INITIATIVE, *supra* note 92, at 5.

<sup>106</sup> Abramson, *supra* note 70, at 481.

<sup>107</sup> Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CANADIAN J.L. & JUR. 281 (2002).

<sup>108</sup> Abramson, *supra* note 70, at 479.

<sup>109</sup> GLOBAL INITIATIVE, *supra* note 92, at 5.

differences or ethnic differences that may give rise to suspicion of the irregular migrant.<sup>110</sup> To overcome these barriers, migrants enlist the services of smugglers, who traditionally help migrants to reach their destination safely and often provide protection from bad actors.<sup>111</sup>

But the harsh criminalization of human smuggling has “tipped [the power dynamic between smuggler and migrant] in favor of the smuggler, eroding the safeguards traditionally protecting migrants and making them increasingly vulnerable to abuse.”<sup>112</sup> Whenever the state constructs a novel barrier for irregular migrants by, for example, militarizing a border section or initiating a law enforcement crackdown in a migration hub, demand for smuggling services increases. The smuggling market responds by offering new and increasingly risky routes and raising prices to compensate for the increased risk. As fees and demand simultaneously increase, the ability of migrants to pay upfront decreases. This means that migrants are more likely to exchange promises of free labor for a smuggling journey, which renders them more susceptible to exploitation and debt bondage.<sup>113</sup>

For example, Thailand is one of the world’s largest fishery exporters and has repeatedly come under fire for failing to address the prevalence of forced labor and victims of trafficking in its fisheries.<sup>114</sup> As the Thai government has “sought to balance negative public attitudes about migration...with strong economic demand for low-cost labor,” they have engaged in “contradictory and inconsistent migration policymaking.”<sup>115</sup> Limited opportunity for legal migration of low-skilled workers has pushed migrants (predominantly from Burma and Cambodia) towards “more expensive and less safe border crossings, thereby increasing profits for smugglers and traffickers.” In short, “[t]he higher the barriers and the more complex the routes, the higher the demand for smugglers becomes, the more specialized they need to be and, consequently, the more they charge.”<sup>116</sup> And the more they charge, the more likely it is that their clients will be unable to pay those charges without becoming exploited.<sup>117</sup> Climate change will exacerbate these dynamics by increasing the demand for smuggling services and simultaneously

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<sup>110</sup> *Id.* at 3.

<sup>111</sup> *Id.* at 2; see also Jennifer M. Chacón, *Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement*, 158 U. PENN. L. REV. 1609, 1612 (2010).

<sup>112</sup> GLOBAL INITIATIVE, *supra* note 92, at 2.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> See generally *Hidden Chains: Rights Abuses and Forced Labor in Thailand’s Fishing Industry*, HUMAN RIGHTS WATCH (Jan. 23, 2018), <https://perma.cc/3BZ2-V7Z3>.

<sup>115</sup> *Id.*

<sup>116</sup> GLOBAL INITIATIVE, *supra* note 92, at 3.

<sup>117</sup> *Id.*

implementing new types of physical and political barriers, a point which will be further elaborated upon in the next Section.

Treating smuggling and trafficking “as twin threats” in this way “allows partners to take [ ] relatively neutral and security-focused actions to combat ‘trafficking,’ while overlooking the broader requirements for suppressing smuggling and better managing migration [and] at the same time claiming to have complied with the spirit of an international agreement [on trafficking].”<sup>118</sup> This strategy contributes to the project of building a nation state by contributing to an “us” and “them” mentality drawn along sovereign borders. Antitrafficking discourse and policymaking has drawn upon and perpetuated “myths of migrant criminality”<sup>119</sup> by depicting traffickers as noncitizen men, particularly noncitizen men of color, in a way that is completely detached from the complicity of citizen consumers of trafficked labor.<sup>120</sup> This framing “fits comfortably within the larger narrative that has been constructed around unauthorized migration”<sup>121</sup> and justifies extensive border control efforts “that may, ironically, give traffickers more business.”<sup>122</sup>

In addition to being premised upon oversimplified conceptions of gender and shortsighted views of the consequences of a securitized response to human smuggling, the smuggling-trafficking binary presents state governments with misplaced incentives. The stark differences between what is owed to someone who is smuggled and someone who is trafficked mean that fighting human smuggling is more expedient and less resource intensive. States are incentivized to “see all trafficked people—non-consenting ‘victims’ and consenting adults—as people who have consented to enter [the country] illegally and therefore are not in need of protection.”<sup>123</sup>

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<sup>118</sup> *Id.* at 5.

<sup>119</sup> Chacón, *supra* note 111., at 1616

<sup>120</sup> *Id.* at 1616, 1627.

<sup>121</sup> *Id.* at 1616.

<sup>122</sup> *Id.* at 1635.

<sup>123</sup> Abramson, *supra* note 70, at 493. Another factor is the practical difficulty of prosecuting human trafficking, because doing so requires establishing the malintent of the trafficker. GLOBAL INITIATIVE, *supra* note 92, at 23 (“Under the UN Trafficking in Persons Protocol, the defining feature that allows one to establish whether the crime of human trafficking has been committed is the intent of the perpetrator. Neither the victim’s consent nor what they experience en route is relevant to identifying a victim of trafficking. Instead, it is the ‘action’, ‘means’ and ‘purpose’ of the trafficker that establishes the crime. The perpetrator must have intentionally planned to exploit his victim, and all three elements must be present to constitute the crime of trafficking in persons. However, the task of identifying the motivations of criminal groups is not easy. Migration and protection agencies rarely concern themselves with gathering data or performing analysis that identifies the groups behind smuggling or trafficking – this is seen as the role of law enforcement. And there is a fear that documenting this would compromise their humanitarian neutrality.”).

As the impacts of climate change become more severe, such that deporting people to their place of origin becomes an increasingly inhumane option, it will be important to ensure that states are not (whether accidentally or intentionally) dismissing bona fide victims of trafficking as people who have willingly participated in smuggling. In addition, deportation will not address the cyclical nature of the climate change-human trafficking nexus: many people are likely to attempt the perilous journey to another country again after deportation, since the on-the-ground conditions in their place of origin will likely only have deteriorated. This Comment thus operates within the context of this smuggling-trafficking binary and seeks to illustrate how climate change will continue to disrupt the bases upon which the binary is built.

### III. THE CLIMATE CHANGE-HUMAN TRAFFICKING NEXUS

In 2019, natural disasters displaced 22 million people globally.<sup>124</sup> This number is more than twice the yearly average number of people who are displaced due to violence, underscoring that environmental degradation—not human conflict—is one of the most significant drivers of instability on our planet.<sup>125</sup> Moreover, environmental degradation and human conflict will likely continue to intersect, with disastrous consequences. For example, one study on the Syrian war and refugee crisis concluded that persistent drought attributable to climate change led 1.5 million Syrian farmers to move from rural areas into overcrowded cities in search of work, “contributing to social turmoil and ultimately a civil war.”<sup>126</sup>

Over the last few decades, anthropogenic climate change has more than doubled the frequency of natural disasters that lead to widespread displacement and insecurity.<sup>127</sup> Legal and policy responses to climate-induced migration have been few and far between, in part because distinguishing “climate change migrants” from “economic migrants” is difficult, since “migration is never solely due to climate change, but rather a compounding result of vulnerabilities.”<sup>128</sup>

However, this Comment subscribes to a relatively maximalist understanding of environmental migration by asserting that environmental migration does exist

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<sup>124</sup> WORLD METEOROLOGICAL ORGANIZATION, WMO STATEMENT ON THE STATE OF THE GLOBAL CLIMATE IN 2019 29–30 (2020).

<sup>125</sup> NORWEGIAN REFUGEE COUNCIL, 2016 GLOBAL REPORT ON INTERNAL DISPLACEMENT (GRID), INTERNAL DISPLACEMENT MONITORING CTR. (IDMC) 4–5 (2016).

<sup>126</sup> Gerrard, *supra* note 43, at 349 (citing Colin P. Kelley et al., *Climate Change in the Fertile Crescent and Implications of the Recent Syrian Drought*, 112 PROC. NAT'L ACAD. SCI. 3241, 3241–42 (2015)); Ian Sample, *Global Warming Contributed to Syria's 2011 Uprising, Scientists Claim*, THE GUARDIAN (Mar. 2, 2015), <https://perma.cc/X73C-VGRV>.

<sup>127</sup> Stephens, *supra* note 11, at 9.

<sup>128</sup> *Id.*

and can be identified as a distinct phenomenon.<sup>129</sup> Such an approach is already prevalent in the scholarship on climate change and migration. One notable example is the typology offered by Fabrice Renaud et al., which provides three categories of climate change-induced migrants: (1) environmental refugees, who flee immediately after sudden onset disasters, (2) environmentally forced migrants, who have to migrate to avoid destitution, and (3) environmentally motivated migrants, who proactively leave an area impacted by slow onset disasters “in order to preempt the worse.”<sup>130</sup> Additionally, advancements in climate science will continue to offer solutions to problems of proof and causality. Through extreme event attribution, for example, scientists are now able to calculate with increasing levels of certainty the impact of anthropogenic climate change on the occurrence and severity of natural disasters.<sup>131</sup>

Of course, climate change and environmental degradation never act in isolation. Climate change is a vulnerability multiplier, meaning that its impacts greatly exacerbate pre-existing conditions, such as water and food shortages, poverty, low educational attainment, and gender inequality, that make people vulnerable to the recruitment of human traffickers.<sup>132</sup> The above discussion illustrates how climate change may be sufficiently isolated so as to identify a distinct group of people who are trafficked as a result of climate vulnerability. Despite ongoing issues of multicausality, empirical evidence makes clear that climate change is responsible for a growing number of natural disasters that lead to displacement and force people into desperate situations where they are more likely to be trafficked.<sup>133</sup> Given this urgency, the multicausal nature of the climate change-human trafficking nexus “should not be an excuse to ignore the necessity of developing a protection framework for climate-induced displacement.”<sup>134</sup>

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<sup>129</sup> David J. Cantor, *Environment, Mobility and International Law: A New Approach in the Americas*, 21 CHI. J. INT'L L. 2, 8–9 (2020).

<sup>130</sup> Fabrice Renaud et al., *Control, Adapt or Flee: How to Face Environmental Migration?*, U.N. UNIV. INST. FOR ENV. AND HUM. SECURITY 29–30 (2007).

<sup>131</sup> Chelsea Harvey, *Scientists Can Now Blame Individual Natural Disasters on Climate Change*, SCIENTIFIC AMERICAN (Jan. 2, 2018), <https://perma.cc/8MXL-2ZJR>.

<sup>132</sup> Null & Risi, *supra* note 93, at 17–18. Climate change is anticipated to displace as many as 200 million people by 2050, both within and across national borders. While climate change is rarely the sole cause of migration and displacement, it acts as a threat multiplier, exacerbating existing vulnerabilities and leaving people with little alternative but to flee. Carmen G. Gonzalez, *Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses*, 36 WIS. INT'L L.J. 366, 367–68 (2019).

<sup>133</sup> Harvey, *supra* note 131.

<sup>134</sup> Mostafa Mahmud Naser, *Climate Change, Environmental Degradation, and Migration: A Complex Nexus*, 36 WM. & MARY ENV'T L. & POL'Y R. 713, 767 (2015) (noting further that “[e]ven the existing refugee structure itself is not immune from this causal complexity. Indeed, it is impractical to assess each individual against the Refugee Convention definition of a refugee, especially in cases involving



## A. Environmental Mechanisms Impacting Human Trafficking

There are two primary environmental mechanisms through which climate change impacts human trafficking: sudden onset disasters and slow onset disasters.<sup>135</sup> In general, sudden onset disasters “lead to mass amounts of displaced persons leaving quickly, while [slow onset disasters] steadily bring strife to natural resources, employment prospects, and agricultural accessibility, leading to a slow movement of people out of the area.”<sup>136</sup> Disaster-related displacement is rarely driven by a sudden or slow onset event alone; instead, environmental factors work in tandem with socioeconomic and political factors that curtail or eliminate people’s ability to stay in their habitual land.<sup>137</sup> Additionally, sudden and slow onset disasters may simultaneously impact certain regions, furthering the destructive effects.

Importantly, the consequences of the displacement and migration spurred by sudden and slow onset disasters are not yet fully known.<sup>138</sup> In the absence of comprehensive data, the ensuing discussion about the mechanisms underlying the climate change-human trafficking nexus provides a coherent narrative by utilizing disparate case studies and common-sense assumptions.

### 1. Sudden Onset Disasters

Sudden onset disasters are unexpected and rapidly developing environmental events such as flooding, mudslides, earthquakes, and tsunamis.<sup>139</sup> Climate change is expected to significantly increase the intensity, unpredictability, and number of sudden onset disasters.<sup>140</sup> These disasters frequently “cause unexpected loss of land and lives, and destruction of means of livelihoods, instantly plunging those without safety nets into poverty.”<sup>141</sup> Since 2004, the IOM has monitored trafficking trends after natural disasters and incorporated the issue of post-disaster trafficking into its crisis response frameworks.<sup>142</sup> As a result, a substantial amount of research on post-disaster trafficking patterns has been conducted. Although this research has yet to incorporate explicit discussions of

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massive numbers of forced migrants. Instead, the current refugee framework, including UNHCR and other international organizations, treats a large number of people who flee their homes because of persecution, war, and famine as ‘persons of concern’ and extends protection and assistance.”)

<sup>135</sup> Coelho et al., *supra* note 5.

<sup>136</sup> Stephens, *supra* note 11, at 19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 21.

<sup>139</sup> Platform on Disaster Displacement, *Key Definitions*, <https://perma.cc/22Y4-3QXP>.

<sup>140</sup> Elizabeth Ferris, *Disasters and Displacement: What We Know, What We Don’t Know*, BROOKINGS (June 9, 2014), <https://perma.cc/A9SV-LNUU>.

<sup>141</sup> Coelho et al., *supra* note 5, at 3.

<sup>142</sup> *Id.* at 6.

the impact of climate change, the data establishes a strong positive correlation between the severity of natural disasters and increased rates in human trafficking.<sup>143</sup>

For example, after Hurricane Harvey wreaked havoc in 2017 in the American South, law enforcement agents, policymakers, and journalists documented increases in trafficking, especially sex trafficking.<sup>144</sup> Former Congresswoman Linda Smith analyzes human trafficking through fundamental market principles, noting that “if someone is going to pay good money, lots of money, somebody else is going to bring a product to that market.”<sup>145</sup> Sudden onset disasters frequently have an impact on both the supply and demand side of the trafficking market. For example, after Hurricane Harvey, women were more likely to lose their jobs and homes and thus become ready targets for traffickers, and hundreds or thousands of male aid workers arrived in the area as potential ‘customers.’<sup>146</sup> These patterns are facilitated by the widespread prevalence of smartphones, as the internet provides an easy and relatively discrete way for traffickers to recruit both customers and victims. Smartphone usage is increasing rapidly across the globe, such that people who lose their homes and livelihoods in a disaster are likely to retain their mobile phone and internet connection.<sup>147</sup>

In addition to sex trafficking, sudden onset disasters are also likely to lead to trafficking for forced labor. As the number of natural disasters increases, the capacity of the international humanitarian aid system to adequately respond will continue to decrease. This will lead to more and more victims of natural disasters undertaking migration journeys. When these journeys stay within the borders of the individual’s state of origin, they are likely to involve moving from rural agricultural areas to urban slums, and research indicates that people in this situation are highly vulnerable to trafficking recruitment efforts.<sup>148</sup>

If an individual’s migration journey involves crossing an international border, they are likely to “seek assistance from human smugglers, [which subsequently] plac[es] them[] at risk of many of the forms of exploitation that are

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<sup>143</sup> Anuj Gurung & Amanda D. Clark, *The Perfect Storm: The Impact of Disaster Severity on Internal Human Trafficking*, 21 INT’L AREA STUDIES R. 302 (2018).

<sup>144</sup> Garsd, *supra* note 8.

<sup>145</sup> *Id.*

<sup>146</sup> *See id.*; see also Elizabeth M. Wheaton et al., *Economics of Human Trafficking*, 48 INT’L MIGRATION 114, 114 (2010).

<sup>147</sup> Garsd, *supra* note 8. The internet’s role in this phenomenon is not limited to developed countries like the U.S. Already, fifty-eight percent of the world’s population are active internet users, and access is growing rapidly in developing countries as 27,000 people per hour become internet users. Mobile phones are the most common way to access the internet, with 1 million new smartphones coming into use every day. *Digital Around the World*, DATAREPORTAL (July 2020), <https://perma.cc/5XUE-R2PS>.

<sup>148</sup> Coelho et al., *supra* note 5, at 4.

commonly associated with trafficking, such as sexual exploitation, forced labour, forced marriage, as well as organ removal.”<sup>149</sup> Global responses to the refugee crises of the last few decades—in particular, the hostility of receiving countries to forced migrants and lack of political will to facilitate legal migration—indicate that use of smugglers will only continue to increase.<sup>150</sup> As a result of climate change, people have fewer viable options for livelihoods and simultaneously experience displacement more frequently. Thus, disaster-induced migration, regardless of the immediacy with which migration begins or the duration and extent of the migration, places people in positions of vulnerability to trafficking. Climate change will significantly impact rates of disaster-induced migration and, by extension, trafficking.

## 2. Slow Onset Disasters

Slow onset disasters include drought, coastal erosion, desertification, salinization, sea level rise, and glacial retreat.<sup>151</sup> Because slow onset disasters occur over time, there may be more opportunity for the development of mitigation and adaptation systems and infrastructure to offset their negative impacts, but these measures require access to resources. This means that communities with fewer resources (who were already more vulnerable to trafficking) are less likely to be insulated from the impacts of slow onset disasters and more likely to resort to migration as a “necessary tool for survival.”<sup>152</sup>

In addition to being a last-resort survival mechanism, migration is a key proactive strategy to diversify income in the face of environmental degradation that challenges the sustainability of traditional agricultural livelihoods.<sup>153</sup> As with sudden onset disasters, migration may be intrastate or involve crossing an international border, but in either scenario, increased vulnerability to trafficking is a likely result.<sup>154</sup> Moreover, “households with extremely limited resources may not be able to migrate at all,” and “[a]s these households remain in inhospitable environments associated with intensifying deprivation, [their] members are also made [increasingly] vulnerable to trafficking.”<sup>155</sup> There is a particular concern about inhabitants of very rural areas, who may not have the ability to migrate and

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<sup>149</sup> *Id.* at 3.

<sup>150</sup> Gonzalez, *supra* note 132, at 367–68.

<sup>151</sup> Coelho et al., *supra* note 5, at 3.

<sup>152</sup> UNFCCC, *Synopsis of Technical Paper: Slow Onset Events*, UNFCCC Technical Papers 2 (Nov. 26, 2012); Stephens, *supra* note 11.

<sup>153</sup> Coelho et al., *supra* note 5, at 3–4.

<sup>154</sup> See WARNER ET AL., *supra* note 22; see Part III.A.1.

<sup>155</sup> Nicole Molinari, *Intensifying Insecurities: The Impact of Climate Change on Vulnerability to Human Trafficking in the Indian Suburbs*, 8 ANTI-TRAFFICKING REVIEW 50, 58 (2017).

may receive delayed or limited assistance by governments and humanitarian organizations after a disaster.<sup>156</sup>

A case study from the Sundarbans region of West Bengal, India, may serve to further illustrate how these mechanisms will operate within the climate change-human trafficking nexus. The Sundarbans is a region of low-lying islands with a population of 4.4 million people, the vast majority of whom experience “severe impoverishment and insecurity.”<sup>157</sup> Gender inequities are prevalent, particularly in regards to educational attainment, workforce participation, and gender-based violence.<sup>158</sup> In addition, the region is home to a number of particularly vulnerable populations, including a high number of “undocumented Bangladeshi migrants and landless households that have historically and contemporaneously faced discrimination, marginalization, and poverty.”<sup>159</sup> The Sundarbans contain one of the world’s largest and most biodiverse mangrove ecosystems on earth, and the region’s peoples have long relied on the soil and water of this ecosystem.<sup>160</sup> But in recent years, “[s]tronger and more recurrent floods and cyclones, erratic rainfall, increased temperatures, and encroaching sea-level rise have contributed to soil and water salinization, crop losses, soil infertility, and significant long-term reductions in agricultural yields, adversely impacting local livelihoods.”<sup>161</sup>

In the face of converging environmental challenges, many of those who are able to do so have chosen to migrate in search of better prospects and greater security.<sup>162</sup> This migration occurs steadily as slow onset disasters progress and spikes as a result of sudden onset disasters. For example, in 2009, after Cyclone Aila swept through the region, seventy-five percent of households in the Sundarbans reported that at least one family member had migrated out of the region in search of labor, and children comprised twenty percent of those migrating.<sup>163</sup>

This type of irregular and insecure labor migration—often, as in this case, undertaken in the context of “degraded environments, unviable livelihoods, destitute, and survival need”<sup>164</sup>—is highly likely to amplify vulnerability to trafficking for forced labor and sexual exploitation. But there may be little alternative; the same unsustainable conditions that compel people to undertake perilous journeys in search of survival simultaneously impede their ability to return

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<sup>156</sup> Gurung & Clark, *supra* note 143.

<sup>157</sup> Molinari, *supra* note 155, at 56.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* at 58.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

home if they do become the subject of trafficking and exploitation.<sup>165</sup> This is a unique aspect of people who are trafficked due to climate change-induced vulnerability: once freed from a trafficking situation, there may be no safe home to which they can return.

### 3. Cycles of Causality

Human trafficking is not only an effect of climate change but also undergirds the structural systems that *cause* climate change and worsen its impacts. Many of the industries that contribute to environmental degradation are “underpinned by large numbers of migrant workers in forced labor situations” who often enter these situations as a result of being trafficked.<sup>166</sup> For example, the lucrative palm oil industry in South East Asia is responsible for widespread rainforest destruction and is “heavily dependent on less-than-ethical recruitment of foreign labour, as well as coercive labour practices.”<sup>167</sup> In fact, data suggests that “up to half of illegal deforestation globally is dependent on slave labour” and these practices are estimated to be responsible for emitting an estimated 2.54 billion tons of carbon dioxide each year—more than any nation in the world except for China and the U.S.<sup>168</sup>

Fishing is another global industry that simultaneously worsens the impact of climate change<sup>169</sup> and relies on modern slavery to make up its workforce and supply chains.<sup>170</sup> The IOM seeks to highlight the prevalence of forced labor in fishing and provide assistance to victims of trafficking on fishing boats and within onshore seafood processing facilities.<sup>171</sup> In 2017, the IOM’s Global Assistance Fund, which serves trafficking victims and other vulnerable migrants, took part in efforts to assist 600 men who were found in forced labor situations on fishing boats (from various nations) in Indonesian waters:

Some had not been on dry land for years. One of the victims had been separated from his family, without any contact, for 22 years. . . . Many migrant fishers enter the destination country through networks of recruitment agents,

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<sup>165</sup> *Id.*

<sup>166</sup> Coelho et al., *supra* note 5, at 5.

<sup>167</sup> *Id.* (citing E. Benjamin Skinner, *Indonesia’s Palm Oil Industry Rife with Human-Rights Abuses*, BLOOMBERG BUS. (July 20, 2013), <https://perma.cc/S7U9-4J6M>).

<sup>168</sup> Brown et al., *supra* note 32, at 8.

<sup>169</sup> See, e.g., MARINE STEWARDSHIP COUNCIL (MSC), *Climate Change and Fishing*, <https://perma.cc/X679-VN66> (“Oceans play a major role in climate dynamics, absorbing ninety-three percent of heat that accumulates in the Earth’s atmosphere, and a quarter of the carbon dioxide (CO<sub>2</sub>) released from fossil fuels. . . . [I]t’s vital that we manage the oceans in a sustainable way.”). Illegal, unregulated and unreported fishing—which Thailand has been accused of multiple times—threatens the ecosystems that are necessary for oceans to continue to serve as an important source of climate change mitigation. *Id.*

<sup>170</sup> HUMAN RIGHTS WATCH, *supra* note 132; Brown et al., *supra* note 32.

<sup>171</sup> ILO & WALK FREE FOUNDATION, *supra* note 47.

often incurring high brokerage fees, even when they are engaged through legally recognised recruitment agencies, leading to personal debts that must be repaid through deductions from wages. And when the labour brokerage is informal and the workers have no contracts of employment, there is considerable risk of further abuse. Debt bondage in the context of labour migration and trafficking is a trend that can be seen across a number of countries and sectors.<sup>172</sup>

There is a third layer of causality, too: as the impacts of climate change are more keenly felt, such as ocean acidification, increased prevalence and severity of storms, and declining fish stocks, fisheries face increased economic pressure and are “forced to extend their operations, both geographically and temporally, for ‘ever diminishing returns’ of fish catches.”<sup>173</sup> As the market becomes more competitive and economic pressures on fisheries increase, the appeal of utilizing low-cost forced labor increases and demand for trafficked workers grows.<sup>174</sup>

## B. Predicted Impacts

### 1. Increased Number of People Impacted by Trafficking

Climate change has already begun to increase the number of people who become victims of human trafficking.<sup>175</sup> Although scientists have varying estimates of the exact rate at which the impacts of climate change will worsen, there is consensus that we are just at the beginning of witnessing these effects.<sup>176</sup> Time is “fast running out for [humans] to avert the worst impacts of climate disruption.”<sup>177</sup> The next few years are a critical tipping point for worldwide action on climate change, and international will to take action is being challenged in unprecedented ways by the COVID-19 pandemic and faltering economies.<sup>178</sup> Through the mechanisms discussed in the previous Part, it is almost certain that climate change will lead to a large increase in the number of people who become vulnerable to the recruitment efforts of traffickers.

In addition to an increased number of trafficking victims, evidence suggests that climate-related environmental degradation will contribute to a simultaneous rise in the number of people who collude with traffickers or become active traffickers themselves. This is especially true after sudden onset disasters, when a

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<sup>172</sup> *Id.* at 35.

<sup>173</sup> Brown et al., *supra* note 32, at 4.

<sup>174</sup> *Id.*

<sup>175</sup> Coelho et al., *supra* note 5.

<sup>176</sup> See, e.g., Henry Fountain, *How Bad is Climate Change Now?*, N.Y. TIMES (Apr. 19, 2020), <https://perma.cc/SGJ9-U4UK>.

<sup>177</sup> Chow, *supra* note 19.

<sup>178</sup> Renee Cho, *COVID-19’s Long-Term Effects on Climate Change—For Better or Worse*, EARTH INSTITUTE (June 25, 2020), <https://perma.cc/83JX-XNRD>.

sharp spike in the supply of trafficking victims will necessarily contribute to a high demand for traffickers to facilitate the distribution of these trafficked people into forced labor situations.<sup>179</sup>

## 2. Altered Methods of Trafficking

In its 2018 *Global Report on Trafficking in Persons*, the UNODC reported that fifty-eight percent of trafficking victims were detected within their own borders, and eighty-six percent were detected within the same sub-region of their point of origin.<sup>180</sup> Thus, current trafficking data indicates that the crime predominantly occurs close to the victim's point of origin. The subset of trafficked people who arise from the climate change-human trafficking nexus will likely dramatically change these patterns, as more people will need to travel far away from home to escape the impact of environmental degradation.

Additionally, as discussed in Section II, increased rates of climate-related migration are likely to be accompanied by a growing willingness on the part of human smugglers to provide loans for their customers:<sup>181</sup>

[smuggling] recruiters encourage migrants who lack the funds needed to embark on their journey on the understanding that they can work to earn the fee at a later point in the journey . . . in most cases, migrants find themselves working as temporary indentured labor . . . it has become increasingly common for the 'pay later' migrant to be kidnapped and held for ransom . . . [t]he migrant may be forced to work for the kidnap gang while being held . . . In other instances, debt collectors seek payment at the end of the journey . . . these debt collectors [often] have links to human-trafficking networks and, in the likely scenario that the migrant is unable to pay, the migrant is sold to traffickers in lieu of payment.<sup>182</sup>

Humanitarian practitioners have already noticed a significant increase in these 'migrate now, pay later' smuggling schemes, which offer unprecedented mobility opportunities to the poorest segments of society for whom migration was "previously unthinkable."<sup>183</sup> Another implication of the rising prevalence of these schemes is that the rising price of smuggling services due to market forces

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<sup>179</sup> Gurung & D. Clark, *supra* note 142; see WARNER ET AL., *supra* note 22; Part III.A.1.

<sup>180</sup> UNODC, *supra* note 15.

<sup>181</sup> This is well-documented through a series of case studies, as well as global data. For example, in 2017 when the IOM conducted over 2,500 interviews with people who crossed the Mediterranean into Europe, 79% of people "answered 'yes' to at least one of the four indicators of human trafficking and other exploitative practices. In particular, 67% said they had been 'held . . . against their will during the[ir] journey[] by armed individuals or groups other than . . . government authorities'; 47% had worked without getting the expected payment; 36% were forced to work; 75% suffered physical violence of some kind; and 0.3% were approached by someone with offers of an arranged marriage." Gerrard, *supra* note 43, at 357 (quoting IOM, *Analysis: Flow Monitoring Surveys the Human Trafficking and Other Exploitative Practices Prevalence Indication Survey*, (June 2017)).

<sup>182</sup> GLOBAL INITIATIVE, *supra* note 92, at 17.

<sup>183</sup> *Id.*

will do “little to quash demand, and migrants will merely seek alternative methods to pay, compromising their safety in the process.”<sup>184</sup>

The increased willingness of smugglers to engage in these schemes undoubtedly contributes to rising rates of debt bondage as a mechanism of coercion.<sup>185</sup> A recent report presented to the U.N. Human Rights Council found that debt bondage is the primary means used to control trafficking victims in North America, Europe and the Middle East and is prevalent across a wide variety of sectors including construction work, domestic work, agricultural work, factory work, and sex work.<sup>186</sup> The converging influences of climate-induced migration and related changes in the human smuggling market will result in some of society’s most vulnerable people becoming at risk of trafficking in new ways.

#### IV. THE TRAFFICKING PROTOCOL APPLIES TO VICTIMS OF CLIMATE CHANGE

This Comment has so far sought to situate the climate change-human trafficking nexus within the existing legal frameworks that govern these issues and illuminate the mechanisms underlying the nexus. In this Section, the Comment argues that part of the response to the climate change-human trafficking nexus involves recognizing that the Trafficking Protocol provides a textual basis for extending its protections to victims of climate change. This argument is not without its challenges. Climate change-induced vulnerability necessarily “entails uneven, uncertain, and complex processes contingent on myriad factors, [which] does not fit neatly into dominant criminal justice-oriented anti-trafficking initiatives.”<sup>187</sup> The ways in which states have thus far implemented the Trafficking Protocol very much reflect “particular forms and dynamics of capitalism and capital and state relations that structure conditions of insecurity and exploitation.”<sup>188</sup> Effective responses to the nexus compel the interrogation of “broader contemporary capitalist modes of production and [] the need for continual capital accumulation.”<sup>189</sup> In short, the climate change-human trafficking nexus complicates mainstream narratives about trafficking.

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<sup>184</sup> *Id.*

<sup>185</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on Contemporary Manifestations of Slavery, Its Causes and Consequences*, thirty-third session, Agenda item 3, July 2016 (UN Doc. A/HRC/33/46) (noting that high rates of debt bondage are “due primarily to the often illicit and prohibitive recruitment fees taken by recruiters and/or employers to enable the migration.”).

<sup>186</sup> *Id.*

<sup>187</sup> Molinari, *supra* note 155.

<sup>188</sup> *Id.*

<sup>189</sup> Brown et al., *supra* note 32, at 12.



In contrast to the story of “inherently vulnerable women being sold or abducted and forced into sexual slavery”<sup>190</sup> and the state stepping in to play hero, the application of the Trafficking Protocol to people experiencing climate-related vulnerability requires acknowledging the reality of climate change as something that the global North (namely the U.S. and the 28 E.U. member states, and not including China) has historically contributed to, with people in the global South bearing many of the worst impacts.<sup>191</sup> Additionally, “blame and responsibility for the conditions and outcomes of [the climate change-human trafficking nexus] cannot be easily pinned to deviant and malevolent perpetrators, organized crime rings, or patriarchal, backward communities,” as much of the blame lies squarely on developed Western nations.<sup>192</sup>

#### A. Victims of Climate Change are in a Position of Vulnerability

The wide range of potential means included in Article 3 of the Trafficking Protocol “generally confirms the position . . . that individuals can end up in a situation of exploitation through indirect methods such as deception and fraud as well as by sheer physical force.”<sup>193</sup> This Comment argues that victims of climate change who are trafficked fulfill the means component of the Trafficking Protocol definition because these traffickers will have necessarily engaged in an “abuse of a position of vulnerability” (APOV) by taking advantage of climate-related vulnerability. In part, this Comment is motivated by and seeks to overcome prominent global trends in the prosecution of trafficking that establish the presence of an implicit presumption against someone being a victim of trafficking when overt, physical means are not present in the case.<sup>194</sup>

This approach is less radical than it may initially seem. Criminal justice systems are already “routinely being called on to distinguish between situations characterized by poor conditions of employment and situations where a person is

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<sup>190</sup> Molinari, *supra* note 155.

<sup>191</sup> The U.S. and the twenty-eight countries of the European Union cumulatively account for approximately fifty percent of global CO<sub>2</sub> emissions since 1751. Hannah Ritchie, *Who Has Contributed Most to Global CO<sub>2</sub> Emissions?*, OUR WORLD IN DATA (Oct. 1, 2019), <https://perma.cc/82R7-RQGL>; Gonzalez, *supra* note 132, at 374–75 (“Scholars, activists, and Southern states sought to infuse climate justice into the legal instruments governing climate change by arguing that the North has incurred a climate debt to the South for its historic and current contribution to climate change. Between 1880 and 1990, the Global North produced 84 percent of the planet’s fossil fuel-based carbon dioxide emissions and 75 percent of deforestation-related carbon dioxide emissions. These emissions can remain in the atmosphere for more than two hundred years, and affect the climate for generations to come. Although China is currently the world’s top carbon dioxide emitter, the historic emissions of the Global North and the per capita emissions of Northern countries continue to surpass those of the Global South.”).

<sup>192</sup> Molinari, *supra* note 155.

<sup>193</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50.

<sup>194</sup> *Id.*

the victim of trafficking.”<sup>195</sup> This Comment suggests, then, that criminal justice systems incorporate an additional factor into their analysis: the presence (or absence) of climate-induced vulnerability. When the temporal and causal connection between the situation and the experienced environmental degradation is sufficiently strong and is accompanied by evidence of an intent to exploit, decision makers should consider this to strongly indicate that an abuse of a position of vulnerability has occurred, thereby fulfilling the definition of the Trafficking Protocol.

APOV remains a relatively vague, undefined, and under-litigated component of the Trafficking Protocol. Scholars and practitioners to date have not substantively discussed whether “there needs to be requisite seriousness or the extent of the . . . abuse of a position of vulnerability that could constitute a ‘means’ for the purposes of the definition of trafficking.”<sup>196</sup> Despite this vagueness, APOV is widely viewed as a “distinct and important part of the international legal definition of trafficking” and has endured the test of time, having “survived intact in all major treaties adopted after the Protocol that incorporate a definition of trafficking in persons, as well as in policy documents and interpretative texts.”<sup>197</sup>

While the formal legislative history of the Trafficking Protocol “does not shed light on how or why the concept [of APOV] was included,” the UNODC notes that informal records indicate that its inclusion was “motivated by an intention to ensure that all the different and subtle ways by which an individual can be moved, placed or maintained in a situation of exploitation were captured.”<sup>198</sup> The drafting history and Legislative Guide of the Trafficking Protocol offer some—albeit slightly circular in nature—elaboration by explaining that APOV “is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”<sup>199</sup> It is certainly arguable that a wide range of applications of this interpretation would comport with conceptions of climate-induced vulnerability that push people into perilous migration journeys or exploitative conditions with no real alternatives.<sup>200</sup>

The UNODC has noted that establishing APOV generally requires two distinct evidentiary findings: (1) “proof of the existence of a position of vulnerability on the part of the victim,” and (2) “proof of abuse of (or intention

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.*

<sup>197</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, *supra* note 54.

<sup>198</sup> *Id.*

<sup>199</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, *supra* note 61 (citing Interpretive Note A/55/ 383/Add.1, para. 63).

<sup>200</sup> WARNER ET AL., *supra* note 22; *see* Part III.A.1.

to abuse) that vulnerability as the means by which a particular act (recruitment, harboring, etc.) was undertaken.”<sup>201</sup> Surveys of countries that have APOV within their domestic definition of trafficking reveal that in practice, “the focus of the inquiry is generally on establishing the fact of vulnerability, rather than on proving its abuse.”<sup>202</sup> This reality establishes some precedent for this Comment’s proposal that adjudicators and decision makers take the existence of climate-related vulnerability, once proven, as a strong indication of the presence of abuse.

Though few in number, prior applications of APOV support this Comment’s argument for the application of APOV to climate-related vulnerability. In Belgium, domestic legislation implementing the Trafficking Protocol specifically enumerated examples of positions of vulnerability such as “illegal or uncertain immigration or residency status, minority status, or conditions such as illness, pregnancy, or physical or mental disability.”<sup>203</sup> Academic literature considers North Korean women who are living in China in situations of exploitative labor or sexual exploitation to be trafficked through the “abuse of their vulnerable position as refugees who fear deportation.”<sup>204</sup>

In addition, scholars have argued that foreign brides who initially consent to travel to another country and marry their husband sight unseen fulfill the definition set for in the Trafficking Protocol because recruiters abuse the vulnerabilities “that come from the woman’s national experience from political, legal, economic, and social structures that are not experienced by their husbands by virtue of his gender and nationality.”<sup>205</sup> These examples bolster the argument that APOV already encompasses a wide variety of vulnerabilities and may be properly extended to include environmental vulnerabilities.

## B. Consent is Not Dispositive

The climate change-human trafficking nexus further complicates existing debates about the applicability of “traditional liberal theory that emphasizes the free will of people to make choices about their lives” to human trafficking.<sup>206</sup> Consent is likely to be at issue in many of the situations that arise from climate change-related environmental degradation and resulting exploitation. For many people, beginning a migration journey that entails enlisting the services of a smuggler or undertaking labor in exploitative conditions may be the best or only

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<sup>201</sup> UNODC, *Issue Paper: Abuse of a Position of Vulnerability and Other ‘Means’ Within the Definition of Trafficking in Persons*, *supra* note 54.

<sup>202</sup> *Id.*

<sup>203</sup> UNODC, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocol Thereto*, *supra* note 61, at 268 n.13.

<sup>204</sup> Kim, *supra* note 90.

<sup>205</sup> *Id.*

<sup>206</sup> Abramson, *supra* note 70, at 483.

option in light of the devastating impacts arising from both sudden and slow onset environmental disasters.

Choice and coercion represent a spectrum, rather than a binary. It is highly likely that many of the trafficking situations considered in this Comment will involve some level of implied or express consent. This is their position of vulnerability, and when abuse of that position has occurred, then the means of trafficking in the Trafficking Protocol has been established and the consent of the trafficked person becomes irrelevant.<sup>207</sup> Indeed, the UNODC has anticipated exactly this type of issues, noting that “[i]n cases where more ‘indirect’ or ‘subtle’ means [of trafficking] are used,” such as APOV, then “indications or assertions of consent are more likely to be raised” and become central to “ascertaining whether a crime of trafficking in persons has in fact been committed.”<sup>208</sup>

In some jurisdictions the relationship between consent and APOV is made explicit. In Moldova, for example, APOV is in fact only considered as a potential means when the victim has provided consent: the prosecution then uses the victim’s vulnerability to “explain away and nullify the apparent consent.”<sup>209</sup>

The UNODC has issued guidance that comports with the position of this Comment that consent is not a barrier to applying the Trafficking Protocol within the context of the climate change-human trafficking nexus. Specifically, in discussing the role of consent in criminal cases within Anglo-American common law, the UNODC has noted that the Trafficking Protocol “does not precisely correspond” to common law conceptions of consent.<sup>210</sup> At common law, the key inquiry is whether the coercive circumstances have been caused by the person to whom consent is given.<sup>211</sup> Thus, “a person’s compulsion to choose between working or starving does not render the apparent consent to work involuntary,” so long as the employer did not directly cause the conditions giving rise to this choiceless choice.<sup>212</sup> The UNODC explicitly notes that this view does not extend to the Trafficking Protocol’s position on APOV; there, “the person to whom consent is given must have abused an existing or created vulnerability (the origin of which is irrelevant) in order to secure an act intended to result in exploitation.”<sup>213</sup>

There is also some indication that this Comment’s position may find support among practitioners. In a global survey of antitrafficking practitioners, the UNODC found “widespread agreement” among interviewees that legitimizing

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<sup>207</sup> Kim, *supra* note 90.

<sup>208</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 82.

<sup>209</sup> *Id.* at 83–84 n.139.

<sup>210</sup> *Id.* at 22.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

consent to exploitative labor conditions by people “who are made vulnerable through lack of economic alternatives” would “fail to uphold basic principles of human dignity and non-discrimination.”<sup>214</sup> However, many practitioners rejected the idea that people who lack economic alternatives and undertake work in exploitative labor conditions should always be considered to be victims of trafficking, as this idea was “unrealistic and unworkable in competitive and difficult labor markets.”<sup>215</sup> Climate-related vulnerability, coupled with an abuse of that vulnerability and an intent to exploit, contains more limiting principles than does the hazy notion of “lack of economic alternatives.” This group of people can be distinguished from other economic migrants because the situation that compels such consent is the product of intentional global state action (through the release of greenhouse gases).<sup>216</sup>

Moreover, practitioners expressed support for requiring legal decision makers to consider the full range of circumstances under which consent was given, including the “cultural, socioeconomic and psychological situation of the victim before the trafficking occurred.”<sup>217</sup> The presence of climate-related vulnerability and experienced environmental degradation would be a highly relevant and determinative factor in these considerations.

Maintaining clear boundaries of the limiting principles governing the application of the Trafficking Protocol to the climate change-human trafficking nexus will be highly important. Climate change is likely to further exacerbate cyclical patterns of coercion and choice by severely restricting the options available to people who are trafficked. This will be true even once they are no longer in the control of their traffickers or being directly coerced. For example, recent research in the Philippines has documented how many women who were trafficked as teenagers for sexual exploitation gain their freedom and return to their home villages, only to later opt to return to urban centers as sex workers because their villages are experiencing devastating environmental degradation and offer limited routes to survival.<sup>218</sup>

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<sup>214</sup> *Id.* at 75.

<sup>215</sup> *Id.*

<sup>216</sup> Of course, one could argue that global economic inequality and the uneven distribution of resources that generally contribute to typical economic migration are also the result of intentional state action through, for example, colonialist regimes and imperialist systems of capital and labor. This argument is not without force, but this Comment is premised upon a maximalist understanding of environmental migration, which asserts that “even if [environmental factors do] interact with other factors, [environmental degradation] may product distinct forms of mobility, as in circumstances of sudden or extreme environmental change,” an approach which has seen an increasing “empirical evidence base” and growing acceptance in the literature. Cantor, *supra* note 129, at 9.

<sup>217</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 79.

<sup>218</sup> Justine Calma, *Sex Trafficking in the Philippines: How Typhoons and Desperation Make Women and Children Vulnerable*, GROUNDTRUTH PROJECT (Apr. 21, 2017), <https://perma.cc/YT3R-33NP>.

Decision makers should respond to this complicated intersection between choice and coercion by interpreting what it means to ‘abuse’ the position of vulnerability that people impacted by climate change may find themselves in. These interpretations may continuously be updated and adapted to ensure that the right balance is being struck. This tension is hardly novel; stakeholders of the Trafficking Protocol have long discussed the risk that “a liberal interpretation of the more ambiguous means—including a low threshold for establishing abuse of a position of vulnerability—can result in apparent consent being overridden to the point that “trafficking” comes to include a very broad range of conduct that otherwise may be treated as a lesser offence.”<sup>219</sup>

Over-inclusion is a very real concern, one that must be taken seriously. However, as this Comment’s exploration of the climate change-human trafficking nexus highlights, under-inclusion is also a critical point of fallibility in the fight against human trafficking. The answer to this tension is to develop a nuanced and multi-factor standard by which individual cases may be assessed, rather than wholesale exclusion of cases where consent may be an issue.<sup>220</sup>

## V. CONCLUSION

This Comment has demonstrated that the Trafficking Protocol may be fairly applied to people who are made vulnerable or displaced as a result of climate change and subsequently become victims of trafficking through the abuse of this vulnerable position. This legal solution could help to decrease the protection gap for millions of people who may become trafficked because climate change has exacerbated their existing vulnerabilities or forced them to flee from their home. Of course, successfully applying the Trafficking Protocol in this way greatly depends on whether individual countries incorporate such an approach into their existing domestic trafficking laws. To effectively combat human trafficking as a result of climate change, the international community and the signatory states of the Trafficking Protocol must recognize the mechanisms and power dynamics underpinning the climate change-human trafficking nexus and commit to a holistic antitrafficking approach that proactively prevents climate-related vulnerability, recognizes and protects people who are trafficked as a result of climate change, and prosecutes those who exploit climate migrants and climate-impacted people. There is room to critique both the viability and suitability of this legal solution.

The Trafficking Protocol already receives sharp criticism on all sides, and many of these critiques gain fresh potency in the context of the climate change-human trafficking nexus and this Comment’s argument. One principal critique

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<sup>219</sup> UNODC, *The Role of ‘Consent’ in the Trafficking in Persons Protocol*, *supra* note 50, at 84.

<sup>220</sup> See Warner, *supra* note 22; see Part II.A.1.

views the Trafficking Protocol as a politically motivated band-aid solution to systemic global inequities.<sup>221</sup> Critics contend that although the Trafficking Protocol sets forth three primary purposes (prosecuting traffickers, protecting people who are trafficked, and preventing trafficking in the first place), states are in practice overly focused on prosecution, emphasizing crime control at the expense of human rights protections.<sup>222</sup> Through heavy criminalization of trafficking and sporadic prosecution of traffickers, states are able to clearly define a bad actor against whom they have taken action and create a fictional account wherein the state's own behavior is irrelevant.<sup>223</sup> In this way, states can avoid any meaningful acknowledgment of and response to “the underlying social, economic, political, and environmental drivers of vulnerability to trafficking” and instead continue to ignore the “material conditions and power relations that contribute to [that] vulnerability.”<sup>224</sup>

Extending legal protections to victims of climate change under the Trafficking Protocol may well become yet another band-aid solution. It is entirely possible that the existence of a legal safety net for people suffering within the climate change-human trafficking nexus could cause state and non-governmental actors to approach preemptive action with less urgency. This Comment takes the position that this concern should be assuaged not through wholesale rejection of post-disaster legal protections, but instead through vigorous advocacy for pairing legal protective solutions with extensive efforts to prevent the vulnerabilities that lead to trafficking in the first place. Such efforts should include “protecting legal economics and ecologies, strengthening social supports and entitlements, guaranteeing labour and migration rights and protections, supporting and diversifying local livelihoods, and ensuring meaningful climate action.”<sup>225</sup> Both the law<sup>226</sup> and our sense of justice compel the diligent pursuit of these proactive efforts to meaningfully protect and provide for the most vulnerable people in our world. Nowhere is this truer than within the context of the climate change-human trafficking nexus—a monster of our own making.

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<sup>221</sup> Molinari, *supra* note 155.

<sup>222</sup> *Id.*; Abramson, *supra* note 70, at 497.

<sup>223</sup> Molinari, *supra* note 155.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*; Abramson, *supra* note 70, at 499.

<sup>226</sup> Article 9(4) of the Trafficking in Persons Protocol requires party states to take positive steps to address the underlying causes of trafficking.

# Linguistic Minorities with Disabilities and the Right to Native Language Instruction

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## Abstract

*This Comment examines whether international law guarantees for linguistic minorities with disabilities the right to native language instruction. Linguistic minorities with disabilities currently face two challenges: the barriers presented by their disability and the difficulties of learning the majority language. A right to native language instruction would help eliminate this second challenge, removing an obstacle in academic and social development. To determine the existence of such a right, this Comment will first analyze the language rights regime and show that linguistic rights require further evaluation of the specific pragmatic interests involved. Next, this Comment looks at treaty and case law surrounding the education rights of linguistic minorities, finding that courts discuss linguistic rights as a balancing of state and minority interests. Under these principles, this Comment will then examine the education rights of linguistic minorities under the disability law framework. It argues that because states are obligated to provide reasonable accommodations maximizing academic and social development consistent with the goal of full inclusion, a right to native language instruction for linguistic minorities with disabilities does exist.*

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## Table of Contents

I. Introduction.....	337
II. The Language Rights Regime for Linguistic Minorities .....	339
A. Definition of a Linguistic Minority .....	340
B. Treaties and Declarations Addressing Linguistic Rights.....	341
1. International instruments create for linguistic minorities a negative right to use their native languages. ....	342
2. Regional instruments create further state obligations to protect linguistic rights.....	343
3. States balance interests when upholding positive linguistic rights.....	346
III. The Education Rights of Linguistic Minorities.....	347
A. Treaty Law .....	347
B. Case Law .....	351
IV. The Education Rights of Linguistic Minorities with Disabilities.....	354
A. Education and Disability Rights pre-CRPD.....	354
B. Education and Disability Rights under the CRPD .....	357
1. States must provide reasonable accommodation and individualized support measures to maximize academic and social development. ....	359
2. States must provide education consistent with full inclusion.....	362
C. Practical Implications and Contours of Such a Right.....	364
V. Conclusion.....	366

## I. INTRODUCTION

For many of us, learning a second language is a choice we make to supplement our education, which we receive entirely in our native language. However, minority language or non-native speakers are often forced to learn a second language in order to access the educational system. Minority language speakers with disabilities must, on top of obstacles created by their disability, also overcome language barriers in school. These students can make up a significant portion of a population: for instance, in 2017, English language learners with disabilities in the United States numbered 718,000, constituting 14.3% of the total English language learner population enrolled in U.S. public schools.<sup>1</sup> In contrast, out of a total of nearly 131,000 public schools in the U.S. in 2017,<sup>2</sup> only 3,000 schools had dual-language immersion programs. Unfortunately, as these dual-language programs become increasingly popular among affluent native English speakers, English learners who stand to benefit significantly from them may be squeezed out.<sup>3</sup>

In 1966, only five nations did not have a linguistic minority equal to at least one percent of their total population, while eighty-four nations had linguistic minorities equaling or exceeding ten percent of their population.<sup>4</sup> Because language serves as a foundation for society, linguistic protection is important. Today, although there are approximately 7,115 languages spoken in the world,<sup>5</sup> linguists predict that at least fifty percent of the world's languages will disappear by the end of the century.<sup>6</sup> Lack of education, even for minority languages not currently at risk of dying out, exacerbates linguistic inequalities. The right to education—particularly instruction in native languages—is “a corner stone for [the] social and economic development” of linguistic minorities.<sup>7</sup> Monolingual education in majority languages may lead to “inferior education, [ ] reinforced conditioning to failure, and excessive dropout rates” for minority language

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<sup>1</sup> *English Language Learners in Public Schools*, NAT'L CTR. FOR EDUC. STAT. (May 2020), <https://perma.cc/7JC5-HTJD>.

<sup>2</sup> Maya Riser-Kositsky, *Education Statistics: Facts About American Schools*, EDUC. WEEK (Jun. 16, 2020), <https://perma.cc/JJJ9-UA95>.

<sup>3</sup> Kristin Lam & Erin Richards, *More US Schools Teach in English and Spanish, but Not Enough to Help Latino Kids*, USA TODAY (May 23, 2020, 8:27 PM), <https://perma.cc/PU9L-PH5N>.

<sup>4</sup> Christopher J. Reeber, *Linguistic Minorities and the Right to an Effective Education*, 3 CAL. W. INT'L L.J. 112, 120 (1972).

<sup>5</sup> *The World Factbook: Languages*, CENT. INTEL. AGENCY, <https://perma.cc/5HNH-PKQN>.

<sup>6</sup> Nina Stochlic, *The Race to Save the World's Disappearing Languages*, NAT'L GEOGRAPHIC (Apr. 16, 2018), <https://perma.cc/2AQY-BQVN>.

<sup>7</sup> Amare Tesfaye & Zelalem Keabu, *The Protection of Linguistic Minorities: An Appraisal on the Role of Multination Federalism*, 7 BEIJING L. REV. 314, 329 (2016).

speakers; for instance, in the U.S., the “proportion of dropouts among Spanish speaking children is far greater in comparison to that of English speaking children.”<sup>8</sup>

Despite continuous emphasis on the need to tailor and specialize programs for people with disabilities to access learning, education systems often fail to provide enough support. The addition of a language barrier further cripples access to learning, making it doubly difficult for linguistic minorities with disabilities to receive an effective education. Nearly one billion people live with a disability.<sup>9</sup> However, ninety percent of children with disabilities in developing countries do not attend school, and the literacy rate for adults with disabilities, according to a 1998 study, may be as low as three percent.<sup>10</sup>

For linguistic minority students with disabilities attending school, requiring that they speak the majority language—supposedly necessary for accessing the curriculum—may also isolate them from their culture and families, especially when their families do not speak the majority language. Linguistic rights in education present complicated obstacles for states trying to integrate minorities while preserving their unique identities, particularly when they view minority languages as threats to the political unity of the state.<sup>11</sup> Some believe that instituting native language support or instruction for minorities, such as bilingual education, will only confuse minority children and prevent them from learning.<sup>12</sup> However, contrary to the perception that monolingual education in the majority language is necessary for advancement, research shows that being exposed to two languages—both the native minority language and the majority language—actually benefits the progress of children with disabilities.<sup>13</sup>

This Comment discusses whether international law guarantees linguistic minorities with disabilities the right to receive native language instruction. Section II analyzes the language rights regime for linguistic minorities by looking at treaties and concludes that, in practice, positive language rights implicate a pragmatic balancing of the state interest against minority interests. Looking specifically at the education rights of linguistic minorities, Section III confirms that courts also employ a balancing or policy-focused approach in deciding when linguistic educational rights can be vindicated. As a result, determining whether linguistic minorities with disabilities are entitled to a positive right of native language

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<sup>8</sup> Reeber, *supra* note 4, at 121–22.

<sup>9</sup> *Factsheet on Persons with Disabilities*, U.N. DEP'T OF ECON. SOC. AFFS. DISABILITY, <https://perma.cc/BC4T-J6U8>.

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

<sup>11</sup> Gulara Guliyeva, *Education, Languages and Linguistic Minorities in the EU: Challenges and Perspectives*, 19 EUR. L.J. 219, 220 (2013).

<sup>12</sup> Sara E. N. Kangas, “*That’s Where the Rubber Meets the Road*”: *The Intersection of Special Education and Dual Language Education*, 119 TCHRS. COLL. REC. 1, 4–5 (2017).

<sup>13</sup> *Id.* at 5.

instruction depends on a balancing of the interests involved. Section IV first explores the treaties concerning disability and education rights. It then argues that linguistic minorities with disabilities are guaranteed a right to education in their native language. Finally, having shown the existence of such a right, this Comment discusses the contours and implications of the right.

## II. THE LANGUAGE RIGHTS REGIME FOR LINGUISTIC MINORITIES

An understanding of the language rights regime provides context for determining whether linguistic minorities with disabilities have a right to native language instruction. Such an understanding requires a brief overview of how international law is structured. International law is a decentralized system formed by international norms or rules, which arise out of international conventions and treaties, international custom, general principles of law, and judicial decisions.<sup>14</sup> These international norms can be categorized as legally-binding or non-legally binding.<sup>15</sup> For instance, signed treaties and covenants require explicit consent from the state and are thus legally-binding.<sup>16</sup> Customary rules, while also legally-binding, require enough states to abide by or practice according to the rule for it to become a legally-binding norm.<sup>17</sup>

Non-legally binding norms include declarations, standards, U.N. General Assembly resolutions, and commitments.<sup>18</sup> However, the divide between legally-binding and non-legally binding norms can be minimal: for example, non-binding declarations like the Universal Declaration of Human Rights (Universal Declaration) are widely seen as binding.<sup>19</sup> On the other hand, treaty reservations and optional provisions mean that signatories of a single treaty may actually have different legal obligations.<sup>20</sup>

Linguistic minorities are discussed—but not defined—in a number of international and regional treaties and declarations outlining the international norms surrounding linguistic rights. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration, and the European Charter for Regional or Minorities Languages (ECRML).

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<sup>14</sup> See Statute of the International Court of Justice art. 38, Jun. 26, 1946, 59 Stat. 1031.

<sup>15</sup> Snezana Trifunovska, *Factors Affecting the Applicability and Efficiency of International Norms Protecting Linguistic Rights of Minorities*, 9 INT'L J. MINORITY & GRP. RTS. 235, 240 (2002).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

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

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

<sup>20</sup> *Id.* at 251.

## A. Definition of a Linguistic Minority

One difficulty of defining education rights for linguistic minorities arises out of the ambiguities surrounding minority rights and the definition of minorities. In human rights, the term “minority” usually refers to national, ethnic, religious, or linguistic minorities.<sup>21</sup> However, it is often difficult to identify or organize minority groups; while some groups live in well-defined areas, others may be scattered throughout one or multiple states.<sup>22</sup> Some minorities may be united under strong cultural or historical bonds, while others group together under a more fragmented notion of commonality.<sup>23</sup> There is no consensus as to what the definition of a minority group is, not even among international documents focused on minority protection.<sup>24</sup>

This Comment will use the 1979 definition provided by Francesco Capotorti, the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the context of the ICCPR. Capotorti defined a minority group as:

[A] group which is numerically inferior to the rest of the population of a State and in a non-dominant position, whose members . . . possess ethnic, religious or linguistic characteristics which differ from those of the rest of the population and who, if only implicitly, maintain a sense of solidarity, directed towards preserving their culture, traditions, religion or language.<sup>25</sup>

Both the objective criterion that a group be in a non-dominant position and the subjective criterion regarding the will of the members of the group remain important in recognizing minority status.<sup>26</sup> The U.N. has focused on protecting national, ethnic, religious, and linguistic minorities; in particular, the U.N. also recognizes the importance of “combat[ing] multiple discrimination and [] address[ing] situations where a person belonging to a national or ethnic, religious and linguistic minority is also discriminated against on other grounds such as [] disability.”<sup>27</sup> Multiple discrimination—such as a child with disabilities who must

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<sup>21</sup> Tesfaye & Kebu, *supra* note 7, at 317.

<sup>22</sup> U.N. Off. of the High Comm’r for Hum. Rts., *Minority Rights: International Standards and Guidance for Implementation*, U.N. Doc HR/PUB/10/3, at 2 (2010) [hereinafter *Minority Rights Standards and Guidance*].

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

<sup>24</sup> Antonija Petričević, *The Rights of Minorities in International Law: Tracing Developments in Normative Arrangements of International Organizations*, 11 CROATIAN INT’L RELS. REV. 47, 48 (2005).

<sup>25</sup> Francesco Capotorti (Special Rapporteur of the Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities), *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, U.N. Doc. E/CN.4/Sub.2/384/Rev.1, ¶ 568 (1979). Originally, this definition included a qualification that members of the group be nationals of the state—this criterion has often been challenged. *See* *Minority Rights Standards and Guidance*, *supra* note 22, at 2.

<sup>26</sup> *See* *Minority Rights Standards and Guidance*, *supra* note 22, at 3.

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

also, unfairly, overcome language barriers—may have lasting damage on minority groups.<sup>28</sup>

Protecting linguistic minorities is important because of the fundamental role language plays in self-conception and community facilitation. To the individual, language is “a culturally inherited trait” affected by other factors like geography, age, occupation, personality, and social status.<sup>29</sup> In society, language functions as a medium of communication.<sup>30</sup> Historically, language deprivation has been used as a tool of oppression: linguistic imperialism involves the “transfer of a dominant language to other peoples,” as “a demonstration of power” where “aspects of the dominant culture are usually transferred along with the language.”<sup>31</sup> International treaties consistently include linguistic minorities within their definitions of “minority” as scholars recognize the importance of linguistic identities—often key to cultural identity and the preservation of communities—and the need to protect linguistic minorities.<sup>32</sup>

## B. Treaties and Declarations Addressing Linguistic Rights

Although no comprehensive international treaty dedicated to language rights exists, language interests are discussed in a number of major international instruments and regional treaties.<sup>33</sup> These include the Universal Declaration,<sup>34</sup> the ICCPR,<sup>35</sup> the African Charter on Human and Peoples’ Rights,<sup>36</sup> the American

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<sup>28</sup> Multiple discrimination refers to discrimination that “occur[s] on the basis of more than one perceived characteristic . . . creat[ing a] cumulative disadvantage.” *Intersectionality and Multiple Discrimination*, COUNCIL OF EUR., <https://perma.cc/P33J-M93H>.

<sup>29</sup> THE USE OF VERNACULAR LANGUAGES IN EDUCATION 8–9 (UNESCO 1953).

<sup>30</sup> *Id.* at 9.

<sup>31</sup> Some scholars, like Robert Phillipson, argue that the spread of English throughout the world is an instance of linguistic imperialism, as the “British Empire [gave] . . . way to the empire of English.” Huda Kamal El-qassaby argues that today, “English as an imperialist language has become settled fact.” Huda Kamal El-qassaby, *Linguistic Imperialism and Reshaping the World’s New Identity: A Research Paper in Linguistics*, 3 INT’L J. LANGUAGE & LINGUISTICS 61, 62 (2015).

<sup>32</sup> See Moria Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, 54 HARV. INT’L L.J. 157, 160–61 (2013).

<sup>33</sup> *Id.* at 170.

<sup>34</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 2 (Dec. 10, 1948) [hereinafter Universal Declaration] (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as . . . language.”).

<sup>35</sup> International Covenant on Civil and Political Rights, art. 27, Dec. 16, 1966, S. TREATY DOC. NO. 95-20, 999 U.N.T.S. 171 [hereinafter ICCPR].

<sup>36</sup> Organization of African Unity, African Charter on Human and Peoples’ Rights, art. 2, Jun. 27, 1981, 1520 U.N.T.S. 217 [hereinafter AfCHPR].

Convention on Human Rights,<sup>37</sup> the European Convention on Human Rights (ECHR),<sup>38</sup> and the ECRML.<sup>39</sup>

1. International instruments create for linguistic minorities a negative right to use their native languages.

While the ICCPR mentions language in Article 26, its general anti-discrimination article,<sup>40</sup> it also contains articles requiring non-discrimination in the protection of children (including on the basis of language) and equal protection of the law.<sup>41</sup> Article 27 of the ICCPR addresses minority rights in particular: “[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>42</sup> Moria Paz describes Article 27 as notable for—unlike the Universal Declaration—expressing a direct right to language going “beyond a guarantee of non-discrimination and the protection of individual rights.”<sup>43</sup> Article 27 places focus on minority groups’ ability to “enjoy,” “profess and practice,” and “use” their culture, religion, or language, suggesting a broad range of rights that states must respect.

However, the use of the language “shall not be denied,” rather than “shall ensure,” implies that the right is a negative one. Negative rights prevent states from discriminating against the right-holder, while positive rights guarantee that the state will take certain actions on behalf of the right-holder. Thus, while the state cannot take actions that prevent minorities from using their own language, the ICCPR does not require states to take affirmative measures to ensure minorities can use their own language. Furthermore, because states shall not deny linguistic minorities the right to use their own language only when “in community with the other members of their group,” the linguistic right guaranteed under Article 27 may be significantly weakened for minorities that are not concentrated in one well-defined area. These limits in the ICCPR’s language suggest that while Article 27 brings attention to linguistic minorities as a group under special

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<sup>37</sup> Organization of American States, American Convention on Human Rights, art. 1, Nov. 22, 1969, S. TREATY DOC NO. 95-21, 1144 U.N.T.S. 123 [hereinafter AmCHR].

<sup>38</sup> Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, art. 14, Nov. 4, 1950, E.T.S. No. 5, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>39</sup> Council of Europe, *European Charter for Regional or Minority Languages*, Nov. 5, 1992, E.T.S. No. 148 [hereinafter ECRML].

<sup>40</sup> ICCPR, *supra* note 35, at art. 2 (“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as . . . language . . .”).

<sup>41</sup> *Id.* art. 24.

<sup>42</sup> *Id.* art. 27.

<sup>43</sup> Paz, *supra* note 32, at 171.

protection, it may be, in practice, a “narrow right that imposes on states only a negative duty to refrain from regulating language use” in linguistic minorities’ own communities.<sup>44</sup>

The 1992 U.N. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (U.N. Minorities Declaration) suggests that when it comes to language rights, states’ responsibilities should look more like positive rather than negative rights. Article 2 guarantees that “[p]ersons belonging to . . . linguistic minorities . . . have the right to enjoy their own culture . . . and to use their own language.”<sup>45</sup> Article 1 requires that states “protect the existence and the . . . linguistic identity of minorities within their respective territories and encourage conditions for the promotion of that identity.”<sup>46</sup> These articles remove the language in the ICCPR suggesting the right is a negative right and replace it with a positive obligation to guarantee usage of native languages and to encourage promotion of linguistic identities. For instance, under article 4(3), states “should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”<sup>47</sup> However, while the U.N. Minorities Declaration suggests a stronger right to native language use, the declaration is not binding and provides no substantive language rights beyond Article 4(3).<sup>48</sup>

At the very least, international instruments provide linguistic minorities with a negative right to use their native language: states cannot take actions stripping them of this right. However, determining whether a state has further obligations to provide native language instruction for linguistic minorities with disabilities requires the support of other legal instruments.

## 2. Regional instruments create further state obligations to protect linguistic rights.

A state may have additional obligations to protect the rights of linguistic minorities under regional legal instruments, which have also included linguistic rights within their protective umbrellas. The African Charter on Human and

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<sup>44</sup> Paz, *supra* note 32, at 173.

<sup>45</sup> G.A. Res. 47/135, annex, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (Dec. 18, 1992) [hereinafter U.N. Minorities Declaration].

<sup>46</sup> *Id.*

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

<sup>48</sup> *See id.*



Peoples' Rights,<sup>49</sup> the American Convention on Human Rights,<sup>50</sup> and the ECHR<sup>51</sup> all contain provisions mentioning language rights: using similar language, these provisions call for states to not discriminate based on race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. These treaties do not include any provisions similar to ICCPR's Article 27 or Articles 1 and 2 of the U.N. Minorities Declaration. Instead, the non-discrimination clauses place the language right under a general human rights regime without providing any guidelines or obligations for substantive realization.

In 1992, the Council of Europe adopted the world's only legally-binding treaty solely addressing linguistic rights. The European Charter for Regional or Minorities Languages (ECRML) includes measures promoting the use of minority languages through aspects like education (Article 8), media (Article 11), cultural activities and facilities (Article 12), and economic and social life (Article 13).<sup>52</sup> These measures imply that states have a positive right to promote and protect minority languages beyond the negative right to not be denied usage. The ECRML preamble identifies "the right to use a regional or minority language in private and public life [as] an inalienable right conforming to the principles embodied in the United Nations International Covenant on Civil and Political Rights."<sup>53</sup> This statement suggests that the parties interpret the ECRML to be a legitimate implementation of Article 27 of the ICCPR, consistent with existing international law rather than inventing new rights. At the same time, Article 4 specifies that the ECRML will "not affect any more favourable provisions concerning the status of regional or minority languages, or the legal regime of persons belonging to minorities which may exist in a Party or are provided for by relevant bilateral or multilateral international agreements."<sup>54</sup> Thus, the treaty leaves open the possibility that other international law instruments may demand more from states in protecting or ensuring the rights of linguistic minorities.

The ECRML defines "regional or minority languages" as languages "traditionally used within a given territory of a State by nationals of that State who

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<sup>49</sup> AfCHPR, *supra* note 36, at art. 2 ("Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as . . . language.").

<sup>50</sup> AmCHR, *supra* note 37, at art. 1 ("The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language . . .").

<sup>51</sup> ECHR, *supra* note 38, at art. 14 ("The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . language.").

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* pmb1.

<sup>54</sup> *Id.* art. 4.

form a group numerically smaller than the rest of the State's population" that are "different from the official language(s) of that State."<sup>55</sup> Consistent with Capotorti's general definition of minorities,<sup>56</sup> the ECRML's definition includes the objective criteria of numeric inferiority and non-dominance. However, the ECRML's definition of language—which in turn defines the linguistic groups affected—does not include the subjective criterion that members intend to preserve their language. As a result, the definition excludes dialects of official languages and the languages of migrants.<sup>57</sup> The treaty also allows States Party considerable leeway in choosing their obligations: States Party must commit to, at a minimum, thirty-five paragraphs or sub-paragraphs from Part III, out of eighty-nine total sub-paragraphs.<sup>58</sup> Moreover, parties take on obligations per *each* minority language in their territory, specified at the time of ratification.<sup>59</sup>

The ECRML categorizes the protection and promotion of minority languages as "an important contribution to the building of a Europe based on the principles of democracy and cultural diversity within the framework of national sovereignty and territorial integrity."<sup>60</sup> However, it also states "that the protection and encouragement of regional or minority languages should not be to the detriment of the official languages and the need to learn them."<sup>61</sup> Combined with the opt-in structure of the treaty, this statement suggests that while linguistic minorities have a negative right to use their own language, any positive rights requiring the state to take action to support their usage must be balanced against other state interests. Thus, although the ECRML sets out provisions dictating positive rights (for instance, a state committing to sub-paragraph 1(b)(i) of Article 8 must "make available primary education in the relevant regional or minority languages"<sup>62</sup>), states may choose which obligations to sign onto for a specific minority language according to their interests.

States have an interest in establishing "national" or "official" languages to "unify and stabilize" their populations and establish centralized systems.<sup>63</sup> The ECRML recognizes this interest by "noting that the protection and

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<sup>55</sup> ECRML, *supra* note 39, at art. 1.

<sup>56</sup> See Capotorti, *supra* note 25, and accompanying text.

<sup>57</sup> ECRML, *supra* note 39, at art. 1.

<sup>58</sup> Under Article 2, States Party must "apply a minimum of thirty-five paragraphs or sub-paragraphs chosen from among the provisions of Part III of the Charter, including at least three chosen from each of the Articles 8 and 12 and one from each of the Articles 9, 10, 11 and 13." Article 8 deals with education, and Article 12 covers cultural activities and facilities. *Id.* art. 2.

<sup>59</sup> *Id.* art. 2.

<sup>60</sup> *Id.* pmb1.

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

<sup>62</sup> *Id.* art. 8.

<sup>63</sup> See Andrea R. Ball, Note, *Equal Accessibility for Sign Language under the Convention on the Rights of Persons with Disabilities*, 43 CASE W. RES. J. INT'L L. 759, 763 (2011).

encouragement of . . . minority languages should not be to the detriment of the official languages and the need to learn them.”<sup>64</sup> Protection of minority languages occurs “within the framework of national sovereignty and territorial integrity.”<sup>65</sup> Unfortunately, these recognized good-faith state interests also compel minority language users “to learn the [official] language in order to freely function within the domestic political and civil system.”<sup>66</sup> Those who cannot acquire the national language instead face “linguistic persecution.”<sup>67</sup> Necessity may force minority language users to give up their languages to conform to the national or official language. Therefore, states need to walk a tight balance between advancing their interests in unity and stability and upholding their obligation to not deny linguistic minorities usage of their native languages.

### 3. States balance interests when upholding positive linguistic rights.

The difficulties of defining language rights heighten the tension between state interests in unity or stability and the rights of linguistic minorities. Scholar Moria Paz defines language rights as “specific entitlements that protect language-related acts and values,” where “the aim of the legal protection is to ensure both that *individuals* enjoy a safe linguistic environment in which to speak their mother tongues and that vulnerable linguistic [ ] groups retain a fair chance to flourish.”<sup>68</sup> Her definition covers only “pure” language rights, which do not include language rights that enable the exercise of other substantive rights. For example, requiring special educational support for linguistic minorities due to their inability to speak the majority language is an educational right rather than a language right, since language is “a barrier they must overcome in order to enjoy equal opportunities in education.”<sup>69</sup> Linguistic differences play into every facet of interactions with society and the state: because of the uniquely pervasive nature of language, it can be difficult to separate out “pure” language interests.

While states must, at minimum, not deny linguistic minorities the right to use their language, states have discretion over balancing which interests to advance and which to forgo when it comes to language rights connected to other rights (such as through the scheme created by Article 2 of the ECRML). Paz argues for breaking down the panoply of language rights into more specific rights to create a “collection of narrower, more particular interests, only some of which (and likely not most) are entitled to absolute protection under the law.”<sup>70</sup> Narrowing the

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<sup>64</sup> ECRML, *supra* note 39, at pmbl.

<sup>65</sup> *Id.*

<sup>66</sup> Ball, *supra* note 63, at 763.

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

<sup>68</sup> Paz, *supra* note 32, at 168.

<sup>69</sup> *Id.* at 169 (citing *Lau v. Nichols*, 414 U.S. 563, 566–68 (1974)).

<sup>70</sup> *Id.* at 213.

discussion to one specific interest helps clarify exactly which rights states must uphold; in particular, this Comment determines whether linguistic minorities with disabilities are entitled to legal protection of their right to native language instruction.

### III. THE EDUCATION RIGHTS OF LINGUISTIC MINORITIES

Because the right to be provided education in one's native language implicates a balancing of the state unity interest against the linguistic minority's interest (not a "pure" language right), a discussion of the right to education and its intersection with language helps further flesh out what this balancing looks like in increasingly multilingual societies. Such an analysis must first look at treaty law surrounding the educational rights of linguistic minorities and then at case law from the U.N. Human Rights Committee and the European Court of Human Rights.

#### A. Treaty Law

A number of international and regional legal frameworks provide for the right to education specifically. The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) emphasizes the universality of the right to education.<sup>71</sup> Articles 28 through 30 of the Convention on the Rights of the Child (CRC) and Article 24 of the Convention on the Rights of Persons with Disabilities also contain provisions on the right to education.<sup>72</sup> While the ICESCR does not mention language rights as applied to education,<sup>73</sup> both the ICCPR and the CRC give linguistic minorities language rights as part of a broad protection of human rights without specifying exactly how they intersect with educational rights.<sup>74</sup>

Drafted by the U.N. Educational, Scientific and Cultural Organization (UNESCO), the 1960 Convention against Discrimination in Education (Discrimination in Education Convention), signed by 106 states, includes a provision recognizing "the right of members of national minorities to . . . , depending on the educational policy of each State, the use or the teaching of their own language."<sup>75</sup> However, this right must (1) not prevent linguistic minorities

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<sup>71</sup> UNESCO, *The Right to Education for Persons with Disabilities: Overview of the Measures Supporting the Right to Education for Persons with Disabilities reported on by Member States; Monitoring of the Implementation of the Convention and Recommendation against Discrimination in Education (8th Consultation)* at 5, U.N. Doc. ED-2015/WS/3 (2015) [hereinafter UNESCO Overview of Measures].

<sup>72</sup> *Id.*

<sup>73</sup> See International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>74</sup> See Convention on the Rights of the Child, art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]; ICCPR, *supra* note 35, at art. 27.

<sup>75</sup> Convention Against Discrimination in Education, art. 5, Dec. 14, 1960, 429 U.N.T.S. 93.

from understanding the majority language and participating in the community, or prejudice national sovereignty; (2) not create a lower standard of education than the general standard of education; and (3) make attendance at minority-language schools optional.<sup>76</sup> Thus, similar to the qualifying language found in the ECRML's preamble,<sup>77</sup> the Discrimination in Education Convention suggests that the right to education in linguistic minorities' native languages is again a positive right under state discretion to balance against other interests.

Nevertheless, according to Article 4 of the 1992 U.N. Minorities Declaration, “[s]tates should take appropriate measures so that, wherever possible, persons belonging to minorities may have adequate opportunities to learn their mother tongue or to have instruction in their mother tongue.”<sup>78</sup> This Article, although non-binding, suggests that linguistic minorities may be entitled to being educated or taught *in* their native languages, not merely to teach or use their native languages with each other. While it does give states some discretion by allowing for “appropriate measures,” it does not include the qualifying language found in the Discrimination in Education Convention.

Furthermore, the CRC reinforces the idea that language is an important factor to be considered by the state. Education must be aimed at the “development of the child’s personality, talents and mental and physical abilities to their fullest potential,” which includes the child’s language skills.<sup>79</sup> Education must also develop “respect for the child’s cultural identity, language and values,” which implies a linguistic identity different from the official or majority language.<sup>80</sup> Education systems fail to respect a child’s language if assimilation into the majority language due to monolingual education erases the child’s native minority language. Language attrition, the “gradual reduction or loss of linguistic knowledge and skills in an individual . . . caused . . . by a change in one’s contact with the language(s) in question,”<sup>81</sup> may lead a child to lose their native language under a monolingual majority language education system.

Studies show that, generally, the younger an individual migrates from their native language environment to a new linguistic environment, the “quicker and the more severe the extent of language loss.”<sup>82</sup> Monolingual education leading to the loss of the child’s native language may also impact their ability to communicate

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<sup>76</sup> Convention Against Discrimination in Education, art. 5, Dec. 14, 1960, 429 U.N.T.S. 93.

<sup>77</sup> The ECRML notes “that the protection and encouragement of . . . minority languages should not be to the detriment of the official languages and the need to learn them.” ECRML, *supra* note 39, at pmb1.

<sup>78</sup> U.N. Minorities Declaration, *supra* note 45.

<sup>79</sup> CRC, *supra* note 74, at art. 29.

<sup>80</sup> *Id.*

<sup>81</sup> Eun Sung Park, *Language Attrition*, in THE TESOL ENCYCLOPEDIA OF ENGLISH LANGUAGE TEACHING 1 (John I. Liontas & Margo DelliCarpini eds., 2018).

<sup>82</sup> *Id.* at 6.

with family members. Article 30 of the CRC mandates that if “linguistic minorities . . . exist” in a state, children “belonging to such a minority . . . shall not be denied the right, in community with other members of his or her group . . . to use [their] own language.”<sup>83</sup> States shall not deny linguistic minorities the use of their language in community with each other. If language attrition significantly frustrates linguistic minority children’s ability to use their language, severing their ability to communicate with family members who do not speak the majority language, states may fail to uphold this right.

Other treaties like the ECRML similarly reflect a mandate for states to balance relevant interests in recognizing language as part of linguistic minorities’ education right. Although the ECRML has only a monitoring system and no judicial enforcement mechanism, it “provides a set of values, [or] international norms, that guide European states in their policies towards minority languages,” setting forth a normative interpretation of the right of language use first stated in the ICCPR.<sup>84</sup> Under the ECRML, parties must choose at least three paragraphs or sub-paragraphs from Article 8 (education) to comply with.<sup>85</sup> States may choose to “undertake [certain provisions], within the territory in which such languages are used, according to the situation of each of these languages, and without prejudice to the teaching of the official language(s) of the State.”<sup>86</sup> For instance, states may choose:

- i) to make available primary education in the relevant regional or minority languages; or
- ii) to make available a substantial part of primary education in the relevant regional or minority languages; or
- iii) to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
- iv) to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient.<sup>87</sup>

Out of seventy-two sets of provisions submitted by states regarding various minority languages in their territories, fifty-eight sets signed on to at least one of the above options for primary education.<sup>88</sup> Similar choices also exist for secondary,

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<sup>83</sup> CRC, *supra* note 74, at art. 30.

<sup>84</sup> R. Gwynedd Parry, *History, Human Rights and Multilingual Citizenship: Conceptualising the European Charter for Regional or Minority Languages*, 61 N. IR. LEGAL Q. 329, 334 (2010); see Section II.B.1; ICCPR, *supra* note 35, at art. 2.

<sup>85</sup> ECRML, *supra* note 39, at art. 2.

<sup>86</sup> *Id.* art. 8.

<sup>87</sup> *Id.*

<sup>88</sup> In choosing which provisions to sign on to, a plurality of sets submitted chose the least restrictive option, ¶ iv. For instance, under Article 8(1)(b) addressing primary education, nineteen sets selected

technical, and vocational education.<sup>89</sup> Outside of territories where regional or minority languages are traditionally used, parties may sign on to Article 8(2), which requires that states “allow, encourage or provide teaching in or of the regional or minority language” when “the number of users of a regional or minority language justifies it.”<sup>90</sup> Out of the seventy-two different sets of provisions, thirty-nine parties signed onto Article 8(2).<sup>91</sup> States have discretion over when they believe the number of linguistic minorities justifies implementing education in or of those minority languages. States are also free to choose their obligations according to a certain language in a specific part of their territory: for instance, the Czech Republic’s declaration of ratification signed onto different provisions for the Polish language in the Moravian-Silesian Region and the Slovak language all throughout the territory.<sup>92</sup>

Twenty-five European states have ratified the ECRML, with eleven states submitting different provisions for different languages and territories within their boundaries (making for a total of seventy-two different sets of provisions).<sup>93</sup> The piecemeal application of the treaty to education rights suggests that European states are balancing different needs and interests in different areas as they consider the implementation of the right of language use first stated in the ICCPR. Critics of the ECRML argue that such broad state discretion gives states too much power to choose and apply provisions according to their political goals.<sup>94</sup> However, the ECRML’s “flexibility can also be a virtue” in Europe’s complex and diverse linguistic landscape.<sup>95</sup> Given the practical complexities of providing education in minority languages (for instance, training teachers or dealing with areas with multiple minority languages), encouraging “gradual, progressive compliance” may lead to better compliance long term.<sup>96</sup> Unreachable short-term goals may result in states simply failing to meet their obligations.

In general, the complexity of linguistic education rights for minorities, even within smaller regions, due to lack of consensus on what is protected may explain the conditioned approaches taken by treaty law. Minority languages span from migrant minority languages—imagine a young Hungarian child who moves from Hungary to live in Romania—to indigenous languages, which are often discussed

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¶ i, eleven chose ¶ ii, seven chose ¶ iii, and twenty-six chose ¶ iv. *Reservations and Declarations for Treaty No. 148 – European Charter for Regional or Minority Languages*, COUNCIL OF EUR., <https://perma.cc/9U4B-SGSN> (Aug. 11, 2020) [hereinafter ECRML Declarations].

<sup>89</sup> ECRML Declarations, *supra* note 88, ECRML, *supra* note 39, at art. 8.

<sup>90</sup> ECRML, *supra* note 39, at art. 8.

<sup>91</sup> ECRML Declarations, *supra* note 88.

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

<sup>93</sup> Germany alone submitted twenty-three sets of provisions for different regions. *Id.*

<sup>94</sup> Parry, *supra* note 84, at 332.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

separately. In Europe, majority-language speakers in one country may become minority-language speakers in another country without becoming a regional minority. The already narrowed linguistic educational right may be further limited by distinctions amongst minority languages: the European Court of Justice tended to give privileges to migrant minority-language E.U. speakers, recognizing “a clear connection between . . . Union citizenship on the one hand and language rights (or, respectively, minority rights) on the other.”<sup>97</sup> Unfortunately, no similar protections guarantee “mother-tongue education [for] ‘traditional’ minorities” who are not majority-language speakers in another European Union country.<sup>98</sup>

## B. Case Law

Cases decided by international courts help explain how language rights are actually implemented beyond the broad conceptions laid out by human rights treaties. Protection for minority languages under treaties (excluding the ECRML) usually appears as negative obligations to prohibit discrimination against linguistic minorities, rather than positive obligations requiring affirmative action to encourage minority language usage in the public sector.<sup>99</sup> Case law reveals that courts, in line with the pragmatism underlying treaty law, act like policy makers in balancing the rights and interests at stake.<sup>100</sup>

Cases concerning linguistic minorities have been brought to both the U.N. Human Rights Committee (UNHRC) and the European Court of Human Rights (ECtHR). In *Mavlonov v. Uzbekistan*, the UNHRC considered the denial of re-registration of a newspaper published in the minority language of Tajik by Uzbekistan authorities.<sup>101</sup> The publication was distributed to schools using Tajik as the language of instruction and contained educational materials, reports on matters of cultural interest, and samples of student work.<sup>102</sup> These schools faced “shortages in Tajik-language textbooks, low wages for teachers and the forced opening of Uzbek-language classes in some Tajik schools.”<sup>103</sup> The UNHRC found a violation of Article 27 of the ICCPR, since the “challenged restriction [had] an impact so substantial that it [ ] effectively den[ie]d to the complainants the right to enjoy their cultural rights.”<sup>104</sup> This denial violated linguistic minorities’ negative right to use their language, which constitutes part of their culture. The UNHRC

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<sup>97</sup> Guliyeva, *supra* note 11, at 234.

<sup>98</sup> *Id.*

<sup>99</sup> *See* Ball, *supra* note 63, at 770.

<sup>100</sup> *See* Paz, *supra* note 32, at 187.

<sup>101</sup> *Mavlonov v. Uzbekistan*, Communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004, 2 (Apr. 29, 2009).

<sup>102</sup> *Id.* at ¶ 2.2 (Apr. 29, 2009).

<sup>103</sup> *Id.* at ¶ 8.7.

<sup>104</sup> *Id.*



noted that “in the context of Article 27, education in a minority language is a fundamental part of minority culture.”<sup>105</sup> Although the UNHRC ruled on the basis of the denial of the cultural right—a lesser infringement on Tajik education may not have resulted in the same ruling—the case affirms the importance of minority language instruction to linguistic minority groups.

In *J.G.A. Diergaardt et al. v. Namibia*, authors of the complaint argued that they had been denied use of their native language in “administration, justice, education and public life.”<sup>106</sup> The UNHRC held that the state violated Article 26, which prohibits discrimination on the basis of language, since the state “barr[ed] the use of Afrikaans [not only] to the issuing of public documents but even to telephone conversations.”<sup>107</sup> Because the authors of the complaint did not argue that their language rights under Article 27 were denied, the UNHRC did not examine the Article 27 issue.<sup>108</sup> The UNHRC did not comment on the education point raised either—likely because the substantial denial of any use of Afrikaans made it easy for the UNHRC to find a violation without going into the details. In both *Mavlonov* and *J.G.A. Diergaardt*, the substantiality of the infringement on the negative right to language usage played a part in the UNHRC’s findings, such that the court did not need to consider the complexities of the positive right to education conducted in minority languages.

In the *Belgian Linguistic Case*, “Francophone parents argued that Belgium implicitly violated the rights of French-speaking minority parents living in Flanders by offering education in state-financed schools in Dutch only, while also withdrawing subsidies from private schools operating in French in that region.”<sup>109</sup> The ECtHR found language to be distinct from identity—unlike religion—such that “requiring children to assimilate against their wishes, into the sphere of the regional language cannot be characterized as an act of depersonalization.”<sup>110</sup> This ruling suggests that assimilation itself, without the severe consequences in *Mavlonov* and *J.G.A. Diergaardt*, does not automatically imply a violation of the negative right to language usage. The Court noted that Belgium’s purpose was “to achieve linguistic unity within the two large regions of Belgium in which a large

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<sup>105</sup> *Mavlonov v. Uzbekistan*, Communication No. 1334/2004, U.N. Doc. CCPR/C/95/D/1334/2004, ¶ 8.7 (Apr. 29, 2009).

<sup>106</sup> *J.G.A. Diergaardt et al. v. Namibia*, Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997, ¶ 10.10 (Jul. 25, 2000). Only 0.8 percent of the population spoke English as their mother tongue; nonetheless, the government set English as the only official language and refused to establish legislation allowing for the usage of other languages. *Id.* at ¶ 3.4.

<sup>107</sup> *Id.* at ¶¶ 10.6, 10.10.

<sup>108</sup> *Id.* at ¶ 3 (Jul. 25, 2000) (P.N. Bhagwati, Lord Colville & Maxwell Yalden, dissenting).

<sup>109</sup> Paz, *supra* note 32, at 181.

<sup>110</sup> *Id.*

majority of the population speaks only one of the two national languages.”<sup>111</sup> Belgian policies thus served the corresponding public interest “that all schools dependent on the State and existing in a unilingual region conduct their teaching in the language [ ] essentially of the region.”<sup>112</sup> In fact, the Court found that the ECHR “implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights.”<sup>113</sup> The passage of the ECRML, three decades later, may better detail such a balance.

The ECtHR in *Oršuš v. Croatia* similarly considered the interests of the state and the individuals. In *Oršuš*, Roma children were barred from Croatian-language classes due to their insufficient Croatian language skills and put into segregated Roma-only classes; these classes implemented a 30% reduced version of the Croatian full curriculum.<sup>114</sup> Rather than order Croatia to boost their Roma-language classes to meet the same standards of the Croatian-language classes, the Court found that Croatia was obligated to “take appropriate positive measures to assist [Roma pupils] in acquiring the necessary language skills . . . so that they could be quickly integrated into mixed classes.”<sup>115</sup> Given that Roma children were being left behind by the Croatian education system,<sup>116</sup> the Court prioritized assimilation as the solution: placing pupils in Roma-only classes was only legitimate if it helped “bring[ ] their command of the Croatian language up to an adequate level” to secure “immediate transfer to a mixed-class.”<sup>117</sup>

The ECtHR’s approach both in *Oršuš* and the *Belgian Linguistic Case* suggests that balancing education and language rights only leads to what Paz calls “speedy assimilation on fair terms.”<sup>118</sup> The treatment of the Roma pupils implies that minority language groups’ spaces of native language instruction are “protected by the law only so long as they are unable to speak the majority language.”<sup>119</sup> The Court’s analysis of language rights sponsors “a policy that allows the State to incentivize assimilation of fair terms, transforming a diversity-protecting impulse into an integrationist regime.”<sup>120</sup> Courts may interpret language claims by

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<sup>111</sup> Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium,” 1968 Y.B. Eur. Conv. on H.R. 832, 884 (1968).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 861.

<sup>114</sup> *Oršuš v. Croatia*, App. No. 15766/03, Eur. Ct. H.R., ¶ 165 (2010); Paz, *supra* note 32, at 186.

<sup>115</sup> *Oršuš*, App. No. 15766/03, Eur. Ct. H.R., ¶ 165.

<sup>116</sup> The Court characterized the Roma students as having “linguistic deficiencies.” *Id.* at ¶ 167.

<sup>117</sup> *Id.* at ¶ 172.

<sup>118</sup> Paz, *supra* note 32, at 187.

<sup>119</sup> *Id.* at 204. Under the *Oršuš* framework, linguistic minorities are provided native language instruction to the extent that it allows them to expediently reach fluency in the majority language. Once they reach that goal, native language instruction vanishes as they are assimilated into the majority language education system.

<sup>120</sup> *Id.* at 201–02.

balancing the facts, economic and political circumstances, and normative stakes.<sup>121</sup> Determining whether linguistic minorities with disabilities may have a right to native language instruction will require further balancing of the state's interests in assimilation and unity against the rights implicated by treaties on disability rights. When state action or inaction looks more like a substantial violation of the negative right to language usage, courts are more likely to find the state in the wrong.

#### IV. THE EDUCATION RIGHTS OF LINGUISTIC MINORITIES WITH DISABILITIES

While the right to use one's native language is an inalienable negative right, the right of linguistic minorities with disabilities to native language instruction is a positive right that states may balance against other interests. Combining disability rights and education rights exposes how courts may interpret a case involving the rights of linguistic minorities with disabilities to native language instruction. Such an analysis must also consider the practical consequences such rights may have on educational policy.

No treaty specifically mentions the educational rights of linguistic minorities with disabilities, although overlaps exist between linguistic rights, disability rights, and educational rights. However, the disability rights framework—composed of both soft law created before the Convention on the Rights of Persons with Disabilities (CRPD) and the CRPD itself—provides enough guidelines to determine what interests are at play when it comes to linguistic minorities with disabilities.

##### A. Education and Disability Rights pre-CRPD

While Section III examined the intersection of the right to education with linguistic rights, an analysis of the intersection of the right to education and disability rights first requires determining the goals of education. The right to education is “one of the most universally recognized rights in national constitutions in the world today,” and “[e]ven when not explicitly identified in the constitution, the right to education can be considered as an essential component for the enjoyment of other rights.”<sup>122</sup> Article 13 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) established that “education shall be directed to the full development of the human personality and

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<sup>121</sup> Paz, *supra* note 32, at 165.

<sup>122</sup> Kishore Singh (Special Rapporteur), *Report of the Special Rapporteur on the Right to Educ.*, at 8–9, U.N. Doc. A/HRC/23/35 (May 10, 2013).

the sense of its dignity, and . . . shall enable all persons to participate effectively in a free society.”<sup>123</sup>

The 1989 Convention on the Rights of the Child (CRC) provided a framework for children’s rights internationally: the CRC is the most widely ratified international human rights treaty, with every single country except the U.S. having ratified it.<sup>124</sup> Article 28 guarantees all children access to education “on the basis of equal opportunity;” in particular, states shall provide free compulsory primary education, encourage the development of secondary education (including vocational education), and higher education “accessible to all on the basis of capacity.”<sup>125</sup> Under Article 29, a child’s education must, among other goals, “be directed to” the “development of the child’s personality, talents and mental and physical abilities to their fullest potential” and the “development of respect for the child’s parents, his or her own cultural identity, language and values.”<sup>126</sup>

The CRC also offers specific protection to children with disabilities. Article 23 broadly recognizes “that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.”<sup>127</sup> As a result, States Party must “recognize the right of the disabled child to special care . . . , subject to available resources.”<sup>128</sup> In particular, states must offer assistance “designed to ensure that the disabled child has effective access to and receives education . . . in a manner conducive to the child’s achieving the fullest possible social integration and individual development, including [their] cultural and spiritual development.”<sup>129</sup> This requirement echoes Article 28 and 29 but specifies that the “fullest potential” for children with disabilities means the “fullest possible social integration and individual development.”<sup>130</sup>

While the CRC does not describe what such special education would look like and limits any special care to available resources, it nevertheless establishes that states must provide an education tailored to help the child’s individual progress. Moreover, by including “cultural and spiritual development” within

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<sup>123</sup> Article 13 also included more specific provisions in pursuit of full realization of the stated right, including free compulsory primary education, generally available and accessible secondary education, and the development of a system of schools at all levels. The Article reserved for parents the right to choose their children’s schools, as long as the schools met minimum standards approved by states. ICESCR, *supra* note 73, at art. 13.

<sup>124</sup> Sarah Mehta, *There’s Only One Country That Hasn’t Ratified the Convention on Children’s Rights: US*, ACLU (Nov. 20, 2015), <https://perma.cc/K6SS-NLY6>.

<sup>125</sup> CRC, *supra* note 74, at art. 28.

<sup>126</sup> *Id.* art. 29.

<sup>127</sup> *Id.* art. 23.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* arts. 23, 28–29.

“individual development,” the CRC suggests that state-provided education for children with disabilities extends beyond improving mental and physical abilities to also include accessing all aspects of the child’s personal life.

Before the CRPD came into force in 2008, a soft law regime created in 1993 governed international law surrounding disability rights.<sup>131</sup> The U.N. Standard Rules for the Equalization of Opportunities for Persons with Disabilities (“Standard Rules”) created twenty-two guidelines on preconditions, target areas for equal participation, and implementation measures.<sup>132</sup> The Standard Rules required that the education of persons with disabilities be integrated into mainstream education and afforded the same amount of educational resources as those for students without disabilities; they also include support services designed to meet the needs of students with different disabilities.<sup>133</sup> Although mainstreaming necessarily implies integration, integration may not always lead to equal participation for linguistic minorities with disabilities—especially when mainstreaming comes at the cost of losing home support systems.

For instance, a 2005 study showed that when parents of bilingual children with autism stopped using their native language in their home, parent–child bonds were weakened due to parents’ limited proficiency in English, which “lessen[ed] the pragmatic models accessible to the child [ ] and exacerbate[ed] the child’s social isolation in the home.”<sup>134</sup> For deaf children, “mentor programming that created a bilingual, both sign and spoken languages, and a bi-cultural environment was found to have had a considerable influence on the deaf child’s language development in both expressive and receptive language, including grammar, vocabulary, and general attitudes.”<sup>135</sup> Similarly, a 2010 study showed that, in reading and math, bilingual students with disabilities who participated in a two-way immersion program (where half of the school day was done in English and the other half in the student’s native language) outperformed bilingual peers with disabilities who were enrolled in other kinds of language programs.<sup>136</sup> Such empirical evidence suggests that language is instrumental in helping linguistic minorities with disabilities access their education and preserve the support of their home communities and organizations.

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<sup>131</sup> Ravi Malhotra & Robin F. Hansen, *United Nations Convention of the Rights of Persons with Disabilities and its Implications for the Equality Rights of Canadians with Disabilities: The Case of Education*, 29 WINDSOR Y.B. ACCESS JUST. 73, 77 (2011).

<sup>132</sup> *Id.*

<sup>133</sup> G.A. Res. 48/96, annex, Standard Rules on the Equalization of Opportunities for Persons with Disabilities (Dec. 20, 1993).

<sup>134</sup> Kangas, *supra* note 13, at 5.

<sup>135</sup> Maya Sabatello, *Disability, Cultural Minorities, and International Law: Reconsidering the Case of the Deaf Community*, 26 WHITTIER L. REV. 1025, 1045 (2005).

<sup>136</sup> Kangas, *supra* note 13, at 5.

Despite reaching a quasi-binding character,<sup>137</sup> the Standard Rules did not spur progress towards the accessibility and equality that advocates hoped for.<sup>138</sup> As a result, the Convention on the Rights of Persons with Disabilities was drafted between 2002 and 2006.

## B. Education and Disability Rights under the CRPD

Attitudes on disability rights have shifted significantly since 1989. Rather than “viewing persons with disabilities as ‘objects’ of charity, medical treatment and social protection,” the international community started seeing “persons with disabilities as ‘subjects’ with rights . . . capable of claiming those rights and making decisions for their lives based on their free and informed consent.”<sup>139</sup>

In 2006, the U.N. adopted the Convention on the Rights of Persons with Disabilities (CRPD), the most comprehensive human rights treaty on disability rights.<sup>140</sup> Drafted between 2002 and 2006, it was a compromise between activists who wanted a CRC-style full treaty (instead of a solely anti-discrimination model) providing affirmative rights and others who wanted only a short additional protocol on disability attached to some existing convention.<sup>141</sup> As a result, while the CRPD is a convention detailing civil, political, economic, social, and cultural rights, its “drafters were clear that no new rights were being created;” instead, “accessibility would foster the ability of people with disabilities to access existing services.”<sup>142</sup> Not only was the CRPD the fastest negotiated human rights treaty, but it was also signed on opening day by the highest number of signatories to a U.N. Convention in history (eighty-two signatories), suggesting widespread acceptance of the norms it embodies.<sup>143</sup> As of today, 182 countries are party to the CRPD and 164 countries are signatories.<sup>144</sup> Ninety-four have also signed onto the Optional Protocol on enforcement and reporting measures.<sup>145</sup>

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<sup>137</sup> Sabatello, *supra* note 135, at 1045.

<sup>138</sup> See Malhotra & Hansen, *supra* note 131, at 78.

<sup>139</sup> Convention on the Rights of Persons with Disabilities, INT’L DISABILITY ALL., <https://perma.cc/766G-Q8DF>.

<sup>140</sup> Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, 2515 U.N.T.S. 3 [hereinafter CRPD]; see also *id.*

<sup>141</sup> Malhotra & Hansen, *supra* note 131, at 79.

<sup>142</sup> *Id.*

<sup>143</sup> Convention on the Rights of Persons with Disabilities, U.N. DEP’T ECON. & SOC. AFFS., <https://perma.cc/QP89-5CC2>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* The U.S. is not a signatory. However, many of the rights in the CRPD were taken from U.S. law, including the Americans with Disabilities Act, the Rehabilitation Act of 1973, and the Individuals with Disabilities Education Act. See David L. Hutt, *The Disability Rights Treaty and Advocacy Strategies Using International Human Rights*, 48 CLEARINGHOUSE REV. 4, 5 (2014).

The purpose of the CRPD is “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”<sup>146</sup> This Comment uses the CRPD’s definition of persons with disabilities: persons with disabilities are “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”<sup>147</sup> In essence, “disability results from the interaction between persons with impairments and attitudinal and environmental barriers.”<sup>148</sup> Instead of placing the problem solely on persons with disabilities, the CRPD’s definition places equal weight on society’s attitudes, conditions, and policies. The drafters also recorded “concern[] about the difficult conditions faced by persons with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion . . . or other status.”<sup>149</sup>

Within this new framework and definition of disability, States Party to the CRPD must “recognize the right of persons with disabilities to education . . . without discrimination and on the basis of equal opportunity.”<sup>150</sup> Like the CRC, it requires states to direct education to, among other goals, the “development by persons with disabilities of their personality, talents and creativity, [and] . . . mental and physical abilities, to their fullest potential.”<sup>151</sup> However, the CRPD goes beyond the CRC by expanding on how states should realize this educational right. Article 24(2) requires States Party to ensure that:

- (a) Persons with disabilities are not excluded from the general education system on the basis of disability;
- (b) Persons with disabilities can access an inclusive, quality and free and primary education and secondary education on an equal basis with others in the communities in which they live;
- (c) Reasonable accommodation of the individual’s requirements is provided;
- (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
- (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.<sup>152</sup>

UNESCO has advocated a human rights-based view of education requiring equal educational opportunities to all, such that the right to education is inclusive

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<sup>146</sup> CRPD, *supra* note 140, at art. 1.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* pmb1.

<sup>149</sup> *Id.* (emphasis added).

<sup>150</sup> *Id.* art. 24.

<sup>151</sup> *Id.*; *see also* CRC, *supra* note 74, at art. 23.

<sup>152</sup> CRPD, *supra* note 140, at art. 24.

of all marginalized or vulnerable groups.<sup>153</sup> Thus, the CRPD “seeks to incorporate difference into the education system so that persons with disabilities learn the skills to participate effectively in a free society while enabling learners without disabilities to benefit from the experiences of students from diverse backgrounds.”<sup>154</sup> The treaty does not seek to eliminate differences or “fix” disabilities: UNESCO notes that “[i]ndividual differences should [ ] become opportunities to enrich learning rather than problems to be fixed.”<sup>155</sup>

1. States must provide reasonable accommodation and individualized support measures to maximize academic and social development.

To provide “inclusive, quality and free . . . education on an equal basis,” the CRPD requires states to provide “[r]easonable accommodation of the individual’s requirements” and “[e]ffective individualized support measures . . . that maximize academic and social development, consistent with the goal of full inclusion.”<sup>156</sup> Full and effective participation in a free society necessitates further analysis, as it exposes tensions between mainstreaming and language preservation. However, for linguistic minorities with disabilities, reasonable accommodation and maximizing academic and social development both require consideration of their native languages.

Article 2 of the CRPD defines “reasonable accommodation” as “necessary and appropriate modification[s] and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”<sup>157</sup> This definition suggests a familiar kind of balancing—in light of the goal of equality, states are to consider the necessity and appropriateness of a modification against the burden and cost it imposes. Although the CRPD does not further define what constitutes a disproportionate or undue burden, other provisions of the treaty help show what is *not* a disproportionate or undue burden.

To ensure “full and equal participation in education and as members of the community,” States Party must take the following measures for persons who are blind, deaf, or deafblind:

- a) Facilitating the learning of Braille, alternative script, augmentative and alternative modes, means and formats of communication and orientation and mobility skills, and facilitating peer support and mentoring;

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<sup>153</sup> UNESCO Overview of Measures, *supra* note 71, at 3.

<sup>154</sup> *Id.* at 6.

<sup>155</sup> *Id.* at 6–7.

<sup>156</sup> CRPD, *supra* note 140, at art. 24.

<sup>157</sup> *Id.* art. 2.



- b) Facilitating the learning of sign language and the promotion of the linguistic identity of the deaf community;
- c) Ensuring that the education of persons, and in particular children who are blind, deaf or deafblind, is delivered in the most appropriate languages and modes and means of communication for the individual, and in environments which maximize academic and social development.<sup>158</sup>

Furthermore, States Party must also “take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education.”<sup>159</sup> All of these provisions—facilitating the learning of “native” languages of Braille and sign language, trying to find and accommodate for best modes of communication, providing for qualified teachers—are necessarily considered reasonable under the CRPD.

It could be argued that the absence of a provision on language rights for linguistic minorities, given the consideration put in place for the deaf and blind, is a conscious decision to exclude. The Convention defines “language” to include “spoken and signed languages and other forms of [non-spoken] languages.”<sup>160</sup> However, it is also likely that the CRPD defined “language” as such because the traditional definition of “language” did not include signed and non-spoken languages: for instance, under the previous ICCPR regime, deaf individuals were only included in protections of linguistic minorities if states chose to consider them as a linguistic minority.<sup>161</sup> Therefore, the emphasis on the languages of the deaf and blind is likely due not to a denial of rights for linguistic minorities, but rather due to the need to clarify a previously non-explicit right.

One could also argue that special protections are offered for Braille and sign language because individuals who are blind, deaf, and deafblind have no other options for accessing mainstream curricula, and thus analogous measures for linguistic minorities—who can assimilate, even if undesirable—would be disproportionate or unduly burdensome. However, the harms associated with assimilation for some linguistic minorities with disabilities are grave enough to make assimilation sufficiently impossible if states do not provide equal educational opportunities. For instance, linguistic minorities with communication or learning disabilities may be doubly challenged. Studies show that the “efficiency of one’s native language skills plays a large part in the success or failure of [second] language learning.”<sup>162</sup> Requiring a child who already has difficulties with their native language to assimilate into the majority language—by having singular input

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<sup>158</sup> CRPD, *supra* note 140, at art. 24(3).

<sup>159</sup> *Id.* art. 24(4).

<sup>160</sup> *Id.* art. 2.

<sup>161</sup> Ball, *supra* note 63, at 772.

<sup>162</sup> Lenore Ganschow et al., *Learning a Foreign Language: Challenges for Students with Language Learning Difficulties*, 1 *DYSLEXIA* 75, 78 (1995).

of the majority language in school—may result in both attrition of the native language and the incomplete acquisition of the majority language.<sup>163</sup> The child’s loss of the native language—especially in households with limited proficiency in the majority language—may “lessen the pragmatic models accessible to the child [ ] and exacerbate the child’s social isolation in the home.”<sup>164</sup>

For linguistic minorities with communication or learning disabilities, such a scenario would also violate CRPD’s requirement that “effective individualized support measures [be] provided in environments that maximize academic and social development.”<sup>165</sup> Aside from the harms caused by lack of native language support, native language support helps maximize academic and social development: empirical research shows that when native languages are used as “medium of instruction for at least 6–8 years,” results included “enhanced self-confidence, self-esteem and classroom participation by minority children, lower dropout rates, higher levels of academic achievement, longer periods in school, better performance in tests and greater fluency and literacy abilities for minority . . . children in both the mother tongue and the official or dominant language.”<sup>166</sup> A 2000 study in Mali showed that children taught in their own language passed their end-of-elementary examinations at a nearly 20% higher rate than those taught only in French, the official language.<sup>167</sup> Both UNESCO and the Special Rapporteur for Minority Issues have noted that “[t]he benefits of education in the mother language are now fairly well established scientifically through studies of minority children in different parts of the world.”<sup>168</sup>

Although these studies describe linguistic minority children in general, rather than linguistic minority children with disabilities, it is unlikely that having a disability would categorically make it easier for children to succeed in the official language only. Research like the 2005 study of bilingual children with autism and the 2010 study of students with disabilities in dual immersion programs<sup>169</sup> suggests that native language support is crucial to both social and academic development. Moreover, research shows that sequential bilinguals (children who learn a new language on top of their home or native language) with communication disorders are more vulnerable to regression in their native language.<sup>170</sup> Under language attrition theory, monolingual education can have a negative impact on the home

<sup>163</sup> See Park, *supra* note 81, at 1; Ganschow, *supra* note 162, at 78.

<sup>164</sup> See Sabatello, *supra* note 135, at 1045, and accompanying text.

<sup>165</sup> CRPD, *supra* note 140, at art. 24.

<sup>166</sup> U.N. Special Rapporteur on Minority Issues, *Language Rights of Linguistic Minorities: A Practical Guide for Implementation*, at 7, U.N. Doc. HRC/NONE/2017/12 (Mar. 2017) [hereinafter Practical Guide].

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 16.

<sup>169</sup> See Section IV.A.

<sup>170</sup> Kathryn Kohnert & Amelia Medina, *Bilingual Children and Communication Disorders: A 30-Year Research Retrospective*, 30 SEMINARS SPEECH & LANGUAGE 219, 223 (2009).

environment, even if a child's parents continue to speak to the child at home in their native language.<sup>171</sup>

2. States must provide education consistent with full inclusion.

Linguistic minorities with disabilities are not simply persons with disabilities who also happen to be linguistic minorities. Because language differences exacerbate barriers created by disability rather than pose entirely unrelated obstacles, the CRPD's provisions for individual support must include language as well. Involving language rights requires states to balance goals of national unity or assimilation with the important interests protected by the CRPD.<sup>172</sup> Within education, these effective individualized support measures must be provided "consistent with the goal of full inclusion."<sup>173</sup>

"Full inclusion" could be interpreted to mean mainstreaming children with disabilities within regular school classrooms: in other words, keeping children with disabilities together with their classmates as much as possible. Mainstreaming creates tension with the language right: specialized support for native languages could make the child feel different from others in the classroom. While full inclusion here more likely refers to the principle of "full and effective participation and inclusion in society" in Article 3, full inclusion in society—hinting at assimilation—also creates tension with the language right as it requires linguistic minorities with disabilities to acquire the dominant language to access much of society.<sup>174</sup>

One might make the counterargument that providing native language instruction will hinder rather than improve full participation and inclusion in society because it may slow down the learning of the majority language, which likely dominates most aspects of general society. The example of the Roma children in *Oršuš* suggests that when segregated by language, states may make policy that effectively results in linguistic minorities being left behind in the education system. Not prioritizing learning the majority language could lead to linguistic minorities with disabilities being isolated from the greater society, frustrating the goals of equal opportunity, inclusion, and participation. However, the goal of participation is one of *effective* participation. Effective participation depends on the circumstances of each individual—denying linguistic minorities with disabilities native language support in favor of advancing monolingual learning fails to recognize the costs imposed on students. If monolingual education in the majority language leads to incomplete understanding of both the majority and native language, combined with severance from the home

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<sup>171</sup> See Park, *supra* note 81, at 6.

<sup>172</sup> See Section II.B.3.

<sup>173</sup> CRPD, *supra* note 140, at art 24.

<sup>174</sup> *Id.* art. 3.

community,<sup>175</sup> linguistic minorities with disabilities (who are thus hindered by linguistic differences) may not be able to participate effectively or meaningfully.

Moreover, such arguments depend on the incorrect idea that native languages and majority languages are effectively involved in a zero-sum game, where adding support for the native language undermines the majority language. First, in *Oršuš*, the Roma children were left behind primarily because their curriculum was not as robust as the Croatian-language curriculum, not because they spoke Roma instead of Croatian.<sup>176</sup> Second, available empirical evidence shows “that a bilingual environment does not, in and of itself, put children with communication disorders [who some might suggest are more challenged by multilingual input] at a disadvantage.”<sup>177</sup> Rather, harm is done when children are faced with monolingual input in a second language. Clinicians suggest that “it would be illogical to recommend that input be reduced from two languages to one because bilingualism does not present an additional risk factor and it may present significant social advantages.”<sup>178</sup> Thus, concerns that native language instruction undermines the majority language are largely unfounded. Instead, studies show that monolingual majority language instruction undermines the native language.

For linguistic minorities without disabilities, the tradeoff between the loss of language and the gained access to society may balance out to favor assimilation, like in the *Oršuš* case. Linguistic minorities may lose aspects of their linguistic proficiency, their culture, and links to their own communities, but like courts recognized, they also stand to gain from acquiring the dominant language. Such gains include access to institutions, politics, and majority culture. However, for linguistic minorities with disabilities—particularly disabilities that affect social, communication, and learning abilities—not only are the costs associated with language attrition greater, but the benefits of assimilation for some linguistic minorities with disabilities are also lesser. For instance, social development may be a primary goal for students with severe disabilities;<sup>179</sup> thus, the home environment is crucial for providing a supportive base. For linguistic minorities with disabilities that affect social, communication, and learning abilities, sacrificing home communities due to lack of native language support could lead to “inclusion” in greater society, but the emotional and social damage done likely negates any possibility of “full and effective participation.”<sup>180</sup>

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<sup>175</sup> See Section IV.B.1.

<sup>176</sup> *Oršuš*, App. No. 15766/03, Eur. Ct. H.R., ¶ 165.

<sup>177</sup> Kohnert & Medina, *supra* note 170, at 223.

<sup>178</sup> *Id.*

<sup>179</sup> David Lansing Cameron & Bryan G. Cook, *General Education Teachers' Goals and Expectations for Their Included Students with Mild and Severe Disabilities*, 48 EDUC. & TRAINING AUTISM & DEVELOPMENTAL DISABILITIES 18, 27 (2013).

<sup>180</sup> See CRPD, *supra* note 140, at art. 3.

This Comment has, so far, addressed disabilities broadly. However, a balancing of the interests and harms involved for linguistic minorities with disabilities must also take into consideration different kinds of disabilities. Linguistic minorities with physical disabilities will not face the same difficulties as linguistic minorities with communication, learning, or social disabilities. In the CRPD's special protections for the blind, deaf, or deafblind, who face communication obstacles, states are to deliver education "in the most appropriate languages and modes and means of communication for the individual."<sup>181</sup> At the very least, for linguistic minorities with disabilities whose linguistic differences exacerbate their disability (such as communication, learning, or social disabilities), states should provide instruction in the most appropriate language—their native language—to meet their obligation to provide an environment that maximizes academic and social development.

If states withhold all native language support, linguistic minorities with disabilities may lose the ability to use their native language without benefiting from assimilation—not quite the "assimilation of fair terms" supported by courts like the ECtHR.<sup>182</sup> The balancing involved is more similar to *Mavlonov* and *J.G.A. Diergaard*, where the UNHRC found a substantial denial of language use that had severe consequences and little benefit, than the *Belgian Linguistic Case*, where the ECtHR determined the assimilation interest to outweigh the rights of French-speaking children to go to a French school in their neighborhood.<sup>183</sup> The addition of the disability rights framework suggests that a court must ensure that any balancing of the assimilation or unity interest and the linguistic minority right also meets states' obligations under the CRPD to maximize academic and social development while ensuring effective participation and inclusion in society.<sup>184</sup> Given the harms that monolingual education in the dominant language may inflict on linguistic minorities with disabilities, courts would need to find that some right to native language instruction exists to reach a fair balancing of the language, education, and disability rights against states' unity, assimilation, and burden interests.

### C. Practical Implications and Contours of Such a Right

Such a right would require states to provide some form of native language instruction; neglecting to offer any linguistic support at all would violate the rights of linguistic minorities with disabilities. However, more work needs to be done to discern what kind of support states would need to implement to comply. Given

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<sup>181</sup> See CRPD, *supra* note 140, at art. 24.

<sup>182</sup> See Section III.B; Paz, *supra* note 32, at 201–02.

<sup>183</sup> See Section III.B.

<sup>184</sup> See Section IV.B.

the difficulties and costs involved in changing current education systems, any natural trend (aside from court proceedings) towards multilingual education and native language support for linguistic minorities with disabilities may be slow. However, implementing minority language instruction is possible: for instance, in India, “more than thirty minority languages are used as the medium of instruction in public schools, [with] usually Hindi or English gradually introduced in later years of schooling.”<sup>185</sup> States should take an open-minded approach to determining what kinds of support best meet the needs of linguistic minorities with disabilities. Native language instruction could range from bilingual special education—whether full time or part time—to translation and interpretation, paraprofessionals, or some combination. These choices should also be tailored to fit the kind of disability; for instance, more intensive support might benefit those with communication disorders.<sup>186</sup>

Some scholars make the case for bilingual education generally, not just in special education. For instance, Christopher Reeber argues that “[i]f educated bilingually, linguistic minorities will not be deprived of their particular heritage yet will be able to communicate and effectuate their ideas to all citizens of their nation.”<sup>187</sup> Reeber’s view rests on his claim that “linguistic minorities need some usage of their native language during their primary education in order to prevent future discrimination,”<sup>188</sup> but also need to rapidly acquire the majority language.<sup>189</sup> However, he does not explain how such bilingual education would be implemented, or how states would choose which languages to teach, especially in multilingual regions. Neither does he mention special education, nor how that might look different from general bilingual education.

Special education may pose unique challenges for bilingual education, given that classrooms are smaller and depend on the needs of the children with disabilities, rather than any arrangement by linguistic identity. In classrooms where students all share a single minority native language, bilingual education may be possible by hiring a bilingual special education teacher. However, because one classroom may have more than two native languages, hiring a multilingual special education teacher, in some cases, may simply be impossible. Nonetheless, states should not be free to disregard their obligations due to a lack of professional staff. Long-term measures designed for compliance may involve training more bilingual or multilingual special education teachers. Such measures might also, in the long

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<sup>185</sup> Practical Guide, *supra* note 166, at 20 (includes examples of other countries’ minority language instruction policies).

<sup>186</sup> Such tailoring, unlike offering support for the blind and deaf but not linguistic minorities, would not violate the CRPD principle of non-discrimination on basis of disability because it works to individualize instruction rather than categorically deny a right.

<sup>187</sup> Reeber, *supra* note 4, at 130.

<sup>188</sup> *Id.* at 117.

<sup>189</sup> *Id.* at 130.

term, involve increasing the number of dual-immersion programs in general education to boost the number of bilingual people in the workforce.

Short-term measures could involve hiring paraprofessionals fluent in the child's native language to accompany and assist children at school, such that multiple minority languages could be accommodated in a single classroom without requiring a teacher fluent in all of the languages. If, in the short term, schools are unable to find therapists, speech-language pathologists, and psychologists who are bilingual or multilingual in the child's native language, they should find interpreters, translators, or paraprofessionals to assist with this element of special education as well.

Other problems may arise for linguistic minorities with disabilities who are mainstreamed in general education classrooms, where they receive support but otherwise attend the same classes as children without disabilities. This Comment does not consider whether children in general have a right to native language instruction. It is possible that an integrated classroom may have a linguistic minority student with disabilities entitled to native language instruction in some form, and a linguistic minority student without disabilities who does not have that same right. Administering native language support without frustrating the goals of integration for linguistic minorities with disabilities in mainstreamed classrooms may be particularly challenging. Nevertheless, the possibility of a legal right being vindicated in an international court—even if states cannot, at the time of judgment, immediately correct violations of linguistic minorities with disabilities' right to native language instruction—could help raise awareness and push states further forwards in developing more linguistically equitable special education.

## V. CONCLUSION

Linguistic minorities with disabilities currently face two major challenges: the impairment caused by the interaction of their disability and various barriers in society and the costs of compelled assimilation into educational institutions dominated by the majority language. Although linguistic minorities are guaranteed a negative right to use their native language, states have discretion to balance interests like national unity against the interests of linguistic minorities when it comes to positive rights, where the language right is tied to another right. This finding suggested that an analysis of linguistic minorities with disabilities' right to native language instruction required looking closely at the education interests involved. By using the CRPD as a framework for discussing the education rights of linguistic minorities with disabilities, the state's obligation to provide reasonable accommodation maximizing academic and social development in consideration of the goal of full inclusion created a right to native language instruction for linguistic minorities with disabilities. Balancing could depend on how linguistic needs interact with the disability—for instance, language needs may more severely

impact linguistic minorities with communication or learning disabilities. Finally, this Comment made a number of brief suggestions for policies states could implement to ensure such a right and flagged some of the challenges involved. Future research could include fleshing out the policy and legal boundaries of each of these suggestions, analyzing how certain disabilities may trigger specific implementations of the right, and what steps the international community could take in combating multiple discrimination.