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Christopher A. Whytock

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Sovereignty

David Luban

Statelessness as Rhetoric: The Case for Revisioning Statelessness in
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Blood and Treasure: How Should Courts Address the Legacy of
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Katie Sinclair

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TRANSNATIONAL ACCESS TO JUSTICE

Christopher A. Whytock*

The study of access to justice has long had a strong domestic focus. This Article draws attention to a different aspect of access to justice, one that has, so far, received comparatively little attention: transnational access to justice. This Article presents a typology of transnational access-to-justice problems, explains why those problems are distinctive and important to understand and address, and proposes an agenda for further transnational access-to-justice research. Part I defines the concept of transnational access to justice. Part II develops a typology of transnational access-to-justice problems, including different types of transnational access-to-justice gaps and conflicts. It shows that although some transnational access-to-justice problems are similar to those that arise in domestic disputes, they tend to be exacerbated by the transnational context. Other transnational access-to-justice problems are distinctive because they result from the decentralized structure of the global legal system and generally do not arise in domestic disputes. Part II also shows that transnational access to justice is affected by international institutions in ways that domestic access to justice ordinarily is not. Part III argues that another reason to focus on access to justice from a transnational, as well as a domestic perspective, is that access to justice is a global governance problem, not only a domestic governance problem. By incorporating the perspective of parties in transnational disputes, and by situating access to justice in the context of the global legal system and global governance, this Article aims to contribute to a more complete understanding of the range of access-to-justice problems that exist in the world and how those problems might be mitigated.

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INTRODUCTION

The study of access to justice has long had a domestic focus. International organizations (both governmental and non-governmental) promote access to justice in States¹ around the world.² In addition, there are numerous in-depth academic studies considering access to justice in different States' domestic legal systems,³ as well as important cross-national comparative research on access to justice.⁴ There also is work in related fields, including human rights and private

1. In international law, "State" is a term of art that is generally used instead of "nation" or "country." Specifically, "a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987). In this Article, the term "State" has its international legal meaning, and does not refer to an individual state of the United States.

2. See, e.g., Julinda Beqiraj & Lawrence McNamara, *International Access to Justice: Barriers and Solutions* (Bingham Centre for the Rule of Law Report), INT'L BAR ASS'N (Oct. 2014), https://www.biicl.org/documents/485_iba_report_060215.pdf?showdocument=1.

3. See, e.g., SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT (2015) (United States); Sherie Gertler, *Legal Aid and International Obligation: Ensuring Access to Justice in the Liberian Context*, 45 COLUM. HUM. RTS. L. REV. 955 (2014) (Liberia); Meena Jagannath, Nicole Phillips & Jeena Shah, *A Rights-Based Approach to Lawyering: Legal Empowerment As an Alternative to Legal Aid in Post-Disaster Haiti*, 10 NW. U. J. INT'L HUM. RTS. 7 (2011) (Haiti). For an overview of other national studies, see Roderick A. MacDonald, *Access to Civil Justice*, in THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 492, 498–501 (Peter Cane & Herbert M. Kritzer eds., 2010).

4. See, e.g., ACCESS TO JUSTICE AND LEGAL AID: COMPARATIVE PERSPECTIVES ON UNMET LEGAL NEED (Asher Flynn & Jacqueline Hodgson eds., 2017). The seminal example is the monumental multi-volume comparative access-to-justice series edited by Mauro Cappelletti and Bryant Garth. See, e.g., Mauro Cappelletti & Bryant Garth, *Access to Justice: The Worldwide Movement to Make Rights Effective—A General Report*, in 1 ACCESS TO JUSTICE: A WORLD SURVEY (Mauro Cappelletti & Bryant Garth eds., 1978).

international law, that has important implications for access to justice beyond purely domestic contexts.⁵

Nevertheless, work on access to justice has been predominantly domestic in three ways: First, it has focused on access-to-justice problems from the perspective of persons in domestic disputes. Second, it has emphasized access to justice in particular domestic legal systems.⁶ Third, it has understood access to justice as a problem of domestic governance.⁷

This Article looks beyond domestic access to justice. Specifically, it draws attention to an aspect of access to justice that so far has largely escaped systematic analysis: *transnational access to justice*—that is, access to justice for persons in transnational disputes.⁸ As this Article argues, transnational access-to-justice problems are important and distinctive. To understand the full range of access-to-justice problems that exist in the world, access to justice studies must include the perspective of parties in transnational disputes, understand these problems in the context of the global legal system, and treat them as problems of global governance, not only domestic governance.⁹

5. See, e.g., JAMES J. FAWCETT, MÁIRE NÍ SHÚILLEABHÁIN & SANGEETA SHAH, *HUMAN RIGHTS AND PRIVATE INTERNATIONAL LAW* (2016) (discussing access to justice in context of European private international law); DINAH SHELTON, *REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW* (3rd ed. 2015) (discussing the right to a remedy for human rights violations); AM. ASS'N OF PRIV. INT'L L., *Principles on Transnational Access to Justice* (2016), <http://www.asadip.org/v2/wp-content/uploads/2018/08/ASADIP-TRANSJUS-EN-FINAL18.pdf> (last visited Aug. 2, 2019) (proposing inter-American principles of civil procedure aimed at ensuring transnational access to justice).

6. See, e.g., works cited *supra* in notes 2 and 3.

7. See, e.g., Michael M. Karayanni, *The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 210, 218 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) (arguing that "[t]he most fundamental value...is achieving access to justice as a basic tool in a participatory democracy" and that "[t]o have access to justice means to belong to the realm of societal decision; to be excluded from one is to be denied the other"). See also UNITED NATIONS DEV. PROGRAMME, *ACCESS TO JUSTICE* 3 (Sept. 3, 2004), http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf ("There are strong links between establishing democratic governance, reducing poverty and securing access to justice.").

8. See Jacques Ziller, *Administering Global Governance: The Issue of Access to Justice, in THE WORLD WE COULD WIN: ADMINISTERING GLOBAL GOVERNANCE* 38, 42–43 (Geraldine Fraser-Moleketi ed., 2005) ("L'étude de l'accès à la justice dans des cadres régionaux et mondiaux reste à mener à bien."). There have, however, been several prior efforts to draw attention to transnational access to justice. See, e.g., Christopher A. Whytock & Cassandra Burke Robertson, *Forum Non Conveniens and the Enforcement of Foreign Judgments*, 111 COLUM. L. REV. 1444 (2011); Antoni Pigrau & Antonio Cardesa-Salzmán, *Seeking Justice in a Multipolar World: Reflections on a Global Standard of Access to Justice for Transnational Litigation*, Presented at Research Forum of the Am. Soc'y of Int'l L. (Oct. 21, 2012); AM. ASS'N OF PRIV. INT'L L., *supra* note 5 at preface and art. 4.9.

9. See Javier L. Ochoa Munoz, *Transnational Access to Justice and Global Governance (Introductory Comments to the ASADIP Principles on Transnational Access To Justice)*, 20 REVISTA DE DIREITO BRASILEIRA 336 (2018) (abstract) ("Access to justice today is one of the most important human rights, which is not limited to the scope of local legal relations, but also involves transnational

The Article develops this argument in three parts. Part I defines the concept of transnational access to justice. Part II presents a typology of transnational access-to-justice problems—including different types of transnational access-to-justice gaps and conflicts—and points out their distinguishing features. It shows that some transnational access-to-justice problems are similar to those that arise in domestic disputes but tend to be exacerbated by the transnational context. Other transnational access-to-justice problems are distinctive because they are due to the decentralized structure of the global legal system and generally do not arise in domestic disputes. Part II also explains how transnational access to justice is affected by international institutions in ways that domestic access to justice typically is not. Part III argues that another reason to focus on access to justice from a transnational as well as domestic perspective is that access to justice is a global governance problem, not only a domestic governance problem. International law and international organizations recognize and aim to promote access to justice, and transnational access to justice can improve the quality of global governance. For all of these reasons, it is important for research on access to justice to be attentive to transnational access-to-justice problems. The Article concludes by proposing an agenda for further transnational access-to-justice work.

By incorporating the perspective of parties in transnational disputes and situating access to justice in the context of the global legal system and global governance, this Article aims to foster a more comprehensive understanding of the range of access-to-justice problems that exist in the world and how those problems might be mitigated.

I.

THE CONCEPT OF TRANSNATIONAL ACCESS TO JUSTICE

This Article defines "transnational access to justice" as access to justice for persons in transnational disputes.¹⁰ Transnational disputes are disputes that have connections—personal or territorial—to more than one State.¹¹ A personal connection is an affiliation between a State and a person involved in, or affected by, a dispute.¹² Examples of personal connections include nationality, citizenship, habitual residence, domicile, statutory seat, or principal place of business. A

legal relations.")
 (https://go.gale.com/ps/anonymous?id=GALE%7CA598536992&sid=googleScholar&v=2.1&it=r&linkaccess=abs&iissn=2237583X&p=AONE&sw=w).

10. Cf. AM. ASS'N OF PRIV. INT'L L. *supra* note 5, at preface and art. 4.9 (referring in preface to "transnational private litigation," including "judicial proceedings involving foreign elements").

11. See Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) [hereinafter Whytock, *The Evolving Forum*] ("By definition, transnational disputes have connections to more than one country. These connections may be territorial when the activity or its effects touch the territory of more than one country; or they may be based on legal relationships between a country and the actors engaged in or affected by that activity, such as citizenship.").

12. *Id.*

territorial connection is a connection between a dispute and the territory of a State.¹³ For example, a territorial connection exists with the State where an event giving rise to the dispute occurred; where a person or thing that is a subject of, or affected by, the dispute is located; or where the court adjudicating the dispute is located.¹⁴ From the perspective of the forum State—the State where a dispute is being resolved—the dispute is transnational if it has a personal or territorial connection to at least one foreign State.

There is no universally agreed upon definition of access to justice,¹⁵ and this Article does not attempt to conclusively settle that definition. Most definitions of access to justice, however, incorporate one or more of the following dimensions:

Formal Legal Dimension: Access to justice requires that persons have a right of access to a court where they can bring legal claims.¹⁶ Some commentators argue that other dispute resolution institutions may be a satisfactory, or even preferable, alternative to court access, or at least a beneficial complement to court access.¹⁷ Others argue that in some contexts, such as mandatory arbitration of consumer disputes, alternative dispute resolution methods can create barriers to access to justice.¹⁸ This Article focuses on courts, without taking a position on

13. *Id.*

14. These connections are similar to the territorial and personal connections that are commonly relevant in private international law (or "conflict of laws") analysis. See PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES & CHRISTOPHER A. WHYTOCK, CONFLICT OF LAWS § 1.1, at 1, § 17.85, at 994 (6th ed. 2018).

15. PIERRE SCHMITT, ACCESS TO JUSTICE AND INTERNATIONAL ORGANIZATIONS: THE CASE OF INDIVIDUAL VICTIMS OF HUMAN RIGHTS VIOLATIONS 91 (Edward Elgar ed., 2017) ("[T]here is no standardized concept of the access to justice and the concept of 'access to justice' tolerates a broad range of definitions.").

16. See Cappelletti & Garth, *supra* note 4, at 6; Francesco Francioni, *The Rights of Access to Justice Under Customary International Law*, in ACCESS TO JUSTICE AS A HUMAN RIGHT 1 (Francesco Francioni ed., 2007) ("In a general manner [access to justice] is employed to signify the possibility for the individual to bring a claim before a court and have a court adjudicate it.").

17. See, e.g., DEBORAH L. RHODE, ACCESS TO JUSTICE 21 (2004) (including alternative dispute resolution as having potential to improve access to justice); Beqiraj & McNamara, *supra* note 2, at 8 ("[access to justice] embraces access to dispute resolution mechanisms as part of justice institutions that are both formal (i.e., institutions established by the state) and informal (i.e., indigenous courts, councils of elders and similar traditional or religious authorities, mediation and arbitration."); Peter Chapman & Alejandro Ponce, *How Do We Measure Access to Justice? A Global Survey of Legal Needs Shows the Way*, OPEN SOC'Y JUST. INITIATIVE (Mar. 16, 2018), <https://www.opensocietyfoundations.org/voices/how-do-we-measure-access-justice-global-survey-legal-needs-shows-way> (last visited Aug. 2, 2019) ("We must challenge the misconception that courts and lawyers are the solution to access-to-justice issues. We should support flexible systems of legal assistance that meet people where they are, to help secure outcomes that are more just. Nonlawyers and community-based paralegals can play a critical role.").

18. See generally Anna Nylund, *Access to Justice: Is ADR a Help or Hindrance?*, in THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES 325–44 (Laura Ervo & Anna Nylund eds., 2014); STASZAK, *supra* note 3, at chap. 3 (discussing arbitration and access to justice); Carrie Menkel-Meadow, *Practicing "In the Interests of Justice" in the Twenty-First Century: Pursuing Peace As Justice*, 70 FORDHAM L. REV. 1761, 1770

the ways that other types of dispute resolution institutions may contribute to access to justice.

Institutional Dimension: Access to justice does not merely depend on a right of court access, but also on a right of access to a court that is independent, impartial, and established by law.¹⁹

Procedural Dimension: Access to justice requires procedural fairness. Without procedural fairness, courts cannot provide effective access to justice.²⁰ Procedural fairness is commonly said to require conditions such as adequate notice, a reasonable opportunity to be heard, procedural equality, adversarial proceedings, a public hearing, a reasoned decision, a judgment in a reasonable time, and enforcement of judgments.²¹

Practical Dimension: Beyond the formal legal, institutional, and procedural dimensions, there are practical requirements that must be satisfied to make access to justice effective.²² These practical requirements include: awareness of one's legal rights and defenses (including the right of access to justice itself), affordability of access, and availability of legal assistance.²³ Some commentators

(2002) (noting "distortions of the 'ADR' process that inhibit . . . access to justice and fairness," such as mandatory arbitration clauses in employment, health care and consumer contracts, but proposing nuanced understanding based on "the reasons for when and how justice is delivered in different settings (and sometimes differentially for different people).").

19. See Francioni, *supra* note 16, at 3 ("[T]he term [access to justice] would normally refer to the right to seek a remedy before a court of law or a tribunal which is constituted by law and which can guarantee independence and impartiality in the application of the law."); SCHMITT, *supra* note 15, at 107–13 (identifying independence, impartiality and establishment by law as among the institutional requirements of the right of access to justice). Cf. CHARLES T. KOTUBY JR. & LUKE A. SOBOTA, GENERAL PRINCIPLES OF LAW AND INTERNATIONAL DUE PROCESS 157-97 (2017) (identifying judicial impartiality and judicial independence as principles of international due process).

20. See FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 63 ("[T]he right of access to a court would be rendered ineffective if the process by which a dispute was determined was deficient.").

21. See *id.* at 67–72 (identifying equality of arms, adversarial proceedings, a reasoned decision, a public hearing, judgment in a reasonable time, and execution of judgments as among the requirements for access to justice under Article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights); SCHMITT, *supra* note 15, at 114–15 (identifying a public hearing, equality of arms, a judgment in a reasonable time, and enforcement of judicial decisions as among the procedural requirements for access to justice). Cf. KOTUBY & SOBOTA, *supra* note 19. Regarding procedural equality ("equality of arms"), see *De Haes and Gijssels v. Belgium*, Eur. Ct. H.R. (ser. A.) at 53 (1998) ("The Court reiterates that the principle of equality of arms—a component of the broader concept of a fair trial—requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.").

22. See Cappelletti & Garth, *supra* note 4, at 7–9. See also FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 62 (noting the following about the right of access to justice under Article 6 of the European Convention on Human Rights, as interpreted by the European Court of Human Rights: "As regards access to a court in fact, there should be no practical obstacles to have a dispute determined. This has had some important consequences for the provision of legal assistance and legal aid.").

23. See Cappelletti & Garth, *supra* note 4, at 12 ("[I]t is certainly clear that high costs, to the extent that one or both of the parties must bear them, constitute a major access-to-justice barrier."); Tom Cornford, *The Meaning of Access to Justice*, in ACCESS TO JUSTICE 27, 39 (Ellie Palmer, Tom

have added that practical inequalities between the parties—such as differences in resources and legal experience—can be a barrier to effective access to justice, even if other practical requirements are met.²⁴

Substantive Legal Dimension: Finally, some scholars adopt a more expansive concept of access to justice. They argue that access to justice depends on substantive law that is capable of producing just outcomes.²⁵ On the one hand, such a conception runs the risk of losing analytical distinctiveness by equating itself with more general concepts of justice.²⁶ Moreover, the inclusion of a substantive legal dimension goes beyond the definition of access to justice in several international human rights instruments.²⁷ On the other hand, it is difficult to separate access to justice from the possibility of a just outcome. Outcomes not only depend on formal, institutional, procedural, and practical factors, but also on substantive law.²⁸ Without the possibility of a just outcome, access to justice

Comford, Audrey Guinchard, & Yseult Marique eds., 2016) ("Properly understood, access to justice entails a right of equal access to legal assistance for every citizen."); RHODE, *supra* note 17, at 20 ("[T]hose who need legal services, but cannot realistically afford them, should have access to competent assistance."); Beqiraj & McNamara, *supra* note 2, at 8 (access to justice requires "awareness and understanding" of access-to-justice rights).

24. See Cappelletti & Garth, *supra* note 4, at 10 ("Optimal effectiveness...could be expressed as complete 'equality of arms'—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopian...the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost."); RHODE, *supra* note 17, at 5–6 (noting that "[i]n most discussions, 'equal justice' implies equal access to the justice system" but reality is that "[t]he role that money plays in legal, legislative, and judicial selection processes often skews the law in predictable directions"); Deborah L. Rhode, *Law, Lawyers, and the Pursuit of Justice*, 70 *FORDHAM L. REV.* 1543, 1549 (2002) ("access to an adversarial process is not necessarily access to justice, particularly in a system where money often matters more than the merits"). See generally Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *L. & SOC'Y REV.* 95 (1974).

25. See David Goddard, *The Judgments Convention—The Current State of Play*, 29 *DUKE J. COMP. & INT'L L.* 473, 476 (2019) ("Access to justice means access to practical justice; to just outcomes that are given effect."); Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 *LOY. L.A. L. REV.* 869, 872–73 (2009) (emphasizing that "the substance of legal rights and remedies" is an important aspect of access to justice).

26. I thank Maya Steinitz for emphasizing this point.

27. See, e.g., FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 67 (the right to a fair hearing entailed by the concept of access to justice recognized by Article 6 of the European Convention on Human Rights "is to be assessed in terms of process and not outcome; that is, the right to a fair trial does not protect substantive fairness"); SHELTON, *supra* note 5, § 2.2 (distinguishing "access to justice" from "substantive redress").

28. See Stefan Wrška, Steven Van Uytsel & Mathias M. Siems, *Access to Justice and Collective Actions*, in *COLLECTIVE ACTION: ENHANCING ACCESS TO JUSTICE AND RECONCILING MULTILAYER INTERESTS?* 1, 1–2 (Stefan Wrška, Steven Van Uytsel, & Mathias Siems eds., 2012) ("The term 'access to justice' itself consists of two parts, 'access' and 'justice,' which – when read together – can be seen as a kind of abbreviation. 'Access' often comes together with 'equal' or 'effective'. It embodies the older, more technical and procedural side of the overall concept: It is the question of enabling those in need to pursue their legal interests. 'Justice' on the other hand, has a more result-oriented meaning

would be illusory; it would be unable to actually provide justice even if formal, institutional, procedural, and practical requirements were satisfied. Thus, as one commentator puts it, "every discussion [of access to justice] assumes a goal called 'justice.'"²⁹

Although this Article does not attempt to settle the definition of access to justice, it posits that however defined, its dimensions are essentially the same for domestic access to justice and transnational access to justice. In other words, insofar as access to justice for parties in domestic disputes depends on the satisfaction of formal legal, institutional, procedural, practical, and substantive law requirements, access to justice for parties in transnational disputes also depends on satisfaction of these requirements.

However, as the rest of this Article argues, even if the domestic and transnational contexts do not imply different definitions of access to justice, they do imply different potential barriers to access to justice and a variety of distinctive transnational access-to-justice problems that require specially tailored solutions.

II.

A TYPOLOGY OF TRANSNATIONAL ACCESS-TO-JUSTICE PROBLEMS

Transnational disputes raise many of the same access-to-justice challenges raised by domestic disputes; but transnational access-to-justice problems differ from purely domestic access-to-justice problems in at least three ways. First, the transnational character of a dispute can exacerbate certain access-to-justice problems that also exist in domestic disputes. Second, there are some distinctive barriers to access to justice that arise in transnational disputes because of the decentralized structure of the global legal system and the heterogeneity of national legal systems. Third, transnational disputes may involve international institutions, either as parties or as potential providers of access to justice, in ways that are unlikely in most purely domestic disputes.

A. *Exacerbated Access-to-Justice Problems*

First, domestic disputes and transnational disputes share some access-to-justice problems. However, the transnational context tends to exacerbate them.

which should be reached through equal or effective access: The outcome of the procedure should be 'just' or at least be made on fair (i.e. unbiased grounds)."). This link between access to justice and the possibility of a just outcome is implicit in the US forum non conveniens doctrine. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981) ("At the outset of any forum non conveniens inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied. Thus, for example, dismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute.").

29. Lawrence M. Friedman, *Access to Justice: Social and Historical Context*, in 2 ACCESS TO JUSTICE: PROMISING INSTITUTIONS 5, 5 (Mauro Cappelletti & John Weisner eds, 1978).

Lack of Impartiality. Access to justice requires access to an impartial court.³⁰ Even in the resolution of purely domestic disputes, impartiality is sometimes lacking, thus posing a barrier to access to justice. But this barrier will often be greater in transnational disputes. In addition to biases that exist in purely domestic disputes, transnational disputes raise the possibility of biases—whether explicit or implicit—in favor of domestic parties or against foreign parties.³¹ Insofar as those biases exist, they undermine impartiality, and thus access to justice, in transnational disputes.

Lack of Awareness and Understanding of Rights. To be effective, access to justice requires that persons are aware of, and understand, their legal rights.³² Lack of awareness and understanding are barriers to access to justice in domestic disputes, but are likely to be an even greater problem in many transnational disputes.³³ First, the multistate connections that define transnational disputes may create uncertainty about which State's law applies. Ordinarily, the degree of uncertainty is lower in purely domestic disputes.³⁴ Second, even if a party knows which State's law applies, if it is not the law of the party's own State (foreign law, from that party's perspective), the party will likely have less understanding of that law. Third, some transnational disputes will raise issues under international law or be resolved in international courts. Typically, disputants will have less awareness and understanding of international law and the procedures of international courts than that of their own law and courts.

30. As noted above, access to non-court dispute resolution processes may also satisfy this requirement under some circumstances. *See supra* Part I.

31. *See* Utpal Bhattacharya, Neal Galpin & Bruce Haslem, *The Home Court Advantage in International Corporate Litigation*, 50 J. L. & ECON. 625, 629 (2007) (arguing that American courts are biased against foreign corporations in international business disputes); Kimberly A. Moore, *Xenophobia in American Courts*, 97 NW. U. L. REV. 1497, 1520 (2003) (arguing that American courts are biased against foreign litigants in patent disputes); Whytock, *The Evolving Forum*, *supra* note 11 (empirical analysis finding anti-foreigner bias in forum non conveniens decisions). *But see* Kevin M. Clermont & Theodore Eisenberg, *Xenophilia or Xenophobia in U.S. Courts? Before and After 9/11*, 4 J. EMPIRICAL LEGAL STUD. 441, 464 (2007) (finding that foreigners have higher win-rates than domestic parties in US federal courts, and concluding that "the data offer no support for the existence of xenophobic bias in U.S. courts"); Christopher A. Whytock, *Myth of Mess? International Choice of Law in Action*, 84 N.Y.U. L. REV. 719 (2009) (empirical analysis of international choice-of-law decisions by US district courts in tort cases challenging claim that there is anti-foreign party bias in those decisions).

32. *See* Beqiraj & McNamara, *supra* note 2, at 8 (access to justice requires "awareness and understanding" of access-to-justice rights).

33. *See, e.g.,* Vera Shikhelman, *Access to Justice in the United Nations Human Rights Committee*, 39 MICH. J. INT'L L. 453, 460 (2018) ("One of the major obstacles to accessing international justice is the lack of awareness of the possibility of filing cases and the rights protected by human rights treaties.").

34. In federal systems, such as the United States, questions about which governmental sub-unit's (e.g., which US state's) law applies can create such uncertainties even in purely domestic disputes.

Limited Access to Legal Representation. A widely recognized domestic access-to-justice problem is limited access to legal representation.³⁵ This problem can be magnified in transnational disputes. It may be especially difficult for a foreign party to identify a lawyer who is appropriately licensed and qualified to represent the party in the forum State, due to possible language differences, unfamiliarity with the forum State's legal profession, and lack of connections to lawyer referral networks in the forum State. In some cases, a foreign party might be able to find a lawyer in the foreign party's home State with the knowledge and connections needed to help the party identify a forum State lawyer—but the increased costs of consulting both home State and forum State lawyers may not be affordable to some parties.

Lack of Affordability. Lack of affordability is another access-to-justice problem that exists in many domestic disputes, but can be exacerbated in transnational disputes.³⁶ Beyond the costs of consulting with home State counsel to identify appropriate forum State counsel, coordination between home State and forum State counsel may be necessary, further increasing costs. In some cases, additional costs—such as translation and travel costs—may make access to justice even less affordable. These increased costs mean that regardless of their legal merits, some smaller claims that might be economically rational in a purely domestic context might be economically irrational in a transnational context.³⁷ Domestic legal measures that can make legal representation more affordable—such as contingent fee arrangements and procedures for claim aggregation or collective redress—do not exist in all States, and States that provide legal aid to their citizens do not necessarily provide it to foreign parties.³⁸

Procedural Barriers. Procedural rules can pose access-to-justice barriers in purely domestic disputes. For example, restrictive rules of standing, pleading, and jurisdiction, and expansive rules of governmental immunity can "close the

35. Cornford, *supra* note 23, at 39 ("Properly understood, access to justice entails a right of equal access to legal assistance for every citizen."); RHODE, *supra* note 17, at 20 ("[T]hose who need legal services, but cannot realistically afford them, should have access to competent assistance.").

36. See Cappelletti & Garth, *supra* note 4, at 12 ("[I]t is certainly clear that high costs, to the extent that one or both of the parties must bear them, constitute a major access-to-justice barrier.").

37. See *id.*, at 13 ("Claims involving relatively small sums of money suffer most from the barrier of cost. If the dispute is to be resolved by formal court processes, the costs may exceed the amount in controversy or, if not, may still eat away so much of the claim as to make litigation futile."). This follows from the basic economic model of litigation, $EV = (p \cdot A) - C$, where EV is the expected value of a claim, p is the probability of winning, A is the amount of the award, and C is the costs of litigation. According to that model, a rational litigant will not file a claim unless $EV > 0$ (that is, if $p \cdot A > C$). See Whytock, *The Evolving Forum*, *supra* note 11, at 487 n.25.

38. However, the Hague Convention on International Access to Justice aims to avoid this. See Hague Convention on International Access to Justice art. 1, Oct. 25, 1980, 19 I.L.M. 1505 ("Nationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State.").

courthouse door" in many disputes.³⁹ In transnational disputes, there are additional procedural doctrines that can limit access to justice.⁴⁰ These rules include foreign sovereign immunity and *forum non conveniens*.⁴¹ Procedural rules also limit access to regional and international courts. Typically, the jurisdiction of these courts is strictly limited, and even disputes over which they might have jurisdiction may be subject to admissibility requirements.⁴²

Inequalities Between Parties. The "haves" tend to come out ahead when it comes to justice for reasons unrelated to the legal strength of the parties' claims and defenses.⁴³ This tendency undermines equal access to justice in purely domestic disputes.⁴⁴ Because of the complexities and costs described above, this tendency is likely to be even more salient in many transnational disputes, especially those in which one party is a particularly experienced and resource-rich litigant and the other is not.

B. Distinctive Access-to-Justice Problems

In addition to access-to-justice problems that exist in domestic contexts and tend to be exacerbated in transnational disputes, some transnational access-to-justice problems are unlikely to arise in purely domestic disputes. These

39. See generally ERWIN CHEREMINSKY, *CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE* (2017); STASZAK, *supra* note 4; Shauhin Talesh, *The Process is the Problem*, in *THE LEGAL PROCESS AND THE PROMISE OF JUSTICE: STUDIES INSPIRED BY THE WORK OF MALCOLM FEELEY 72–94* (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019).

40. See generally Pamela Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081 (2015). For an overview of these barriers in the United States and the European Union, see MAYA STEINITZ, *THE CASE FOR AN INTERNATIONAL COURT OF CIVIL JUSTICE* 83–104 (2018).

41. For empirical analyses of how these doctrines limit court access in US federal courts, see Whytock, *The Evolving Forum*, *supra* note 11 (*forum non conveniens*) and Christopher A. Whytock, *Foreign State Immunity and the Right to Court Access*, 93 B.U. L. REV. 2033 (2013) (foreign sovereign immunity) [hereinafter Whytock, *Foreign State Immunity*].

42. See Statute of the International Court of Justice art. 34–36 (governing the Court's jurisdiction). See also JAMES CRAWFORD, *BROWNIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 695–705 (9th ed. 2019) (discussing the jurisdiction of the International Court of Justice and exceptions to its jurisdiction); Mario Oetheimer & Guillem Cano Palomares, *European Court of Human Rights*, in *MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW*, para. 16–34 (2013) (discussing jurisdiction and admissibility requirements of European Court of Human Rights) (<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e791?rskey=sK3SuL&result=1&prd=OPIL#>).

43. See Galanter, *supra* note 24. See also RHODE, *supra* note 17, at 5–6 ("The role that money plays in legal, legislative, and judicial selection processes often skews the law in predictable directions.").

44. See Cappelletti & Garth, *supra* note 4, at 10 ("Optimal effectiveness...could be expressed as complete 'equality of arms'—the assurance that the ultimate result depends only on the relative legal merits of the opposing positions, unrelated to differences which are extraneous to legal strength and yet, as a practical matter, affect the assertion and vindication of legal rights. This perfect equality, of course, is utopian...the differences between parties can never be completely eradicated. The question is how far to push toward the utopian goal, and at what cost.").

distinctive problems largely arise from the decentralized nature of the global legal system.⁴⁵ In addition to international law and international courts, as well as private norms and private forms of dispute resolution, the global legal system also includes each State's domestic legal system.⁴⁶ The multistate connections that define a transnational dispute may implicate the legal systems of more than one State, and possibly international rules and institutions as well. This is not the case in most purely domestic disputes.⁴⁷ The problem is that there is no central global authority to ensure that at least one domestic legal system provides access to justice in a given transnational dispute, but that multiple systems do not do so for the dispute in ways that conflict with each other. This problem is even more complex if, in addition to domestic legal systems, international law applies or an international court has jurisdiction. The result is two general categories of access-to-justice problems: transnational access-to-justice gaps and transnational access-to-justice conflicts.

1. *Transnational Access-to-Justice Gaps*

A *transnational access-to-justice gap* arises when no legal system provides access to justice in a transnational dispute. There are three basic types of transnational access-to-justice gaps: jurisdictional gaps, applicable law gaps, and recognition and enforcement gaps.⁴⁸

A *jurisdictional gap* arises when no court is available to adjudicate a transnational dispute in a way that satisfies the requirements of access to justice.⁴⁹ This situation may occur if no State has sufficient connections to the parties or the dispute to give it authority to adjudicate under its domestic law or under international law. This may also occur even if a State has authority to adjudicate. For example, a State might not have a legal system that satisfies the institutional requirements (such as impartial and independent courts), procedural requirements (fair procedures), or practical requirements (such as affordability and access to legal representation) for access to justice.

45. See Christopher A. Whytock, *The Concept of a Global Legal System*, in *THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP'S BOLD PROPOSAL* (Peer Zumbansen ed., 2020).

46. In addition, the global legal system includes private norms and private forms of transnational dispute resolution. *Id.*

47. However, in a State organized as a federal system, access-to-justice problems analogous to those in transnational disputes may of course arise in disputes that are purely domestic within that State but have connections to more than one governmental subunit.

48. See MICHAEL BOGDAN, *CONCISE INTRODUCTION TO EU PRIVATE INTERNATIONAL LAW* 5 (2d ed. 2012) (explaining that the rules governing applicable law, jurisdiction, and recognition and enforcement of judgments are interconnected and must be coordinated "to avoid the risk of creating a legal vacuum").

49. Maya Steinitz has referred to this as the "problem of the missing forum." See STEINITZ, *supra* note 40.

Even if there is a State that both possesses authority to adjudicate and satisfies the institutional, procedural, and practical requirements for access to justice, that State may nevertheless decline to adjudicate the dispute.⁵⁰ For example, a court in a State that recognizes the doctrine of *forum non conveniens* may exercise its discretion to dismiss a transnational dispute in favor of a foreign court. It may do so even if it has the authority to adjudicate that dispute.⁵¹ However, it is often uncertain whether the foreign court will actually provide access to justice. First, it is uncertain whether the other State's court will agree to adjudicate the dispute. A court dismissing a transnational dispute on *forum non conveniens* grounds has no authority to require another State's court to adjudicate the dispute, leaving the possibility of a jurisdictional gap.⁵² Even if the foreign court agrees to adjudicate the dispute, the increased costs of litigating in the other State may lead a party to abandon its claim, even if the claim is legally strong.⁵³ Furthermore, even if the foreign court actually adjudicates the dispute, the access-to-justice gap will remain if the foreign State lacks the rule of law and impartial, independent courts. In still other cases, a State's *forum non conveniens* doctrine may allow a court to dismiss a transnational dispute in favor of a foreign court even when the same State's judgment enforcement doctrine would not allow enforcement of a judgment issued by that foreign court.⁵⁴ In all of these ways, the *forum non conveniens* doctrine can undermine transnational access to justice by creating jurisdictional gaps.

Similarly, the foreign sovereign immunity doctrine can lead to jurisdictional gaps. This doctrine may require a court in one State to dismiss a claim against a foreign State's government, even if the court would otherwise have the authority to adjudicate the dispute. Beyond that, the doctrine may also prevent other States from adjudicating the dispute, leaving only the foreign State's own courts available.⁵⁵ This situation raises the possibility of two additional problems. First,

50. Or, in cases involving multiple defendants, the State may assert jurisdiction as to one (or some) defendants and not other (or all) defendants, requiring the plaintiff to pursue access to justice simultaneously in multiple States. The increased costs of pursuing multiple rather than a single suit may in some cases pose a significant access-to-justice barrier.

51. For a comparative analysis of the *forum non conveniens* doctrine in Australia, Canada, the United Kingdom and the United States, see RONALD A. BRAND & SCOTT R. JABLONSKI, *FORUM NON CONVENIENS: HISTORY, GLOBAL PRACTICE, AND FUTURE UNDER THE HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS* (2007).

52. A dispute dismissed from a court on *forum non conveniens* grounds will only continue in a foreign court if the plaintiff refiles the suit in the foreign court and the foreign court asserts jurisdiction. See David W. Robertson, *The Federal Doctrine of Forum Non Conveniens: "An Object Lesson in Uncontrolled Discretion,"* 29 TEX. INT'L L. J. 353, 370 (1994) ("[A] court in New York cannot transfer a case to a court in India. It can only dismiss, impose conditions, and wish the plaintiffs 'Godspeed.'").

53. See David W. Robertson, *Forum Non Conveniens in America and England: "A Rather Fantastic Fiction,"* 103 L. Q. REV. 398, 418–20 (1987) (concluding only 14.5% of personal injury plaintiffs and 16.6% of commercial plaintiffs refiled cases abroad after *forum non conveniens* dismissals).

54. See generally Whytock & Burke Robertson, *supra* note 8.

55. Whytock, *Foreign State Immunity*, *supra* note 41.

the foreign State's internal rules of sovereign immunity may prevent adjudication there. Second, the foreign State may lack rule of law or impartial and independent courts. In either situation, the foreign sovereign immunity doctrine can contribute to a jurisdictional gap that prevents access to justice.⁵⁶

The interaction of corporate law and jurisdictional rules can also lead to jurisdictional gaps in transnational disputes. Many multinational corporations have a parent company in a "home" State and engage in business activities in a "host" State through subsidiaries. If those activities injure a person in the host State, that person might, on the one hand, seek a remedy in a host State court. However, access to justice might be unavailable in the host State if it lacks rule of law or impartial and independent courts. Access to justice may also be unavailable if the host State is reluctant to deter foreign investment by imposing liability or if the subsidiary has insufficient assets to satisfy a resulting judgment. On the other hand, the injured person might seek a remedy in a court of the parent company's home State. However, access to justice might not be available there either, because the subsidiary might lack sufficient contacts with the home State for a court there to have jurisdiction, the applicable rules of corporate law may preclude the liability of the parent company for the acts of its subsidiary, or the home State's courts might dismiss the suit on *forum non conveniens* grounds. This "impasse" means that persons harmed in one State by the activities of a multinational business based in another State might lack access to justice in both States.⁵⁷

An *applicable law gap* arises when a court fails to apply substantive law under which a transnational dispute is capable of being resolved justly.⁵⁸ This may occur in at least three different ways. First, in theory, there may be situations in which no State's law recognizes a claim or defense for which recognition would, in principle, be required by justice, thus making an applicable law gap inevitable.⁵⁹ Second, the forum State may have substantive law that is capable of

56. Cf. Richard Garnett, *Foreign State Immunity: A Private International Law Analysis*, in RESEARCH HANDBOOK ON JURISDICTION AND IMMUNITIES IN INTERNATIONAL LAW 297, 306–10 (Alexander Orakhelashvili ed., 2015) (positing access-to-justice concerns as one reason to abolish the principles of foreign sovereign immunity); 1 OPPENHEIM'S INTERNATIONAL LAW § 109, 342 (Robert Jennings & Arthur Watts eds., 9th ed. 1996) (foreign sovereign immunity can "den[y] . . . a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection").

57. See Daniel Augustein, *Torture as Tort? Transnational Tort Litigation for Corporate-Related Human Rights Violations and the Human Right to a Remedy*, 18 HUM. RTS. L. REV. 593, 596–97 (2018). See also Pigrau & Cardesa-Salzmán, *supra* note 8 (arguing that multinational corporations "have been quite successful in escaping the meshes of justice in this global patchwork of national judiciaries with largely territorial powers").

58. Of course, if one does not include the substantive legal requirements discussed in Part I as part of the concept of access to justice, then one might not consider an applicable law gap to be an access-to-justice problem.

59. Similarly, a court might decide not to decide the merits of a claim "due to the absence of suitable law [or] the vagueness or ambiguity of rules," which is known as a *non liquet*. See Ulrich Fastenrath & Franziska Knur, *Non Liquet*, in OXFORD BIBLIOGRAPHIES, INTERNATIONAL LAW (2016) (<https://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0130.xml>).

producing a just outcome, but the court may decline to apply that law based on domestic or international legal principles that limit the extraterritorial application of domestic law, and then dismiss the case rather than deciding it under foreign law.⁶⁰ If no other State's courts are able and willing to adjudicate the dispute, or if no other State's law is capable of producing a just outcome, this will lead to an applicable law gap.⁶¹ Third, the court may decline to apply forum law and instead apply foreign law based on choice-of-law principles, or vice versa. This choice of law leads to an applicable law gap if the chosen law is incapable of producing a just outcome.⁶² In these situations, applicable law gaps may arise that undermine transnational access to justice.⁶³

As noted above, whether a given State's law is capable of producing a just outcome will be contestable in most cases because understandings of justice vary across States and across cultures. Yet the possibility of a just outcome is unavoidably part of the concept of access to justice. For this reason, the problem of applicable law gaps merits attention even if they are difficult to identify with certainty. In some cases, however—such as when a law is inconsistent with widely recognized human rights—there may be a high degree of agreement that a particular State's law cannot produce a just outcome.

A *recognition and enforcement gap* arises when an impartial and independent court in one State enters a judgment resolving a transnational dispute in a manner that fulfills the requirements of access to justice, but other States'

60. See, e.g., *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (dismissing securities fraud claim brought by foreign plaintiffs against foreign and US defendants for their misconduct as to securities traded on foreign stock exchanges, because the US statute upon which the claim was based did not apply extraterritorially).

61. Of course, in some such cases there may be an alternative forum willing to adjudicate the dispute and apply law that is capable of producing a just outcome. In the *Morrison* case, some plaintiffs indeed pursued their claims in Australian courts, and their claims were ultimately settled. See Grant Swanson, *A Comparative Law Analysis of Private Securities Litigation in the Wake of Morrison v. National Australia Bank*, 87 CHI-KENT L. REV. 965, 989 (2012) ("At the time of writing this comment, the *Morrison* plaintiffs have filed a complaint against NAB in the Supreme Court of Victoria regarding the HomeSide allegations with a commercial litigation funder financing the costs."); *Pathway Invs. Pty Ltd. v. Nat'l Austl. Bank Ltd.*, [2012] V.S.C. 625 (Austl.); *NAB Class Action Update*, MAURICE BLACKBURN (Feb. 2014), <https://www.mauriceblackburn.com.au/class-actions/past-class-actions/nab-shareholder-class-action/> (last visited Aug. 4, 2019).

62. See Axel Halfmeier, *Is There a World Courthouse on Foley Square? On Civil Procedure, Private International Law and Human Rights in the Age of Globalisation*, in 3 GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: CIVIL SOCIETY 81, 93 (Peter Odell & Chris Willett eds., 2008) (explaining how in human rights cases, the application of the traditional place-of-the-wrong rule can result in the application of the law of the same State that violated the claimant's human rights, in accordance with how that State would interpret that law, even if that State is a dictatorship, such that "one would return control over the plaintiff's claim to the legal system in which the abuses took place").

63. See, e.g., *Al Shimari v. CACI Intern., Inc.*, 951 F. Supp. 2d 857 (E.D. Va. 2013) (Iraqi citizens filed tort claims against a US private military contractor for abuse and torture while they were detained in Abu Ghraib, Iraq; court determined that Iraqi law, which had been promulgated by the US-led Coalition Provisional Authority, applied, and because that law granted immunity to military contractors, the suit was dismissed), *vacated on other grounds*.

courts decline to recognize or enforce the judgment.⁶⁴ For example, a court in one State may resolve a transnational dispute by ordering the non-prevailing party (the "judgment debtor") to pay a sum of money to the prevailing party (the "judgment creditor") as a remedy, but the judgment debtor might refuse to pay. In purely domestic disputes, the judgment debtor will typically have assets in the forum State, and the court can order the attachment and sale of those assets to satisfy the judgment. In transnational disputes, however, it is not unusual for the judgment debtor to lack assets in the forum State. In this situation, the judgment creditor will seek a State where the judgment debtor has assets and ask a court there to enforce the judgment against those assets. If the court refuses to enforce the judgment, the judgment creditor will be left without a remedy, thus preventing complete access to justice.⁶⁵

Three final points on transnational access-to-justice gaps deserve attention. First, the discussion above has pointed to various legal doctrines—including conflict-of-laws doctrines, the *forum non conveniens* doctrine, and the foreign sovereign immunity doctrine—as potential contributors to transnational access-to-justice gaps. But this does not mean that those doctrines are categorically inappropriate. To the contrary, they generally are based on legitimate policies. The point is rather that in spite of any virtues these doctrines may have, they can

64. The link between access to justice and the recognition and enforcement of foreign judgments is well-established under European human rights law and European Union Law. See FAWCETT, SHÚILLEABHÁIN & SHAW, *supra* note 5, at 78–79 (discussing the role of recognition and enforcement of foreign judgments under Article 6 of the European Convention on Human rights); Consolidated Version of the Treaty on the Functioning of the European Union, art. 67(4), Dec. 17, 2007, 2010 O.J. (C 306) 1 ("The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters."). Access to justice is also a leading rationale for the Draft Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, under consideration by the Hague Conference on Private International Law. See Francisco Garcimartin & Genevieve Saumier, *Judgments Convention: Revised Draft Explanatory Report* 5 (Dec. 2018), <https://assets.hcch.net/docs/7d2ae3f7-e8c6-4ef3-807c-15f112aa483d.pdf> (last visited Aug. 4, 2019) ("This draft Convention seeks to promote access to justice globally through enhanced judicial cooperation.... First, and most importantly, the draft Convention will ensure that judgments to which it applies will be recognised and enforced in all Contracting States, thereby enhancing the practical effectiveness of those judgments and ensuring that a successful party can obtain meaningful relief. Access to justice is frustrated if a wronged party obtains a judgment which cannot be enforced in practice because the other party and/or the other party's assets are in another State where the judgment is not readily enforceable."). See also ANTÔNIO AUGUSTO CANÇADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* 71 (2011) ("[T]he right of access to justice comprises...the right to protection by means of faithful compliance with judicial decisions."); Goddard, *supra* note 25 ("Access to justice means access to practical justice; to just outcomes that are given effect. In today's increasingly globalized world, it is frequently necessary for that practical effect to span borders, if justice is to be effective. So the goal of access to justice [entails] access to just outcomes that are practically effective in every State where they need to be implemented...."); Christopher A. Whytock, *Enforcement of Foreign Judgments: Governance, Rights, and the Market for Dispute Resolution Services*, in *THE TRANSFORMATION OF ENFORCEMENT: EUROPEAN ECONOMIC LAW IN GLOBAL PERSPECTIVE* 47, 52 (Hans W. Micklitz & Andrea Wechsler eds., 2016) (explaining the link between foreign judgment enforcement and access to justice).

65. See Whytock & Burke Robertson, *supra* note 8, at 1463–64.

impose transnational access-to-justice costs, and those costs must be considered in any analysis of those doctrines.

Second, while this discussion has focused primarily on domestic courts and domestic law, the global legal system also includes international courts and international law. As discussed below, a regional or international court may occasionally be able to fill jurisdictional gaps by adjudicating transnational disputes—but the jurisdiction of these courts is generally very limited.⁶⁶ Moreover, in some cases international law may be able to fill applicable law gaps by supplying rules of decision that can produce just outcomes when domestic courts adjudicate transnational disputes—but there are domestic law limits on the authority of domestic courts to apply international law, and those limits are quite strict in some States.⁶⁷ Thus, international courts and international law presently do not provide complete solutions to the transnational access-to-justice gaps discussed above.

Third, all three types of transnational access-to-justice gaps—jurisdictional gaps, applicable law gaps, and recognition and enforcement gaps—are due to the highly decentralized nature of the global legal system.⁶⁸ In theory, these gaps could be avoided if there were a centralized authority that could effectively coordinate the world's domestic legal systems to ensure an available court, applicable law, and recognition and enforcement for every transnational dispute. However, it is difficult to imagine such a solution in the foreseeable future.

2. *Transnational Access-to-Justice Conflicts*

A *transnational access-to-justice conflict* may arise when two or more States attempt to provide access to justice for the same transnational dispute. A paradox underlies transnational access-to-justice conflicts: *Individually* each State may satisfy the requirements of access to justice, but *collectively* they may create

66. See generally KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014).

67. See generally JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 45-100 (9th ed. 2019).

68. Currently, there is no rule of public international law requiring a State to exercise jurisdiction that it possesses, even when exercising jurisdiction would be necessary to avoid a transnational access-to-justice gap. See Alex Mills, *Connecting Public and Private International Law*, in *LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW* 13, 23 (Verónica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French eds., 2018) ("[W]hile public international law establishes that a state may not impose its regulation in the absence of a recognised justification, it does not (at least generally) require that a state regulation be exercised where such a recognised justification exists. Principles of access to justice, developing particularly in the context of human rights law, may in the future have an increased role in requiring states to exercise and perhaps even expand their grounds of civil jurisdiction, but at present they have had a limited influence, except in relation to the protection of weaker parties (like consumers or employees) and less frequently in the adoption of forum of necessity rules of jurisdiction.").

access-to-justice problems.⁶⁹ There are three basic types of transnational access-to-justice conflicts: jurisdictional conflicts, applicable law conflicts, and judgments conflicts.

Jurisdictional conflicts may arise when courts in two or more States assert jurisdiction to adjudicate the same dispute—that is, when there is parallel litigation.⁷⁰ Each court may have a reasonable basis for asserting jurisdiction, and each State's legal system may have procedural rules that satisfy access-to-justice requirements. However, when multiple courts assert jurisdiction over the same dispute, the parties are forced to litigate their dispute in multiple States, which may greatly increase costs.⁷¹ This is inefficient, and in some cases a party may find it cost prohibitive for a party to pursue or defend litigation in more than one State, even if their claims or defenses are legally strong. In addition, parallel litigation raises the specter of further access-to-justice problems, including applicable law conflicts and judgment conflicts, as discussed below.⁷²

Applicable law conflicts may arise when the legal rules of two or more States provide different rights or impose different obligations for parties in the same transnational dispute. For example, one State's law may recognize a given claim or defense, while another State's law might not. Subjecting a party to inconsistent legal rules in the same dispute is inconsistent with access to justice. In purely domestic disputes, applicable law conflicts are unlikely because a State's domestic legal rules generally are (or generally should be) internally consistent,⁷³ and

69. Cf. Duncan French & Verónica Ruiz Abou-Nigm, *Jurisdiction: Betwixt Unilateralism and Global Coordination*, in LINKAGES AND BOUNDARIES IN PRIVATE AND PUBLIC INTERNATIONAL LAW 75, 86 (Verónica Ruiz Abou-Nigm, Kasey McCall-Smith & Duncan French eds., 2018) ("As private international law rules provide for a range of suitable connections, more often than not it is plainly possible for the courts of two or more countries to have jurisdiction, i.e., to be competent to adjudicate a particular cross-border dispute (known as concurrent jurisdiction). While this could be seen as desirable in principle, facilitating the right of access to justice, and fostering global connectivity, yet, the downside is the possibility of the abuse of forum shopping tactics, usually by the party that is better placed to take advantage of such opportunities. In any case the simultaneous exercise of jurisdiction by more than one court in parallel proceedings, that is, in cases between the same parties and based on the same cause of action, is clearly inefficient.").

70. In some cases, however, a court in one State may allow ancillary proceedings to provide judicial assistance to a court in another State, without any adjudication of the merits of the case. In that situation, the multiple proceedings may actually facilitate transnational access to justice rather than undermining it.

71. See Goddard, *supra* note 25 ("[A]t present it is often necessary for a party to a dispute to bring substantive proceedings of the same kind in more than one country in order to obtain the desired practical outcome. Avoiding the need for duplicative proceedings will contribute significantly to access to justice, and to reducing the costs and risks of cross-border dealings.").

72. Private international law rules on parallel litigation—e.g. *lis pendens* stays, antisuit injunctions, and first-to-file rules—implicitly attempt to mitigate these problems. They do not question the ability of any State individually to offer genuine access to justice, but they at least implicitly acknowledge the access-to-justice problems raised by joint assertion of jurisdiction.

73. Of course, in States organized as federal systems, different governmental subunits (US states, Swiss cantons, etc.) may have different laws, raising federal issues similar to those in transnational disputes.

ordinarily there would be no reason to consider applying any other State's law.⁷⁴ However, when the dispute has multi-State connections, two or more States' laws might reasonably be applied to the same dispute.

An applicable law conflict is most serious if one State's law requires a party to do something forbidden by another State's law.⁷⁵ For example, discovery rules in the United States may require a party to respond to another party's discovery requests. On the other hand, a "blocking statute" in another State may forbid the other party from responding to those requests.⁷⁶ Neither State's rule is intrinsically unjust, but when both States' rules are simultaneously applied the result is unjust: A single party will be required to comply with two rules but incapable of complying with both. Thus, the party will inevitably be in violation of the law of one State or the other. To be clear, the reason that applicable law conflicts can pose transnational access-to-justice problems is not that the applicable law of any given State is somehow unjust (although that, too, would be a problem), or that one State's law is in some sense "better" than the other's.⁷⁷ Instead, the reason is simply that a party may be simultaneously subjected to the laws of more than one State and those laws may be inconsistent with each other.

Judgment conflicts arise when the courts of two or more States enter conflicting judgments. For example, in the same transnational dispute between the same parties, one court might issue a judgment in favor of one party on an issue, and another court might enter a judgement in favor of the other party on the same issue.⁷⁸ Even if each judgment is the result of fair and impartial procedures and not in any sense unjust, the judgments together may undermine access to

74. An exception (albeit an uncommon one) would be a purely domestic contract dispute where the contract contains an enforceable choice-of-law clause that indicates the law of a foreign State.

75. Cf. Anthony J. Colangelo, *Absolute Conflicts of Law*, 91 IND. L. J. 719, 729 (2016) ("With absolute conflicts of law...it is impossible to comply with both laws simultaneously. This impossibility...imports powerful rule of law considerations that disfavor subjecting parties to contradictory legal commands in arbitrary fashion.").

76. GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 966–67 (6th ed. 2018).

77. This notion that different laws can both be (but are not necessarily always) just is implicit in private international law (foreign law is routinely applied under choice-of-law rules, but those rules are typically subject to a public policy exception) and human rights law (which typically confers to States a margin of appreciation). See generally HAY, BORCHERS, SYMEONIDES & WHYTOCK *supra* note 14, § 3.15, at 149–51 (discussing public policy exception); ANDREW LEGG, THE MARGIN OF APPRECIATION IN INTERNATIONAL HUMAN RIGHTS LAW: DEFERENCE AND PROPORTIONALITY (2012).

78. Private international law rules on judgments generally attempt to mitigate these problems by refusing recognition and enforcement of a judgment in conflict with an earlier, inconsistent judgment and by having a public policy exception. See, e.g., Hague Conference on Private International Law, *Convention of 30 June 2005 on Choice of Court Agreements* art. 9, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=98> (last visited Aug. 4, 2019) (including both grounds for refusing recognition and enforcement).

justice.⁷⁹ From a plaintiff's perspective, even if one State's court entered a judgment providing a remedy, that remedy may be difficult or impossible to obtain if a second State's court denies that remedy (especially if the defendant and the defendant's assets are in that second State). From a defendant's perspective, one State's judgment might impose requirements that are inconsistent or even incompatible with those imposed by a second State's judgment, and in some cases simultaneous compliance with both might not be possible.

Access-to-justice conflicts arise because there is no central global authority that allocates jurisdiction over each transnational dispute to a single State or international court or dictates the application of a single body of law. In this sense, access-to-justice conflicts, like access-to-justice gaps, are due to the decentralized structure of the global legal system.

C. Access-to-Justice Problems Involving International Institutions

In addition to access-to-justice barriers that can be exacerbated in transnational disputes and those that are distinctive to transnational disputes, a third factor distinguishes transnational access to justice: the role of international institutions.

On the one hand, special access-to-justice problems may arise when individuals have claims against international organizations. There are hundreds of international organizations in the world that make many positive contributions to global governance.⁸⁰ But they can, and historically they sometimes have, done wrong.⁸¹ When that happens, access to justice is often lacking. As Pierre Schmitt argues in an in-depth study of this problem:

In cases where the rights of individuals may be threatened or violated by international organizations, the aggrieved individual may seek to obtain a remedy from the international organization. However, this entails two necessary conditions: first, this presupposes the existence of a legal regime governing the responsibility of international organizations towards individuals; second, there has to be an accountability mechanism where individuals can claim such responsibility

79. Judgments based on proceedings that do not meet the procedural requirements for access to justice, such as impartiality and independence, also raise access-to-justice problems. Ideally, such problems are resolved in the State where the judgment was entered through appellate or other review procedures, but this cannot be assured in States lacking rule of law. See UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT, § 4 cmt. 7 (UNIF. LAW COMM'N 2005) (explaining that "the assertion that intrinsic fraud has occurred should be raised and dealt with in the rendering court").

80. By one count, there were 285 conventional international organizations in 2017, and there are an additional 1,655 unconventional international organizations. See Yearbook on International Organizations, *Figure 2.1: Number of International Organizations by Type*, UNION OF INT'L ASS'NS (2018).

81. See SHELTON, *supra* note 5, at 45 ("International organizations figure among the non-State entities whose proliferation and increased power have raised the question of their responsibility for human rights violations. International organizations are taking on many new and extended functions throughout the world, from expansion of traditional peacekeeping to governance and managing common resources. These new roles place them in a position where they have the capacity to violate the human rights of individuals not only within, but outside the organization.").

and consequently ask for redress. Nowadays, it is clear that both foundations are to a large extent shaky or even inexistent.⁸²

This access-to-justice gap is due to three factors. First, there is no established international legal framework for determining the responsibility of international organizations toward individuals.⁸³ The Draft Articles on the Responsibility of International Organizations adopted by the United Nations International Law Commission in 2011 contemplates the invocation of an international organization's responsibility only by States and other international organizations.⁸⁴ Second, international courts typically lack jurisdiction over claims brought by individuals against international organizations, and not all international organizations have internal procedures for handling such claims.⁸⁵ Third, access to justice in national courts is often precluded by jurisdictional immunities granted to international organizations under domestic or international law.⁸⁶ As Schmitt puts it, this means that "individuals aggrieved by acts of international organizations are frequently left out in the cold."⁸⁷

On the other hand, international institutions—particularly, international courts—can increase access to justice. There are a growing number of international courts that, in theory, can help fill transnational access-to-justice gaps left open by domestic courts. However, for four reasons, the promise of international courts as contributors to access to justice is subject to important limits in today's global legal system. First, some international courts are accessible only to States. Second, even international courts that allow access to individuals and other non-State actors often subject that access to various conditions, such as

82. SCHMITT, *supra* note 15, at 1–2.

83. *Id.* at 2.

84. See Int'l Law Comm'n, *Draft Articles on the Responsibility of International Organisations*, art. 43 and art. 49, U.N. Doc. A/66/10; GAOR, 63th Sess., Supp. No. 10 (2011). Moreover, the Draft Articles clearly contemplate obligations that "may be owed to one or more States, to one or more other organizations, or to the international community as a whole," but they do not explicitly address obligations that may be owed to individuals. See *id.* at art. 33 ("1. The obligations of the responsible international organization set out in this Part may be owed to one or more States, to one or more other organizations, or to the international community as a whole, depending in particular on the character and content of the international obligation and on the circumstances of the breach. 2. This Part is without prejudice to any right, arising from the international responsibility of an international organization, which may accrue directly to any person or entity other than a State or an international organization."). See generally RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS: ESSAYS IN MEMORY OF SIR IAN BROWNLIE (Maurizio Ragazzi ed. 2013).

85. *Id.* at 2. See also August Reinisch, *Securing the Accountability of International Organizations*, 7 GLOB. GOVERNANCE 131, 139 (2001) ("As a rule, international courts have no jurisdiction to adjudicate claims against international organizations").

86. RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS, *supra* note 84, at 2 (in most cases "the only option that remains available to individuals is at the national level and in domestic courts, where international organizations generally enjoy immunity from jurisdiction and immunity from enforcement"). On these domestic and international rules of immunity, see generally THE PRIVILEGES AND IMMUNITIES OF INTERNATIONAL ORGANIZATIONS IN DOMESTIC COURTS (August Reinisch ed. 2013).

87. SCHMITT, *supra* note 15, at 2.

a determination of admissibility, the consent of the respondent State (in claims against States), or referral by a commission or other non-judicial body. Third, the jurisdiction of international courts is limited by factors that may include subject matter, membership, or geographic scope. Fourth, the global legal system lacks reliable processes for the enforcement of international court judgments.⁸⁸ Thus, notwithstanding their important contributions, international courts are currently unable to provide meaningful access to justice in most transnational disputes, especially those between private parties.⁸⁹

Finally, while the availability of international courts may increase access to justice, it may also contribute to access-to-justice conflicts. As discussed above, jurisdictional conflicts can arise if the domestic courts of two or more States assert jurisdiction over the same transnational dispute. In some cases, an international court—or even more than one international court—may also assert jurisdiction, which could lead to a type of jurisdictional conflict that is unlikely to arise in purely domestic disputes.⁹⁰

To summarize: The role of international institutions distinguishes transnational access to justice from domestic access to justice. Special access-to-justice problems arise when individuals have claims against international organizations. International courts can in some cases help remedy access-to-justice gaps, but they also create potential jurisdictional conflicts.

III. ACCESS TO JUSTICE AS A GLOBAL GOVERNANCE PROBLEM

This Article has argued that there are important reasons for access-to-justice research to examine the distinctive access-to-justice problems faced by parties in transnational disputes and in domestic disputes. It has further argued that these problems should be understood in the context of the decentralized global legal system (as well as in the context of domestic legal systems). An additional reason to focus on access to justice from a transnational perspective is that access to justice is not only a domestic governance problem, but also a global governance

88. See generally KAREN J. ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014). For a discussion of the trend toward providing direct access to individuals in international human rights tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights, and the African Court on Human and Peoples' Rights, see CANÇADO TRINDADE, *supra* note 64, at ch. II.

89. See SCHMITT, *supra* note 15, at 103 ("It is true—although regrettable—that there are currently no global international mechanisms which grant an individual the possibility of exercising an effective right of access to justice in the absence of treaty law."). For a proposal for an international court that would address this problem, see STEINITZ, *supra* note 40.

90. See generally YUVAL SHANY, *THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS* (2003); YUVAL SHANY, *REGULATING JURISDICTIONAL INTERACTIONS BETWEEN NATIONAL AND INTERNATIONAL COURTS* (2007). This possibility has also led to debates over whether the increase in international courts is contributing to the fragmentation of international law. See Pierre-Marie Dupuy & Jorge E. Viñuales, *The Challenge of "Proliferation": An Anatomy of the Debate*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION* 143–49 (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2013).

problem.⁹¹ First, international law—one of the principal instruments of global governance—increasingly recognizes access to justice as a right. Second, access to justice is on the agendas of various international organizations. Finally, global governance itself depends significantly on access to justice. For these three reasons, access to justice is more than a matter of domestic governance—it is a global governance problem, too.

A. International Law and Access to Justice

International law increasingly recognizes access to justice as a right. This right is more firmly established in some areas of international law than others. As such, it may be premature to state that a general international legal right to access to justice exists, even if such a right would be desirable. Nevertheless, as Francesco Francioni concludes, "access to justice has come a long way towards its recognition as a true enforceable right under international law."⁹²

One well established aspect of access to justice is the customary international law duty of a State to provide basic justice to foreigners injured within its territory.⁹³ A "denial of justice" occurs when a State violates that duty.⁹⁴ As one exhaustive study concludes, even if the precise scope of the concept of denial of justice is not entirely settled, it clearly includes a State's refusal to allow foreigners to establish their rights before the State's ordinary courts.⁹⁵ More specifically, "[d]enial of justice exists when there is a denial, unwarranted delay or obstruction of access to courts, gross deficiency in the administration of judicial or remedial

91. See generally Ziller, *supra* note 8; Javier L. Ochoa Munoz, *Transnational Access to Justice and Global Governance (Introductory Comments to the ASADIP Principles on Transnational Access to Justice)*, 20 *REVISTA DE DIREITO BRASILEIRA* 336 (2018) (introducing principles "designed to help guarantee fundamental rights, especially the right of access to justice, from a perspective of global governance") (abstract available at <https://go.gale.com/ps/anonymous?id=GALE%7CA598536992&sid=googleScholar&v=2.1&it=r&linkaccess=abs&issn=2237583X&p=AONE&sw=w>). The ASADIP Principles are discussed below. The link to domestic governance is well established. See Michael M. Karayanni, *The Extraterritorial Application of Access to Justice Rights: On the Availability of Israeli Courts to Palestinian Plaintiffs*, in *PRIVATE INTERNATIONAL LAW AND GLOBAL GOVERNANCE* 210, 218 (Horatia Muir Watt & Diego P. Fernández Arroyo eds., 2014) (arguing that "[t]he most fundamental value...is achieving access to justice as a basic tool in a participatory democracy" and that "[t]o have access to justice means to belong to the realm of societal decision; to be excluded from one is to be denied the other"). See also UNITED NATIONS DEV. PROGRAMME, *supra* note 7 (last visited Aug. 4, 2019) ("There are strong links between establishing democratic governance, reducing poverty and securing access to justice.").

92. Francioni, *supra* note 16, at 54.

93. See Francioni, *supra* note 16, at 10 (arguing that access to justice is "an integral part of the guarantees provided by the international standard on the treatment of aliens"); JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 1 (2005) (arguing that the duty of States "to provide decent justice to foreigners" is "one of [international law's] oldest principles").

94. See PAULSSON, *supra* note 93, at 62 (defining the customary international law concept of "denial of justice" as a State's "administ[r]ation [of] justice to aliens in a fundamentally unfair manner").

95. *Id.* at 65 (referencing a study by Vattel, who proposed that not allowing foreigners to establish rights before the ordinary courts comprised a denial of justice).

process, failure to provide those guarantees which are generally considered indispensable to the proper administration of justice, or a manifestly unjust judgment."⁹⁶

However, this right to access to justice is limited to foreign nationals, and it is a right only against the State in which the foreign national suffered the alleged injury.⁹⁷

An international legal right to access to justice for human rights violations is also widely recognized. A variety of human rights treaties explicitly provide such a right. For example, Article 13 of the European Convention on Human Rights provides: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."⁹⁸ Article 47 of the Charter of Fundamental Rights of the European Union provides:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.⁹⁹

Article 7(1) of the African Charter on Human and Peoples' Rights provides: "Every individual shall have the right to have his cause heard. This comprises...[*inter alia*] [t]he right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force...."¹⁰⁰

Beyond these treaty provisions, some experts argue that customary international law recognizes a right to access to justice for violations of human rights law.¹⁰¹ Such a right has also been declared by the United Nations General

96. Harvard Research in International Law, *The Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT'L L. (Supplement) 131, 134 (1929). See also IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 529 (7th ed. 2008) (referring to the Harvard study as probably "the best guide" to the concept's meaning).

97. See Francioni, *supra* note 16, at 9 (explaining these and other limits).

98. European Convention on Human Rights, Nov. 4, 1950, 213 U.N.T.S.

99. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 18.

100. African Charter on Human and People's Rights, June 27, 1981, 1520 U.N.T.S. 217.

101. See SHELTON, *supra* note 5, at 432 ("The right of access to judicial remedies is widely guaranteed in international human rights treaties and can be considered as part of the corpus of the customary international law of human rights."); Riccardo Pisillo Mazzeschi, *Access to Justice in Constitutional and International Law: The Recent Judgment of the Italian Constitutional Court*, 24 IT. Y.B. INT'L L. 9, 13 (2014) ("The right of access to justice for violations of human rights (or at least of fundamental human rights) is, in my opinion, now established by a customary international norm."). See also *Jurisdictional Immunities of the State (Germany v. Italy)*, Dissenting Opinion of Judge

Assembly: "A victim of a gross violation of international human rights law or of a serious violation of international humanitarian law shall have equal access to an effective judicial remedy as provided for under international law."¹⁰²

A more general international legal right to access to justice—one that extends beyond human rights violations to other types of disputes—is also recognized, but to a more limited extent. For example, Article 8 of the Universal Declaration of Human Rights broadly provides that: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."¹⁰³ Article 8 of the American Convention on Human Rights states that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."¹⁰⁴ Article 5 of the Association of Southeast Asian Nations' Human Rights Declaration provides: "Every person has the right to an effective and enforceable remedy, to be determined by a court or other competent authorities, for acts violating the rights granted to that person by the constitution or by law."¹⁰⁵ Article 12 of the Arab Charter on Human Rights provides: "The States parties...shall...guarantee every person subject to their jurisdiction the right to seek a legal remedy before courts of all levels."¹⁰⁶

In addition, the European Court of Human Rights has interpreted Article 6 of the European Convention on Human Rights to recognize a broad right to access to justice. Article 6 provides that "[i]n the determination of his civil rights and

Cançado Trindade, 2012 I.C.J. (Feb. 3); Francioni, *supra* note 16, at 41 (human rights treaties and judicial practice show that "access to justice is generally recognized as a human right in the context of domestic law and that every state is under an obligation to fulfill such right by making available a system of effective remedies to all persons subject to its jurisdiction and under its control"); Manfred Nowak, *The Right of Victims of Gross Human Rights Violations to Reparation*, in *RENDERING JUSTICE TO THE VULNERABLE—LIBER AMICORUM IN HONOUR OF THEO VAN BOVEN* 203 (Fons Coomans ed. 2000) (arguing that "the right of victims of (gross) human rights violations to adequate reparation ... is already fairly well established under present international law").

102. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. G.A. Res. 60/147, U.N. Doc A/60/147 (Dec. 16, 2005).

103. Universal Declaration of Human Rights, Art. 8, GA Res. 217A (III), UN GAOR, 3d Sess., Resolutions, at 71, UN Doc. A/810 (1948).

104. American Convention on Human Rights, 1144 U.N.T.S. 123, 9 I.L.M. 673.

105. Ass'n of Se. Asian Nations [ASEAN], ASEAN Human Rights Declaration (Nov. 19, 2012), <https://asean.org/asean-human-rights-declaration/>.

106. Arab Charter on Human Rights, League of Arab States, May 22, 2004, reprinted in 12 Int'l Hum. Rts. Rep. 893. *See also id.* at art. 13 ("1. Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. Each State party shall guarantee to those without the requisite financial resources legal aid to enable them to defend their rights. 2. Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights.").

obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."¹⁰⁷ As the European Court of Human Rights has held:

[Article 6] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court," of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6...as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.¹⁰⁸

Notwithstanding these treaty provisions, a general right to access to justice does not appear to be as widely recognized as the right implicit in the denial of justice concept or the right in the context of human rights violations.

The right to access to justice is also expressed in a variety of private international law (or "conflict of laws") doctrines.¹⁰⁹ For example, under the doctrine of jurisdiction by necessity (*forum necessitatis*), "a court has exceptional jurisdiction if justice so demands, even absent the usual requirements, because no other forum is available to the plaintiff."¹¹⁰ The doctrine is sometimes justified as permitted, or even required, by either a legal right to access to justice or the international law prohibition of denial of justice.¹¹¹ In addition, the right to access to justice is implicit in the adequate alternative forum requirement of the *forum non conveniens* doctrine.¹¹² Although the doctrine may permit denial of court access in a particular forum, the alternative forum requirement embodies the

107. European Convention on Human Rights, *supra* note ⁹⁸, at art. 6.

108. *Golder v. United Kingdom*, 18 Eur. Ct. H.R. (ser. A) at 36 (1975). For a detailed analysis of the rights protected by Article 6, see FAWCETT, SHÚILLEABHÁIN & SHAH, *supra* note 5, at 60–79.

109. See generally J. J. Fawcett, *General Report*, in *DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW I* (J. J. Fawcett ed., 1995).

110. Ralf Michaels, *Two Paradigms of Jurisdiction*, 27 MICH. J. INT'L L. 1003, 1053–54 (2006). See also Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. OF INT'L L. 187, 223–24 (2014) ("[F]orum of necessity' rules...support[] an assertion of jurisdictional power (and event duty) to protect the rights of private parties in the absence of the connections of territory or nationality which would traditionally be required under private or public international law rules of jurisdiction.").

111. See French & Ruiz Abou-Nigm, *supra* note ⁶⁹, at 98 ("[T]he rationale underpinning [forum of necessity jurisdiction] is considered to be based on, or even imposed by, the right to a fair trial under Article 6(1) of the European Convention on Human Rights."); Arnaud Nuyts, *Study on Residual Jurisdiction: General Report* (2007), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.193.8681&rep=rep1&type=pdf> (last visited Aug. 4, 2019) (commenting that the jurisdiction by necessity principle is, in some States, based on the right to a fair trial and the prohibition of denial of justice).

112. Typically, dismissal is not permitted on *forum non conveniens* grounds unless there is an adequate alternative forum in which the plaintiff may pursue the claim. See Fawcett, *supra* note ¹⁰⁹, at 14–15 ("It is an essential requirement for declining jurisdiction on the basis of *forum non conveniens* in Britain, other Commonwealth States, and the United States that there is an alternative forum abroad.").

principle that a *forum non conveniens* dismissal should not deny the plaintiff access to justice altogether.¹¹³

As this discussion shows, international law—one of the principal instruments of global governance—widely recognizes access to justice as a right. The scope of this right, and its status as customary international law, are not entirely settled. Nevertheless, its recognition shows that access to justice is a global governance issue, not merely a domestic governance issue. Of course, as Part II's discussion of transnational access-to-justice gaps and transnational access-to-justice conflicts showed, the right to access to justice is far from fully realized in practice.

B. *International Organizations and Access to Justice*

Another indication that access to justice is a global governance problem is that promotion of access to justice is on the agendas of governmental and nongovernmental international organizations.¹¹⁴ One of the targets of the United Nations' Sustainable Development Goals is to "ensure equal access to justice for all."¹¹⁵ The United Nations Development Programme¹¹⁶ and the Organisation for Economic Co-operation and Development¹¹⁷ are among the international organizations promoting access to justice. International nongovernmental organizations promoting access to justice include the World Justice Project,¹¹⁸ the Bingham Centre for the Rule of Law, and the International Bar Association.¹¹⁹

As is the case with access-to-justice scholarship, most of the access-to-justice work of international organizations focuses on domestic access to justice. However, there are notable exceptions. For example, in 1980, the Hague Conference on Private International Law adopted the Convention on International Access to Justice, which declares that the signatories "[d]esir[e] to facilitate

113. See Whytock & Burke Robertson, *supra* note 8, at 1454–62 (arguing that the alternative forum requirement is "[t]o ensure that the plaintiff will have court access somewhere and that the dismissal will not entirely deny the plaintiff access to justice" but observing adequacy standard applied to a putative alternative forum is very lenient in practice and therefore might not effectively ensure such access); Mills, *supra* note 111, at 226–27 ("English courts...have increasingly considered the availability of an alternative forum before which the claimant can practically achieve justice to be one of the central questions in exercising the *forum non conveniens* discretion. In the absence of such an alternative forum English proceedings are highly likely to continue, to ensure that the claimant has 'access to justice.'").

114. For an overview of other access-to-justice initiatives by international organizations, see MacDonald, *supra* note 3, at 497–98.

115. UNITED NATIONS, *Sustainable Development Goals*, Goal 16, Target 16.3, <https://www.un.org/sustainabledevelopment/peace-justice/> (last visited Aug. 4, 2019).

116. See UNITED NATIONS DEV. PROGRAMME, *supra* note 7.

117. ORGANISATION FOR ECO. CO-OPERATION AND DEV., *Access to Justice*, <https://www.oecd.org/gov/access-to-justice.htm> (last visited Aug. 4, 2019).

118. *Global Insights on Access to Justice*, WORLD JUST. PROJECT, <https://worldjusticeproject.org/our-work/wjp-rule-law-index/special-reports/global-insights-access-justice> (last visited Aug. 4, 2019).

119. See, e.g., Beqiraj & McNamara, *supra* note 2.

international access to justice" and provides that "[n]ationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State."¹²⁰ The Principles on Transnational Access to Justice approved in 2016 by the American Association of Private International Law (ASADIP) is another important project focused specifically on access-to-justice issues that arise in transnational disputes.¹²¹

C. Global Governance and Access to Justice

As discussed in the last two Sections, certain principles of international law and certain international organizations aim to improve access to justice. However, the relationship between global governance and access to justice is not one-way—access to justice can also improve the quality of global governance.

First, transnational access to justice can enhance the *legitimacy* of global governance. One threat to this legitimacy is the perception—and to some extent the reality—that global governance is dominated by a relatively small number of powerful States and multinational business interests. Individuals, civil society groups and other less powerful actors often perceive little opportunity for them to participate in and voice grievances about global governance. Broader transnational access to justice for such grievances—whether provided by national or international courts—could enhance the legitimacy of global governance by giving these stakeholders more involvement and voice. In this sense, access to justice is, in the words of Jacques Ziller, "[un] instrument d'inclusion dans la gouvernance mondiale"—an instrument of inclusion in global governance.¹²²

Second, transnational access to justice can enhance the *effectiveness* of global governance. Courts play an important role in domestic governance.¹²³

120. Hague Convention on International Access to Justice, *supra* note 38.

121. AM. ASS'N OF PRIV. INT'L L., *supra* note 5. Although not explicitly organized around the goal of transnational access to justice, two other projects on transnational civil procedure address many topics that are relevant to transnational access to justice: the ALI/UNIDROIT Principles of Transnational Civil Procedure adopted in 2004, and the current ELI-UNIDROIT Transnational Principles of Civil Procedure project. See, *Study LXXVIA - Transnational Civil Procedure - Formulation of Regional Rules*, UNIDROIT <https://www.unidroit.org/work-in-progress/transnational-civil-procedure> (last visited Aug. 4, 2019).

122. Ziller, *supra* note 8, at 41. See also Rachel A. Cichowski, *Introduction: Courts, Democracy, and Governance*, 39 COMP. POL. STUD. 3, 7 (2006) (Emphasis added) ("[E]xtending public access to courts can increase citizen and interest group participation in the development, monitoring, and enforcement of laws . . .").

123. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004); MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* (1981); MARTIN SHAPIRO & ALEC STONE, *SWEET, ON LAW, POLITICS, AND JUDICIALIZATION* (2002).

They also play an important role in global governance.¹²⁴ Domestic courts also contribute to global governance, by helping allocate governance authority among States, international institutions, and private actors, and by determining the rights and obligations of persons in transnational disputes.¹²⁵ This is called "transnational judicial governance."¹²⁶ However, neither international courts nor domestic courts act on their own. Instead, they must be activated by disputants with legal claims. As Martin Shapiro and Alec Stone Sweet put it, "litigants activate courts, and thus it is obvious that patterns of litigation partly fix the parameters for how judges impact politics."¹²⁷ Transnational access to justice allows private parties to perform that role, thereby enabling transnational judicial governance.¹²⁸

Third, and closely related to effectiveness, transnational access to justice can improve *oversight* in global governance. Any effective system of governance requires some degree of oversight to determine whether rules are being followed and when steps need to be taken to elicit compliance. In their study of congressional oversight of administrative agencies, US political scientists Mathew McCubbins and Thomas Schwartz distinguish two basic forms of oversight: "police patrols" and "fire alarms."¹²⁹ The police patrol approach is "comparatively centralized, active, and direct: at its own initiative, Congress examines a sample of executive agency activities, with the aim of detecting and remedying any violations of legislative goals and, by its surveillance, discouraging such violations."¹³⁰ The "fire alarm" approach is "less centralized and involves less active and direct intervention than police-patrol oversight." Instead, it relies on "a system of rules, procedures, and informal practices that enable individual citizens and organized interest groups to examine administrative

124. See generally COURTS CROSSING BORDERS: BLURRING LINES OF SOVEREIGNTY (Mary L. Volcansek & John F. Stack, Jr. eds., 2005) (reviewing the role of international courts in world politics).

125. Christopher A. Whytock, *Domestic Courts and Global Governance*, 84 TUL. L. REV. 69, 75–96 (2009).

126. See Christopher A. Whytock, *Transnational Judicial Governance*, 2 ST. JOHN'S J. INT'L & COMP. L. 55 (2012).

127. SHAPIRO & STONE SWEET, *supra* note 127, at 293. See also Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping*, 92 NOTRE DAME L. REV. 579, part III.B (2016) (arguing that global forum shopping contributes to regulatory enforcement through private litigation); Hannah L. Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219 (2001) (discussing the role of private litigants in judicial regulation of transnational economic activity).

128. Karayanni, *supra* note 91, at 217 ("Because courts do not solicit litigants to file claims so that they can eventually render judgments on a certain topic but are dependent on claimants' initiatives, it is imperative and instrumental for the judiciary to guarantee litigants a meaningful right of access to courts in order to fulfil its functions as a branch of government. It is through the handling of disputes that courts shape and influence policy, whether by the mere fact of setting a precedent, by rendering relief that affects the rights and status of numerous others, or by clarifying the meaning of law.").

129. Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

130. *Id.*

decisions . . . , to charge executive agencies with violating congressional goals, and to seek remedies from agencies, courts, and Congress itself."¹³¹ McCubbins and Schwartz argue that the fire alarm approach will often be optimal.¹³²

The distinction between police patrols and fire alarms also applies to global governance.¹³³ A police patrol approach to oversight in global governance would require centralized global institutions actively monitoring compliance—but due to lack of resources and lack of political will, the feasibility of such an approach would be remote on a global scale. An alternative is a fire alarm approach that encourages private parties to draw attention to violations by seeking remedies in court. By enabling private parties to perform this role, transnational access to justice can enhance the oversight function in, and ultimately the effectiveness of, global governance.

CONCLUSION

This Article has argued for three shifts in thinking about access to justice. First, to understand the full range of access-to-justice problems that exist in the world, access-to-justice studies should explicitly incorporate the perspective of parties in transnational disputes, not just the perspective of parties in purely domestic disputes. Second, due to the multi-State connections that define transnational disputes, transnational access to justice should be understood in the context of the decentralized global legal system, not only in the context of individual domestic legal systems. This global context tends to exacerbate access-to-justice problems in transnational disputes and it gives rise to a variety of access-to-justice problems that are distinctive to transnational disputes, such as transnational access-to-justice gaps and transnational access-to-justice conflicts. Third, access to justice should be understood as a global governance problem, not only a domestic governance problem.

These three shifts, in turn, raise important questions that can serve as focal points for three streams of further transnational access-to-justice research. First, beyond the access-to-justice problems described in this Article, what other access-

131. *Id.*

132. *Id.* at 171. The authors provide two reasons for generally favoring fire-alarm oversight:

First, legislative goals often are stated in such a vague way that it is hard to decide whether any violation has occurred unless some citizen or group registers a complaint. Such a complaint gives Congress the opportunity to spell out its goals more clearly—just as concrete cases and controversies give courts the opportunity to elucidate legal principles that would be hard to make precise in the abstract. Second, whereas a fire-alarm policy would almost certainly pick up any violation of legislative goals that seriously harmed an organized group, a police-patrol policy would doubtless miss many such violations, since only a sample of executive-branch actions would be examined.

Id. at 171-72.

133. These fire alarms may also enhance the legitimacy of global governance. *See* Kal Raustiala, *Police Patrols and Fire Alarms in the NAAEC*, 26 *LOY. L.A. INT'L & COMP. L. REV.* 389, 409 (2004) ("The use of a fire alarm may also enhance the legitimacy of [global governance] by enhancing public participation. Citizen participation is a mantra of many advocates of good global governance.").

to-justice problems are faced by parties in transnational disputes? What are the sources of these transnational access-to-justice problems? How does the global legal system contribute to them?

This first stream of research leads to a second, focused on how to mitigate transnational access-to-justice problems. For example, how can private international law ("conflict of laws")—including its rules governing jurisdiction, forum of necessity, choice of law, and the recognition and enforcement of foreign judgments—be reformed to better facilitate transnational access to justice and reduce the number of transnational access-to-justice gaps? How can private international law responses to parallel litigation—such as *lis pendens* stays, antisuit injunctions, and first-to-file rules—be improved to better resolve transnational access-to-justice conflicts?¹³⁴

Furthermore, how can public international law help mitigate transnational access-to-justice problems? What are the prospects for the continued development of a customary international legal right to access to justice in transnational disputes? How might international legal principles that interfere with transnational access to justice—like foreign sovereign immunity—evolve in ways that can better accommodate it?¹³⁵

This Article's analysis also implies a third stream of research that explores how the institutions of global governance—including international courts and international organizations—can more effectively promote transnational access to justice.¹³⁶

By emphasizing transnational access to justice, this Article in no way intends to downplay the importance of domestic access to justice. Both aspects of access to justice are important. Bringing transnational access to justice into the broader research agenda on access to justice will provide a more complete picture of access to justice and give needed attention to the distinctive challenges faced by persons in transnational disputes.

134. One important effort in this direction merits special attention: the American Association of Private International Law's (ASADIP) Principles on Transnational Access to Justice, discussed above, contain a number of principles that, if implemented, promise to improve transnational access to justice—including rules on equal treatment of foreign nationals (art. 2.1), *forum necessitatis* (art. 3.10), the recognition and enforcement of foreign judgments (chap. 7), as well as its general principle that "[e]ach state shall establish and apply its rules of procedure, seeking to ensure maximum respect for human rights, in particular, the right to access to justice." See AM. ASS'N OF PRIV. INT'L L., *supra* note 5. In addition, recent scholarship comprehensively surveys the relationship between private international law and human rights law in Europe in ways that highlight the potential of private international law to improve access to justice. See FAWCETT, SHÚILLEABHÁIN & SHAW, *supra* note 5.

135. See, e.g., Whytock, *Foreign State Immunity*, *supra* note 41, at pt. IV (proposing changes to foreign sovereign immunity doctrine to better accommodate access-to-justice concerns).

136. One important proposal along these lines is for the establishment of an international court of civil justice. See STEINITZ, *supra* note 40.

Responsibility to Humanity and Threats to Peace: An Essay on Sovereignty

David Luban*

This Essay examines current and emerging threats to peace—social and political threats as well as military and technological. It argues that leading conceptions of State sovereignty cannot sustain a legal order capable of meeting those threats. The Essay proposes that recent efforts by international law scholars to reformulate State sovereignty as responsibility to humanity—what the Essay calls ‘R2H’ for short—offer a better hope. Under this reformulation, a State’s decision-making must take into account the interests of those outside their sovereign territory as well as those of its own people—in particular, the shared interest in subduing dire threats to world peace. The Essay reviews the historical background of sovereignty as control and sovereignty as responsibility, the two leading current conceptions. The latter is a principle underlying the “responsibility to protect” (R2P) doctrine, but this Essay argues that R2P is both too narrow in scope and too focused on military interventions. R2H can be understood as a generalization of R2P. R2H raises distinctive philosophical issues about what “humanity” means, which the Essay addresses. Finally, it confronts the concern that in an age of resurgent nationalism, a strongly internationalist approach such as R2P is anachronistic. In reply, the Essay criticizes current reactionary nationalisms as both morally and practically misguided. An epilogue written during the COVID-19 pandemic offers preliminary thoughts about R2H in connection with the pandemic.

I. THE UNITED NATIONS ORDER AND THE RIGHTS-PEACE HYPOTHESIS..... 188

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* University Professor and Professor of Law and Philosophy, Georgetown University, Washington, D.C., USA; Distinguished Chair in Ethics, Stockdale Center for Ethical Leadership, United States Naval Academy. I owe debts to more people than I can acknowledge for help on this Essay, which I presented at conferences in several countries. Some are acknowledged in the footnotes. My overall debt to Eyal Benvenisti will be apparent in the Essay; he introduced me to his theory of sovereigns as trustees of humanity in 2011, in our working group at Hebrew University’s Institute for Advanced Studies. Many of the ideas about threats to peace originated in a year-long research seminar on the future of armed conflict conducted at the Stockdale Center for Ethical Leadership in 2016-17. I wish to thank participants in that seminar: Lt. j.g. Charlotte Asdahl, Ed Barrett, Andrew Bell, Adam Betz, Chris Eberle, Marcus Hedahl, David Lefkowitz, Mitt Regan, Michael Skerker, and Lt. Cameron Wegener (USMC). I am especially grateful to Doyle Hodges, Sarah Nouwen, and Antje Wiener for detailed comments on an earlier draft.

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Near the end of the Cold War, historian John Lewis Gaddis coined the phrase "the Long Peace" to name the surprising fact that there had been no wars among the great powers in forty years.¹ The Long Peace has now lasted more than seventy years, and during much of that time armed conflict and war deaths declined.² Unhappily, since 2010 that trend has reversed, and violent conflicts have steadily become more frequent and more lethal.³ Moreover, after decades of small wars, great power rivalries have once again become a major source of alarm.⁴

1. JOHN LEWIS GADDIS, *THE LONG PEACE: INQUIRIES INTO THE HISTORY OF THE COLD WAR* (1987).

2. See the sources cited in note 49, *infra*, and accompanying text. In noting this, I do not mean to minimize such horrifying conflicts as the Balkan and Congo Wars.

3. For recent data, see UNITED NATIONS and WORLD BANK, *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018), <https://openknowledge.worldbank.org/handle/10986/28337>, 11–19.

4. Here, I am referring primarily to rivalries between the United States and both China and Russia. This is certainly the view taken by the United States Department of Defense. "The central challenge to US prosperity and security is the *reemergence of long-term, strategic competition* by what the National Security Strategy classifies as revisionist powers. It is increasingly clear that China and Russia want to shape a world consistent with their authoritarian model—gaining veto authority over

The Essay that follows is born of concern about novel threats to peace, including social and political, as well as military and technological, threats. It worries that familiar conceptions of State sovereignty cannot sustain a legal order capable of countering those threats, whether we understand sovereignty in its classical Westphalian form or in the modern conception that incorporates a sovereign responsibility to protect human rights. I suggest that recent efforts to reformulate State sovereignty as *responsibility to humanity* offer a better hope for an international law that advances both peace and human rights.⁵ Under this reformulation, sovereignty includes the idea that States must take into account the interests of those outside their sovereign territory as well as those of their own people—in particular, the shared interest in subduing dire threats to world peace.

Responsibility to humanity (R2H) raises difficult practical and philosophical questions, which I shall address. With waning trust in internationalism and an upsurge of nationalism, such a utopian-sounding proposal may seem to some like exactly the wrong medicine. In response, I argue that nationalism in its contemporary resurgent form is itself a dire moral and practical mistake. This "reactionary nationalism" is a symptom of our current problems, not a cure. Other critics may fear that R2H is a neo-colonialist Trojan horse that would allow powerful States to impose their will on those less powerful. I argue that these fears arise from a misunderstanding of what R2H requires.

The approach of this Essay is historical, philosophical, and unapologetically speculative; but the threats it canvasses are all too real. Part I briefly reviews some familiar history: the creation of a postwar international legal order centered on peace and human rights. Parts II and III describe the old and new concepts of sovereignty entangled with that legal order. Although this is well-traveled territory, it is essential to set the stage for what follows. In Parts IV and V, I survey the landscape of contemporary threats to peace, drawing significantly on the work of military planners tasked with assessing those threats. Parts VI through VIII introduce R2H and explore some practical and philosophical questions it raises. Part IX examines the reactionary nationalist response. In Part X, I conclude by asking the philosophical question of what "humanity" means, and I address the objection that R2H's conception of sovereignty is fatally utopian. Finally, an Epilogue (written after the body of the text, during the early months of the COVID-19 pandemic) offers preliminary thoughts about the world's responses to the pandemic and their connection with R2H.

other nations' economic, diplomatic, and security decisions." U.S. DEP'T OF DEFENSE, *Summary of the National Defense Strategy of the United States of America* (2018), <https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf>, 2. These rivalries are now "the principal priorities for the [Defense] Department." *Id.* at 4.

5. See Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 102 AJIL 295 (2013).

I.

THE UNITED NATIONS ORDER AND THE RIGHTS-PEACE HYPOTHESIS

The search for peace—or at any rate, for the absence of war—lies at the origin of the postwar international order. In the preambular words of the United Nations (UN) Charter, the UN's aim is "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind."⁶ "Untold sorrow" was plain truth, not rhetoric. The Second World War killed 60 million people, or three percent of the world's population. This occurred less than thirty years after World War I killed 15 million people.⁷ Untold sorrow was written on landscapes and cenotaphs in five continents.

The UN Charter's Preamble (Preamble) goes on to "reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small."⁸ The emphasis on human rights and human dignity was also exactly right. In Europe alone, more than 10 million of the war deaths were intentional murders of helpless civilians and prisoners of war; in Asia, estimates run between 3 and 10 million.⁹ Yet, the connection of human rights with peace was not obvious, and the idea of giving human rights a central role in international affairs came along late in the Charter's drafting process. The Dumbarton Oaks draft barely mentions human rights.¹⁰ At

6. UN Charter Preamble, para. 1.

7. The number of deaths in the two world wars cited here are generally accepted estimates. Milton Leitenberg, *Deaths in Wars and Conflicts in the 20th Century* (Cornell University Peace Studies Program Occasional Paper #29 (3d ed. 2006)), https://www.clingendael.org/sites/default/files/pdfs/20060800_cdsp_occ_leitenberg.pdf, at 9.

8. UN Charter Preamble, para. 2.

9. Exact numbers are unknown, but in addition to an estimated 6 million murdered Jews, they include 1.8–1.9 million non-Jewish Poles. *Polish Resistance and Conclusions*, U.S. HOLOCAUST MEM'L MUSEUM, <https://web.archive.org/web/20180102111652/https://www.ushmm.org/learn/students/learning-materials-and-resources/soles-victims-of-the-nazi-era/polish-resistance-and-conclusions>. They also include Soviet prisoners of war (POWs) who died in captivity, estimated by Russian historians as between 1.2 million and 2.4 million. The lower of these estimates comes from G. F. KRIVOSHEEV, *SOVIET CASUALTIES AND COMBAT LOSSES IN THE TWENTIETH CENTURY* 236 (1997), the higher from V.N. Zemskov, "The statistical maze": *The total number of Soviet prisoners and the extent of their mortality*, DEMOSCOPE, no. 559–60 (Jun. 17–30, 2013), <http://www.demoscope.ru/weekly/2013/0559/analit04.php>. Historian Timothy Snyder puts the number even higher: 3.1 million Soviet POWs, half a million of whom were shot and the remainder of whom were starved. TIMOTHY SNYDER, *BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN* 184 (2010). Snyder estimates the total World War II murders by Germany, alone, as: 5.4 million Jews, 4.2 million Soviet citizens starved between 1941 and 1944, 700,000 Belarussians and Poles shot in "reprisals"—along with 200,000 Poles shot between 1939 and 1941 by German and Soviet occupiers. *Id.* at 411. As for Japan, R. J. Rummel estimates between 3 and 10 million murders between the 1937 occupation of China and the end of the war. R. J. RUMMEL, *STATISTICS OF DEMOCIDE* (1997), <https://www.hawaii.edu/powerkills/SOD.CHAP3>.

10. Washington Conversations on International Peace and Security Organization, *Proposals for the Establishment of a General International Organization* (Oct. 7, 1944), <http://www.ibiblio.org/pha/policy/1944/441007a.html>.

the San Francisco conference, South African diplomat Jan Smuts elevated human rights into the Preamble and connected it with the "sanctity" of human life, after which Virginia Gildersleeve, a member of the US delegation, changed "sanctity" to "dignity."¹¹ The Preamble draws no explicit connection between the peace and human rights pillars of the Charter.

A. *The Universal Declaration of Human Rights*

Connection of a sort came four years later, when the UN's General Assembly adopted the Universal Declaration of Human Rights (UDHR). The UDHR's Preamble begins as follows: "[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"—language later echoed in two human rights covenants.¹² Why is respect for human dignity and human rights the foundation of peace? The connection is not obvious, and the UDHR does not explain it. Presumably, the argument would be that without such respect, nothing will constrain our aggressive drives except brute force and fear, undermining the Charter's prohibition on the threat or use of force.¹³ The Declaration contends that without protection of their human rights, oppressed people will be "compelled to have recourse to rebellion."¹⁴ No doubt its drafters had in mind the history of modern rebellions from the American and French revolutions onward, including the Latin American and European revolutions of the nineteenth century and the Russian and Chinese revolutions in the twentieth—the last of which was ongoing during the UDHR's genesis.¹⁵ Again, we must conjecture how an argument connecting internal strife with threats to international peace would proceed. Presumably, the fear is that other States may become embroiled in a strife-torn State's internal rebellions and civil wars, sometimes for geopolitical advantage, sometimes to protect their own nationals or State interests in the conflict zone, or

11. Samuel Moyn, *Why Is Dignity in the Charter of the United Nations?*, HUMANITY J. (Jun. 10, 2014), <http://humanityjournal.org/blog/why-is-dignity-in-the-charter-of-the-united-nations-2/>. As Katherine Sikkink emphasizes, the "Big Four" were ambivalent about emphasizing human rights in the Charter. KATHERINE SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 67 (2017). However, the twenty Latin American States, the largest single bloc at the San Francisco conference, along with diplomats from other small States, succeeded in overcoming these hesitations. *Id.* at 68–71.

12. United Nations, Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [henceforth: UDHR], Preamble, para. 1. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (1967), Preamble, para. 2; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 993 (1967), para. 2.

13. See U.N. Charter, art. 2(4).

14. UDHR, *supra* note 12, Preamble, para. 3.

15. In addition, it seems likely that some colonial powers foresaw struggles for decolonization, and perhaps hoped that the UDHR would provide a governance blueprint that, if put into practice, would defuse anticolonial movements. At the time of the UDHR, Vietnam was already fighting for independence from France (the First Indochina War began in 1946).

sometimes to protect their borders from spill-over violence and waves of refugees.¹⁶ These are reasons why domestic respect for human rights may be a necessary condition for peace, internationally as well as domestically.

The UN's founders obviously did not think that domestic respect for human rights was a sufficient condition for peace: their principal peacekeeping devices consisted of the prohibition on the threat or use of force by States against other States, backed by Security Council powers to act against threats to peace.¹⁷ But the prominent place of human rights in the Charter suggests that its framers saw domestic rights fulfillment as a contributor to peace, if only by damping down the discontents that motivate rebellion and war. Let us call the proposition that fulfilling human rights will contribute to peace the "rights-peace hypothesis." Over the intervening decades, researchers have found at least some evidence confirming that States that do the best job of protecting human rights domestically are also less belligerent in foreign affairs.¹⁸ Whether the UDHR's architects accepted the rights-peace hypothesis is unclear. Historian Samuel Moyn highlights that the UDHR is principally a blueprint for the domestic welfare state "as a talisman against the geopolitics of war."¹⁹ How the talisman would work was left unclear.

B. *Human Rights and Sovereignty*

This characterization does not suggest that human rights have only instrumental importance in helping maintain peace. If human rights are supposed

16. These are not hypotheticals; all of them have happened. At the very dawn of the Age of Revolution, France intervened in the American Revolution as part of its geopolitical conflict with Great Britain, and Austria and Prussia invaded post-revolutionary France to combat republicanism and lop off territory—just as foreign powers intervened in the Russian civil war following the Bolshevik revolution. India invaded Pakistan during the 1971 Bangladeshi secession struggle to stanch the flow of refugees into India, and NATO intervened in the Balkan wars, in part, because of refugees streaming into western Europe. On the relationship between refugees and the NATO intervention in the former Yugoslavia, see generally STANLEY HOFFMAN, *THE ETHICS AND POLITICS OF HUMANITARIAN INTERVENTION* (1997). Rwanda's Hutu-Tutsi conflict of 1994 spilled over into Congo's Kivu Province and sparked the disastrous Congo Wars of the late 1990s.

17. In its original conception, the UN would have its own military forces, contributed by member States, under the supervision of a Military Staff Committee (MSC). See U.N. Charter, art. 43-47. However, "Cold War dynamics and the early rejection of an autonomous, permanent UN military force prevented the MSC from fulfilling its intended purpose of serving as the UN's global defence department." U.N. SCOR, *United Nations Military Staff Committee*, <https://www.un.org/securitycouncil/subsidiary/msc> (last visited Aug. 10, 2020).

18. See, e.g., Mary Caprioli & Peter F. Trumbore, *Human Rights Rogues in Interstate Disputes, 1980-2001*, 3 J. PEACE RSCH. 131 (2006); Caprioli & Trumbore, *Identifying 'Rogue' States and Testing Their International Conflict Behavior*, 9 EUR. J. INT'L REL. 377 (2003); Timothy M. Peterson & Leah Graham, *Shared Human Rights Norms and Military Conflict*, 55 J. CONFLICT RESOL. 248 (2011); David M. Sobek et al., *The Human Rights Peace: How the Respect for Human Rights at Home Leads to Peace Abroad*, 68 J. POL. 519 (2006); Michael Tomz & Jessica L. P. Weeks, *Human Rights and Public Support of War*, 82 J. POL. 182 (2020). This evidence is at best suggestive, however.

19. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 44 (2018).

to be an "instrument" of anything, it is of furthering human dignity and well-being. Some argue that the value of human rights is intrinsic, not instrumental.²⁰ In the decades since the UDHR, it has become clear that viewing human rights solely through the lens of peace preservation can lead to lax enforcement of rights whenever enforcement threatens peace. This is obvious when rights enforcement would require humanitarian military intervention. A less obvious example is the unwillingness of States to accept politically unpopular refugees for fear of having to grant them human rights, a policy that, in effect, sacrifices the rights of desperate refugees for the sake of domestic political tranquility.²¹ Peace and human rights are distinct pillars of the UN Charter for good reason.²²

Even so, the UDHR, like the two binding human rights covenants, asserts that human rights recognition is the foundation of peace in the world. In other words, even if protecting the peace is not the primary purpose of a human rights regime, because the value of human rights is intrinsic, peace is very much a hoped-for collateral benefit. Thus, one can accept the rights-peace hypothesis without subordinating the intrinsic value of rights to their instrumental value—but also without denying that sometimes circumstances may force tradeoffs.

Though they were loath to admit it, the UN's framers undoubtedly understood that protecting human rights would require more than creating an international organization of States. It would require those States to cede at least a few of their sovereign powers.²³ Not only would those States henceforth "refrain from the threat or use of force" against one another, but they would also have to

20. On this point, see the overview of instrumental versus non-instrumental justifications of human rights in *THE PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS* 11–18 (Rowan Cruft, S. Matthew Liao, & Massimo Renzo eds., 2015).

21. For telling analysis, see Moria Paz, *Between the Kingdom and the Desert Sun: Human Rights, Immigration, and Border Walls*, *BERKELEY J. INT'L L.* 1 (2016); Paz, *The Law of Walls*, 28 *EJIL* 601 (2017) (both articles discussing construction of border walls in Europe to keep out immigrants who would be entitled to robust human rights protections in European territory).

22. The other preambular pillars are promotion of the international law and promotion of "social progress and better standards of life in larger freedom." U.N. Charter, Preamble. Steven Ratner argues that peace and human rights are the twin pillars of all morally defensible contemporary international law. See STEVEN RATNER, *THE THIN JUSTICE OF INTERNATIONAL LAW* (2015).

23. It might be objected that joining the UN by ratifying its Charter has no effect on sovereignty. It is no different from joining any other treaty: both are consensual exercises of the sovereign privilege of entering into binding treaties, and whatever obligations States undertake should be regarded as exercises of their sovereign power, not limitations of it. See *S.S. Wimbledon (U.K. v. Japan)*, 1923 P.C.I.J. (ser. A) No. 1 (Aug. 17), at 35. Why is joining the UN different? The answer is twofold. First, the Charter requires UN member States to carry out decisions of the Security Council (art. 25), so, in effect, the member States have granted the Council legislative power—a point that alarmed observers in connection with Resolution 1373, the post-9/11 Security Council decision that dictated a detailed list of anti-terrorist measures that States were bound to enact. U.N. Charter art. 25; U.N. Doc. S/RES/1373 (2001); see also Stefan Talmon, *The Security Council as World Legislature*, 99 *AJIL* 175 (2005). Second, obligations under the Charter take precedence over obligations under any other international agreement. art. 103.

place at least some enforcement powers in the hands of the Security Council.²⁴ Eventually, by acceding to the core human rights treaties, most States have bound themselves to honor human rights domestically, and some of those treaties created mechanisms of external monitoring and enforcement.²⁵ To abandon these two privileges of sovereignty—the privilege of launching wars and the privilege of violating the human rights of their own people—requires States to step back from the fiercest forms of nationalism.

Of course, there was a great deal of ruthless Machiavellian calculation involved in the UN project. In 1945, some imperial powers had no intention of relinquishing their colonies; and the great powers had no intention of letting weaker powers tell them what to do, or raise claims of economic justice against them.²⁶ Not all states shared the founding faith in individual human rights, as demonstrated in the General Assembly vote on the UDHR in which 10 states refrained from voting or abstained. The philosophical basis of human dignity and human rights remains as contestable as ever.²⁷ Jacques Maritain, surveying intellectuals and spiritual leaders on what the UDHR should contain, relayed an anonymous comment: "we agree about the rights but on condition no one asks us why."²⁸ Moyn contends they did not even agree about the rights.²⁹

Nevertheless, it would be a mistake to dismiss the UN Charter and UDHR language as mere rhetoric. Even the most ruthless cynics sitting in Dumbarton Oaks and San Francisco were genuinely horrified by the untold sorrow of the world wars and wanted to prevent another one.³⁰ I believe that at least some of

24. The UN Charter vests power in the Security Council to determine threats to international peace and security and decide on measures to restore peace and security (art. 39); to authorize non-military measures (art. 41), an authority used to create the international criminal tribunals in former Yugoslavia and Rwanda; and to authorize the use of military force if non-military measures are inadequate (art. 42).

25. All nine of the major human rights treaties create optional mechanisms through which their operative organizations can receive complaints by individuals. See U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, *Human Rights Bodies—Complaints Procedures*, <https://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx#individualcomm>.

26. For two skeptical views of the UDHR's world view, see MOYN, *supra* note 19, 44–64 and Martti Koskeniemi, *The Preamble of the Universal Declaration of Human Rights*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 27–39 (Gudmundur Alfredsson & Asbjørn Eide eds., 1999).

27. MOYN, *supra* note 19, at 61–64. For a sampling of recent treatments of human dignity, see AHARON BARAK, *HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT* (2015); UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden, ed. 2014); MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* (2012); JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* (2012); GEORGE KATEB, *HUMAN DIGNITY* (2011).

28. JACQUES MARITAIN, *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 1 (1949) ("It is related that at one of the meetings of a U[NESCO] National Commission where Human Rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. 'Yes,' they said, 'we agree about the rights but on condition that no one asks us why.'" (emphasis original)).

29. MOYN, *supra* note 19, at 61–64.

30. Washington Conversations on International Peace and Security Organization, *supra* note 10.

those ruthless cynics were genuinely nauseated by the assaults on human dignity they had witnessed in the war. Even if they did not entirely believe the noble words they put in the Preamble and UDHR, millions of their own people did and still do, and domestic support for human rights creates a political check against government violations.³¹

Today, the postwar international order is under attack from many directions. The world today is in retreat from what is alternatively called "globalism," "cosmopolitanism," and "liberal internationalism."³² Moreover, the UN is beset by problems: it is weak, politically fractured, underfunded, at least slightly corrupt, and often helpless. These issues raise two fundamental questions for any discussion of international politics and law that shares the axiomatic treatment of peace and human rights: What are the prospects for peace and human rights today? Does the rights-peace hypothesis have any continued plausibility?

C. *The Supposed Threat of Liberal Internationalism to National Sovereignty*

One source of anti-globalism is the widespread fear that liberal internationalism poses a threat to national sovereignty. This has been a theme of Euroskeptics for many years, but we might date the rise of its political clout in Europe to June 2005, when Dutch voters rejected a proposed European constitution in a national referendum.³³ This surprise was the first warning shot across the bows of a European unification project that, until then, had seemed nearly inevitable. Similarly, the United States has bitterly rejected the International Criminal Court's (ICC) authority to investigate US nationals as an

31. For careful assessment of the efficacy of human rights instruments, see generally BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009). Her overall finding is that mobilized domestic constituencies are the key to human rights compliance by governments. For a more recent confirmation, see Beth A. Simmons & Cosette D. Creamer, *Do Self-Reporting Regimes Matter? Evidence From the Convention Against Torture* (INT'L STUD. Q. (forthcoming)), SSRN: <https://ssrn.com/abstract=3346591> (finding that self-reporting provides information to domestic constituencies and improves compliance).

32. For a typical pessimistic view, see Bruce W. Jentleson, *The Liberal Order Isn't Coming Back: What Next?*, 48 *DEMOCRACY: A J. OF IDEAS* (Spring 2018) (referring to the "Liberal International Order"), <https://democracyjournal.org/magazine/48/the-liberal-order-isnt-coming-back-what-next/>.

33. Marlies Simons, *Dutch Voters Solidly Reject New European Constitution*, N.Y. TIMES, June 2, 2005, <https://www.nytimes.com/2005/06/02/world/europe/dutch-voters-solidly-reject-new-european-constitution.html>.

infringement of US sovereignty;³⁴ and Russia and China have both denounced criticism of their human rights records on sovereignty grounds.³⁵

Superficially, concern about sovereignty violations sounds like a legal objection, but it is really political rather than legal, because sovereignty is not a well-defined legal concept. In the complaint of one eminent international lawyer, Louis Henkin: "I don't like the 'S word.' Its birth is illegitimate, and it has not aged well. The meaning of 'sovereignty' is confused and its uses are various, some of them unworthy, some even destructive of human values."³⁶ Like it or not, though, the "S word" looms large in political discourse and in the political imagination. Suspicion that a nefarious global order has plans to "take our sovereignty away" packs atavistic emotional power. Unsurprisingly, sovereignty conceptions sometimes drive legal arguments in unarticulated ways. They will be the focus of this Essay, so it will be useful to revisit some of the varied conceptions of sovereignty.

II.

THE SOVEREIGN STATE AS PEACEKEEPER

Just as the UN Charter is emblematic of the postwar international order, the Peace of Westphalia is the emblem of traditional sovereignty.³⁷ It, too, emerged from a horrific multi-party war and aimed to restore peace. It, too, invented a

34. In June 2020, President Donald Trump issued an Executive Order imposing punitive sanctions on the ICC and its personnel if it investigates the United States or its allies. Donald J. Trump, *Executive Order on Blocking Property Of Certain Persons Associated With The International Criminal Court*, WHITE HOUSE (Jun. 11, 2020), <https://www.whitehouse.gov/presidential-actions/executive-order-blocking-property-certain-persons-associated-international-criminal-court/>. The Order asserts that ICC investigations "threaten to impinge upon the sovereignty of the United States," and warns that the ICC "must respect the decisions of the United States and other countries not to subject their personnel to the ICC's jurisdiction, consistent with their respective sovereign prerogatives." *Id.* Two individuals have been named for sanctions as of October 2020: ICC Prosecutor Fatou Bensouda and a division head, Phakiso Mochochoko. US Dep't Treasury, *Blocking Property Of Certain Persons Associated With The International Criminal Court Designations*, Sept. 2, 2020, <https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20200902>. For critique of this Executive Order and its sovereignty claims, see David Luban, *America the Unaccountable*, N.Y. REV. OF BOOKS (Aug. 20, 2020), <https://www.nybooks.com/articles/2020/08/20/icc-justice-america-unaccountable/>.

35. See, e.g., *China tells U.N. rights chief to respect its sovereignty after Xinjiang comments*, REUTERS (Sept. 11, 2018), <https://www.reuters.com/article/us-un-rights-china/china-tells-u-n-rights-chief-to-respect-its-sovereignty-after-xinjiang-comments-idUSKCN1LR0L0>; Jane Perlez, *China Wants the World to Stay Silent on Muslim Camps. It's Succeeding*, N.Y. TIMES (Sept. 25, 2019), <https://www.nytimes.com/2019/09/25/world/asia/china-xinjiang-muslim-camps.html>; Philip Remler, *Russia at the United Nations: Law, Sovereignty, and Legitimacy* (Carnegie Endowment for Int'l Peace Paper, Jan. 20, 2020), <https://carnegieendowment.org/2020/01/22/russia-at-united-nations-law-sovereignty-and-legitimacy-pub-80753> (arguing that Russian conceptions of sovereignty "enables Russia to reject on principle commitments regarding human rights").

36. Louis Henkin, *That 'S' Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 *FORDHAM L. REV.* 1 (1999).

37. See Treaty of Münster (1648), http://avalon.law.yale.edu/17th_century/westphal.asp.

political conception of sovereignty that spun off legal implications that were often implicit rather than explicit. Even though it originated in Europe, the Westphalian sovereign State proved easy to transplant: in the era of decolonization, former colonies understandably yearned for their own sovereignty. Today, former colonial States guard their sovereignty jealously, just as jealously as the great powers guard their own. Indeed, the UN itself is based on the principle of sovereign equality.³⁸

Early State-making involved four elements: (1) the consolidation of small political units into larger ones; (2) the accompanying creation (often by force) of an allegedly unitary "people" out of all the disparate local groups in the State's territory; (3) the replacement of overlapping jurisdictions by territorial States with exclusive and unlimited authority within their own territory (the crucial jurisdictional device of the Peace of Westphalia³⁹); (4) and the State's monopoly over the legitimate use of violence.⁴⁰ Hobbes called the result "that great LEVIATHAN, or rather, to speak more reverently, . . . that *mortal god* to which we owe . . . our peace and defence."⁴¹ By the end of the nineteenth century, nationalism had become the dominant ideology of Europe; it is the assertion of peoplehood and self-determination, and peoples without States yearn for mortal gods of their own.⁴² Sovereignty of this sort combines a domestic (or internal) principle giving the State the privilege not to be resisted by its own people with an international (or external) principle granting States immunity against outside intervention. Together, domestic and international sovereignty constitute the two familiar faces of "Westphalian" sovereignty, sometimes labeled "sovereignty as control."⁴³ With Westphalian sovereignty came the consensualist model of international law, in which States are bound only by those rules of international law to which they have consented.⁴⁴

Nation-states waged brutal wars, but some argue that the nation-state reduced overall violence because of its efficacy at the Leviathan function of suppressing

38. UN Charter, art. 2(1).

39. Treaty of Münster, *supra* note 37, art. 64–65.

40. This familiar last point comes from Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 78 (H. H. Gerth & C. Wright Mills eds. and trans., 1991).

41. THOMAS HOBBS, LEVIATHAN 117 (Michael Oakeshott ed., 1957).

42. Greece won its independence from the Ottoman Empire by 1830; nationalism helped spur the 1848 revolutions, and by 1870, Germany and Italy had achieved unification and the status of nation-states.

43. See *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty* (ICISS) (Dec. 2001) [hereafter: ICISS Report], § 2.14, p. 13, <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/18432/IDL-18432.pdf?sequence=6&isAllowed=y>.

44. The standard, classic statement of the consensualist theory is the majority opinion in the *Lotus* decision of the Permanent Court of International Justice. S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

private violence while also defending against external threats.⁴⁵ But the DNA of the sovereign State contained genes with deadly potential. Under the consensualist theory of international law, States retained the right to conduct war, unless they ceded the right on their own volition.⁴⁶ With good reason, Kant likened international lawyers who endorsed this right to Job's "sorry comforters," the three "friends" who explained to Job why his sufferings were justly inflicted.⁴⁷ Most dramatically, the State's exclusive authority over its own people allowed it to turn against them and commit what we now call "crimes against humanity."⁴⁸ The legal principle of sovereign equality (*par in parem non habet imperium*, "equals have no dominion over equals") means that a State cannot be held to legal account by other States without its own consent.⁴⁹ These principles enabled the 19th- and 20th-century pathologies of sovereignty, culminating in the "untold sorrow" of the world wars, which the UN order, with its prohibition on the use of force, its emphasis on human rights, and its international tribunals, hoped to eradicate.

There are obvious and dramatic failures of the postwar international order to maintain the peace—in the 1990s Balkans, in Africa, in the Middle East, and elsewhere. But, in comparison with other eras, the project of tweaking the DNA of Westphalian sovereignty succeeded. The databases compiled by the Oslo Peace Research Institute and the Uppsala Conflict Data Program show that both in

45. See, e.g., STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). Much in Pinker's account is controversial. For a useful overview of the evidence for and against Pinker's (and others') thesis of high violence in pre-State societies, see ROBERT M. SAPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* 306–25 (2017). Sapolsky finds "the cleanest assessment" of warfare and other lethal violence in hunter-gatherer societies in Douglas P. Fry & Patrik Söderberg, *Lethal Aggression in Mobile Forager Bands and Implications for the Origins of War*, 341 *SCI.* 270 (Jul. 19, 2013) and CHRISTOPHER BOEHM, *MORAL ORIGINS: THE EVOLUTION OF VIRTUE, ALTRUISM, AND SHAME* (2012). Neither supports Pinker's thesis. However, the issue of whether the nation-state reduced overall violence (internal and external) as compared with its political predecessors is independent from the issue of violence levels in hunter-gatherer societies.

46. The first international treaty in which States renounced war as an instrument of national policy was the Kellogg-Briand Pact of 1928 (officially titled the General Treaty for the Renunciation of War as an Instrument of National Policy). See generally OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD* (2017).

47. See Immanuel Kant, *Toward Perpetual Peace* (1795) in KANT, *PRACTICAL PHILOSOPHY* (The Cambridge Edition of the Works of Immanuel Kant) 326 (Mary J. Gregor ed. & trans., 1996) (1795), 8:355 in the standard pagination of Kant's works; Job 16:2.

48. Crimes against humanity are atrocity crimes committed against a civilian population. See DAVID LUBAN, JULIE R. O'SULLIVAN, DAVID P. STEWART, AND NEHA JAIN, *INTERNATIONAL AND TRANSNATIONAL CRIMINAL LAW* 926–30 (3rd ed. 2019) (comparing definitions of crimes against humanity in the statutes of six international tribunals); David Luban, *A Theory of Crimes Against Humanity*, 29 *Yale J. Int'l L.* 85, 104 (2004) (characterizing crimes against humanity). A recent piece emphasizes how novel it was to upend the supposed sovereign right of States to attack their own people by declaring such attacks to be crimes against humanity. Menachem Z. Rosensaft, *75 Years Ago at Nuremberg: Giving a Name to Crimes Against Humanity*, JUST SEC. (Nov. 19, 2020), <https://www.justsecurity.org/73432/75-years-ago-at-nuremberg-giving-a-name-to-crimes-against-humanity/>.

49. It still does. See *Al-Adsani v. United Kingdom*, [2001] ECHR 35763/97, 21 Nov. 2001, § 54 (holding that the *par in parem* principle applies even when a State violates *jus cogens*).

number and deadliness, warfare declined dramatically in the UN era, although, as mentioned earlier, this trend has reversed since 2010.⁵⁰ Annual battle deaths have fallen off by 90 percent since the late 1940s.⁵¹ Today's conflict-ridden world remains, astonishingly, among the most peaceful in modern history.

An important caution is in order here. The decline in direct physical violence (negative peace) does not indicate the absence of structural violence (positive peace).⁵² The claim that today's world is among the most peaceful in recent history refers solely to negative peace; we are still a long way away from positive peace.

III.

SOVEREIGNS AS ROBBERS, GODS, AND PROTECTORS

We might think that the State is an improbable instrument for keeping peace. One classic view holds that a State is nothing but a criminal enterprise that has defeated other criminal enterprises and been legitimated by time and habit. In *The City of God*, Augustine writes: "What are kingdoms but great bands of robbers? What are bands of robbers themselves but little kingdoms? . . . If . . . [a band of robbers] acquires territory . . . and subjugates peoples, it assumes the name of kingdom more openly."⁵³ David Hume concurs: "Almost all the governments which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both."⁵⁴ In Hume's eyes, people obey Leviathan out of unreflective habit, not consent, and Leviathan secures its dominion "by employing, sometimes violence, sometimes false pretences."⁵⁵ Charles Tilly updates Augustine's robber theory with a different criminal analogy: "If protection rackets represent organized crime at its smoothest, then war risking and state making—quintessential protection rackets with the advantage of legitimacy—qualify as our largest examples of organized

50. See *supra* note 3; PEACE RSCH. INST. OSLO (PRIO), *Data on Armed Conflict*, <https://www.prio.org/Data/Armed-Conflict/>; UPPSALA UNIV, DEP'T OF PEACE & CONFLICT RSCH., *Uppsala Data Conflict Program (UDCP)*, <https://www.pcr.uu.se/research/ucdp/>.

51. PINKER, *supra* note 45, at 302. See the UDCP/PRIO data summarized by PINKER, 298–305. See also SIKKINK, *supra* note 11, at 186–88. For detailed data on intra-state wars, see generally JEFFREY S. DIXON & MEREDITH REID SARKEES, *A GUIDE TO INTRA-STATE WARS: AN EXAMINATION OF CIVIL, REGIONAL, AND INTERCOMMUNAL WARS, 1816–2014* (2016), a product of the long-running Correlates of War project.

52. On the distinction between negative and positive peace, see, e.g., Devon Curtis, *Introduction: The Contested Politics of Peacebuilding in Africa*, in *PEACEBUILDING, POWER, AND POLITICS IN AFRICA 6* (Devon Curtis & Gwinyayi A. Dzinesa eds., 2012).

53. AUGUSTINE OF HIPPO, *THE CITY OF GOD AGAINST THE PAGANS*, Bk. IV, ch. 4, 147–48. (R. W. Dyson ed. & trans. 1998).

54. DAVID HUME, *OF THE ORIGINAL CONTRACT*, in *ESSAYS: MORAL AND POLITICAL* 471 (Eugene F. Miller ed. 1985).

55. *Id.*

crime."⁵⁶ States put their people at risk of war and then extort wealth and obedience as the price of protection.

Call this cynical line of thought the "deflationary view of the State." It certainly corresponds with one strand of international law: the doctrine that sovereignty over a territory requires effective control, with no additional requirement of good, or even mediocre, governance.⁵⁷ Even deflated States with no concern for their inhabitants' well-being or rights enjoy sovereign equality with other States, so long as they effectively control their territory and people.

At the other extreme from the deflationary view are those who identify the State with the nation (that is, the people), and view it with reverence, as if it were a god—a political theology closely identified with nationalism.⁵⁸ Call this the "romantic view of the State," although one might also label it the "overinflated view of the State."⁵⁹ All too frequently, the opposite views meet: tyrants and kleptocrats invoke the romance of the nation-state as a smokescreen for what is in reality a large criminal enterprise.

Is there any way to pump oxygen into the deflated state without embracing the metaphysical and theological excesses of the romantic view? The best-known answer lies in the spirit of the UDHR: what begins as a band of criminals becomes a legitimate sovereign not simply by controlling territory, but by also respecting and promoting the human rights of its people. UN Secretary General Kofi Annan articulated this now-familiar view in his 1999 address to the UN's General Assembly:

State sovereignty, in its most basic sense, is being redefined The State is now widely understood to be the servant of its people, and not vice versa. At the same time, individual sovereignty—and by this I mean the human rights and fundamental

56. Charles Tilly, *War Making and State Making as Organised Crime*, in BRINGING THE STATE BACK IN 169 (Peter Evans, Dietrich Rueschemeyer, & Theda Skocpol eds., 1985).

57. The classic legal statement of effective control is Max Huber's *Island of Palmas* arbitral decision, 2 R. Int'l Arb. Awards 869 (Perm. Ct. Arb. 1928). The dispute is noteworthy: the United States and the Netherlands each claimed ownership over a tiny island also known as Miangas, located between the Philippines and Indonesia. *See id.* at 835–36. The United States' argument was based on the idea that Spain "discovered" the island in 1526 and claimed it, ceding it to the United States after the Spanish-American War. *Id.* at 836–37, 843–45. The Dutch claim was that it had ruled the East Indies, including Miangas, since 1677. *Id.* at 836–38. Huber found for the Netherlands because it had exercised effective control; and by that, he explained, is meant effective protection of foreign interests. *See id.* at 867–69. Even the bare hint that the 750 residents of Miangas should have a say is absent from the decision—as is the idea that effective control might require good governance from the inhabitants' point of view.

58. Some have argued that statism is not a secularized theology but the opposite: a deification of the secular State. *See, e.g.*, ERNST H. KANTOROWICZ, *THE KING'S TWO BODIES: A STUDY IN MEDIEVAL POLITICAL THEOLOGY* (1957); PAUL W. KHAN, *POLITICAL THEOLOGY: FOUR NEW CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (2011); PAUL W. KAHN, *SACRED VIOLENCE: TORTURE, TERROR, AND SOVEREIGNTY* (2008); CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY*.

59. David Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980).

freedoms of each and every individual ... —has been enhanced....⁶⁰

This view of State legitimacy through human rights is usually called "conditional sovereignty," or "sovereignty as responsibility" (the latter term coined by Francis Deng three years before Annan's speech).⁶¹ These are subtly different concepts, but we can treat them both as articulations of Annan's reformulation of sovereignty.⁶² The condition of sovereignty under this conception is that States are servants of their peoples, and in particular, protectors of their human rights; the State's sovereign responsibility is to respect, protect, and fulfill its own peoples' rights.

To be clear, Deng's and Annan's reformulation of sovereignty as responsibility does not mean that despotic States that violate the condition will forfeit international recognition of their statehood. Diplomacy with despotic, kleptocratic, or racist governments is just as crucial as it is with those that are servants of their people. The criteria of statehood must therefore remain those of the 1933 Montevideo Convention: "a permanent population" in "a defined territory," a "government" (good, bad, or ugly), and the "capacity to enter into relations with other States."⁶³ But recognizing a despotism as a State is not the same as conceding a sovereign right of its government to behave despotically.⁶⁴ Like all States, despotisms are protected under the Charter from military aggression, so declaring that they fail the test of sovereignty as responsibility does not license invasion or conquest.⁶⁵ But States cannot invoke sovereignty to shield themselves from lesser forms of international pressure, such as sanctions or "outcasting" in response to their human rights failings—or, for that matter, measures imposed by the Security Council under Chapter VII, including referral to the ICC.⁶⁶ Sovereignty as responsibility, as formulated by Deng and Annan, is a moral advance over sovereignty as control, but both are conceptions of sovereignty within an international order based on sovereign States. They are by no means a radical revision of the State-based order.

The Deng-Annan formulation of sovereignty is contemporary, as is the focus on human rights; but the idea behind it is much older. Earlier I quoted Augustine's memorable description of kingdoms as great bands of robbers, but I intentionally

60. Secretary General Address, Sept. 20, 1999, <https://www.un.org/press/en/1999/19990920.sgs7136.html>.

61. See FRANCIS M. DENG ET AL., *SOVEREIGNTY AS RESPONSIBILITY: CONFLICT MANAGEMENT IN AFRICA* (1996).

62. "Conditional sovereignty" suggests that the baseline concept of sovereignty remains Westphalian, with side-constraints layered onto it. "Sovereignty as responsibility" is closer to Deng's and Annan's idea, which is that baseline sovereignty itself has metamorphosed away from Westphalian sovereignty.

63. Montevideo Convention on the Rights and Duties of States (1933), art. 1.

64. I am grateful to Miriam Gur-Arye and Carlos Vázquez for suggesting this clarification.

65. UN Charter, art. 2(4).

66. See generally Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L. J.* 252 (2011) (explaining and developing the term "outcasting").

excluded the beginning of his sentence: "*Justice removed then, what are kingdoms [regna] but great bands of robbers?*"⁶⁷ Just kingdoms are a different matter, because just rulers have the interests of the ruled in mind.⁶⁸ James Turner Johnson has argued that the notion of sovereignty as responsibility for the common good has medieval roots.⁶⁹ Even so, sovereignty as responsibility struck many as a dramatic change from the conception of sovereignty that had prevailed for more than a century. The diplomats in the audience for Annan's speech gave it a chilly reception—perhaps the best evidence of how novel this conception seemed.⁷⁰

Novel or not, the Deng-Annan reconceptualization of sovereignty gave rise to current doctrines of "responsibility to protect" (R2P). The responsibility to protect doctrine originated in a 2001 report by a Canadian-sponsored international group of experts, the International Commission on Intervention and State Sovereignty (ICISS) on the issue of humanitarian military intervention by outsiders in internal armed conflicts.⁷¹ This was a pressing issue in the wake of the Balkan wars and Rwandan genocide of the 1990s. One key question was whether outside intervention can be reconciled with respect for the sovereignty of the conflict-ridden State, to which ICISS answered yes.⁷² Echoing Deng and Annan,⁷³ it argued that the UN order transformed the Westphalian concept of sovereignty as control to sovereignty as responsibility, in particular, responsibility to protect against gross human rights violations.⁷⁴ Sovereignty under either conception implies that States themselves bear the primary responsibility to prevent humanitarian catastrophes within their borders, to react when they happen, and to rebuild in their wake. But under sovereignty as responsibility, the international community serves as a backstop when the State itself fails, with outside military intervention as a remedy of last resort if lesser measures of pressure or assistance prove unavailing. ICISS's conceptual innovation is that once we reimagine sovereignty as responsibility rather than control, humanitarian

67. AUGUSTINE OF HIPPO, *supra* note 53, at 147–48.

68. For Augustine, the virtue of justice is "to give each man his due." *Id.* at 921 (bk. XIX, ch. 4).

69. JAMES TURNER JOHNSON, SOVEREIGNTY: MORAL AND HISTORICAL PERSPECTIVES 9 (2014). *See*, for example, the passages from Aquinas quoted in *id.* at 38–39.

70. Annan was rebutted bluntly in the UN by Algeria's president Abdelaziz Bouteflika, who was also chair of the Organization of African Unity: "[W]e remain extremely sensitive to any undermining of our sovereignty." Barbara Crosette, *U.N. Chief Wants Faster Action To Avoid Slaughter in Civil Wars*, N.Y. TIMES (Sept. 21, 1999), <https://timesmachine.nytimes.com/timesmachine/1999/09/21/issue.html>; A decade later, James Traub recalled the "stinging reception" of Annan's speech. James Traub, *The Perversion of Sovereignty*, GLOB. POL'Y F. (Mar. 4, 2009), <https://www.globalpolicy.org/component/content/article/172/30577.html>.

71. ICISS Report, *supra* note 43.

72. *Id.*, §§ 1.35–1.36, p.8; §§ 2.25–2.27, p. 16.

73. *See* DENG ET AL., *supra* note 61 and accompanying text.

74. ICISS Report, *supra* note 43, § 2.14, p. 13.

intervention when a State does not or cannot discharge its responsibility to protect is not a violation of its sovereignty.⁷⁵

IV.

THE NEW THREATS TO PEACE

Can the sovereign State, under either conception of sovereignty, maintain the peace under present conditions? My answer is no, because today's threats to peace transcend the boundaries and powers of States, including States committed to human rights. To respond to these threats, we need a third conception of sovereignty, which includes State responsibility to cooperate across borders to control transnational threats to peace.⁷⁶

What are those threats? To answer that question, I draw from demographers, futurologists, and, above all, from writings by people whose business it is to foresee future threats to peace: military planners looking twenty or more years out.⁷⁷ The following discussion focuses on two factors: social conditions that generate armed conflicts and new military technologies.

75. I discuss the plusses and minuses of humanitarian intervention, and its connection with sovereignty concepts, in David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE AND TRANSNATIONAL POLITICS: ESSAYS ON THE MORAL AND POLITICAL CHALLENGES OF GLOBALIZATION 79–115 (Pablo de Greiff & Ciaran Cronin, eds., 2002). For a sophisticated recent analysis, see NED DOBOS, *INSURRECTION AND INTERVENTION: THE TWO FACES OF SOVEREIGNTY* (2012).

76. By transnational threats, I do not mean solely exogenous threats emanating from foreign sources. Transnational threats include endogenous behaviors that provoke other States to respond in a way that harms the prospects for peace. For example, a high-consuming developed State might promote commercial practices in weaker, resource-cursed developing States that elicit violence and instability—in which case, the seemingly-exogenous threat emanating from a civil war in the weaker State could also, and rightly, be regarded as endogenous to the developed State. My thanks to Sarah Nouwen for emphasizing this point.

77. The most useful I have found are the UK MINISTRY OF DEFENCE, GLOBAL STRATEGIC TRENDS – OUT TO 2045 (5th ed. 2014) [henceforth: GST 5], https://espas.secure.europarl.europa.eu/orbis/sites/default/files/generated/document/en/MinofDef_Global%20Strategic%20Trends%20-%202045.pdf, along with UK MINISTRY OF DEFENCE, GLOBAL STRATEGIC TRENDS – THE FUTURE STARTS TODAY (6th ed. 2018) [henceforth: GST 6], https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771309/Global_Strategic_Trends_-_The_Future_Starts_Today.pdf. I also draw on similar documents produced by the US intelligence community and think-tanks: US Joint Chiefs of Staff, *Joint Operating Environment 2035 (JOE 2035): The Joint Force in a Contested and Disordered World* (Jul. 14, 2016), https://www.jcs.mil/Portals/36/Documents/Doctrine/concepts/joe_2035_july16.pdf?ver=2017-12-28-162059-917; David T. Miller, *Defense 2045: Assessing the Future Security Environment and Implications for Defense Policymakers*, CTR. FOR STRATEGIC AND INT'L STUDIES (CSIS 2015), https://csis-prod.s3.amazonaws.com/s3fs-public/legacy_files/files/publication/151106_Miller_Defense2045_Web.pdf; ATLANTIC COUNCIL, *Global Risks 2035: The Search for a New Normal* (2016), <https://www.atlanticcouncil.org/in-depth-research-reports/report/global-risks-2035/>; U.S. NAT'L INTEL. COUNCIL (NIC), *Global Trends 2030: Alternative Worlds* (Dec. 2012),

A. *The Fall in Global Poverty and the Changing Character of Work*

In what follows, I argue that vast and undeniable improvements in human welfare and human rights over the past half-century have generated unintended consequences that threaten peace, security, and—paradoxically—some of the same hard-won rights. A good place to begin is with what surely counts as one of the greatest human rights achievements in history: the dramatic fall in global poverty over the last half-century.⁷⁸ In 1970, sixty percent of the world's population lived in extreme poverty; today, it is less than ten percent.⁷⁹ The fall in poverty can be attributed to industrialization, technology, and advances in agriculture. Not only has poverty fallen, but life expectancies have risen dramatically.⁸⁰ For example, a Frenchwoman today has a life expectancy forty years longer than a century ago.⁸¹

In obvious ways, women's rights have advanced in the UN era.⁸² An important paradigm case is the right to vote: almost seventy percent of the world's States granted suffrage to women only after 1945.⁸³ Advancing women's rights confers a collateral benefit to peace: there is evidence that States with greater gender equality are less likely to resort to force in international crises than States with less gender equality.⁸⁴ One analyst offers women's enfranchisement as a partial explanation: women voters are less supportive of warfare than men—five to fifteen percent less, according to surveys in Western democracies.⁸⁵ That is enough to make politicians responsive, at least in countries with competitive elections.

https://www.dni.gov/files/documents/GlobalTrends_2030.pdf. An important caveat: long-range forecasts are almost certain to be unreliable. On this point, see PHILIP TETLOCK & DAN GARDNER, SUPERFORECASTING: THE ART AND SCIENCE OF PREDICTION 4 (2015). This is a point of emphasis in GST 6, *supra*, at 9–11, 13. These studies should therefore be regarded as projections of current trends rather than predictions, and my own depiction of future scenarios should be understood the same way.

78. The Visual History of World Poverty, slide 8, at <https://ourworldindata.org/slides/world-poverty/#/declining-world-poverty-1820-2015-step1>.

79. *Id.* Not only is the percentage living in extreme poverty lower, the absolute numbers have fallen by two-thirds since 1970. *Id.* The fall in poverty is especially conspicuous in China, where in 1990, 98.3 percent of the population lived on less than \$5.50 per day, while in 2017, the percentage is 27.2 percent. Visual History of World Poverty, *supra*, at slide 10. World Bank data is summarized at <https://www.macrotrends.net/countries/CHN/china/poverty-rate>.

80. NAT'L INST. OF AGING ET AL., GLOBAL HEALTH AND AGING 6–7 (2011), https://www.who.int/ageing/publications/global_health.pdf?ua=1. For a graphic display of increases in life expectancy in all countries from 1960 to 2016 (based on World Bank data), see *Life Expectancy*, OUR WORLD IN DATA, <https://ourworldindata.org/grapher/life-expectancy-at-birth-total-years?year=latest>.

81. NAT'L INST. OF AGING ET AL., *supra* note 80, at 7, Figure 4.

82. Moreover, Beth Simmons has marshalled evidence that international human rights law has contributed to this advance in some countries. SIMMONS, *supra* note 31, ch. 6.

83. See the timeline in WOMEN SUFFRAGE AND BEYOND, *The Women Suffrage Timeline*, https://womensuffrage.org/?page_id=69.

84. GST 5, *supra* note 77, at 5–6.

85. AZAR GAT, WAR IN HUMAN CIVILIZATION 606–07 (2006).

Yet these advances generate new threats to peace, in the form of unintended consequences, which are what I want to focus on. Better health and greater longevity allow older workers to work longer. But that has the unintended consequence of freezing youth out of job markets, and unemployment is a source of social unrest.⁸⁶ Automation likewise kills low-skill jobs, and this may become even more pronounced as artificial intelligence becomes more sophisticated.⁸⁷ Young men have always been the most violent segment of humanity.⁸⁸ Although evidence is inconclusive about whether unemployment correlates with violent crime, the lack of alternative economic opportunities makes unemployed youth fertile ground for recruiting insurgent or otherwise irregular soldiers in politically unstable countries.

These unintended consequences generate stresses that threaten both rights and social stability. One result is a backlash against women's rights.⁸⁹ Another is hatred of immigrants and resentment of foreigners, who are seen (often wrongly) as economic competitors or, alternatively, as welfare moochers. In the developed world, unemployed young men threaten social stability; in the developing world,

86. Aimee Picchi, *More Americans are Working into Old Age*, CBS NEWS (Dec. 19, 2019, 11:34 AM), <https://www.cbsnews.com/news/more-americans-are-working-into-old-age/>.

87. The usual rejoinder is that automation also creates new jobs. That may be true, but it is far from obvious that those whose jobs have been killed can transition to those new jobs.

88. This conclusion (confirming common experience) comes from the confluence of two strands of research—one on gender differences in rates of serious physical violence and the other on age differences. Pinker notes two large studies concluding that "countries with a larger proportion of young men are more likely to fight interstate and civil wars." PINKER, *supra* note 45, at 688 (citing J. D. Fearon & D. D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 APSR 75 (2003) and C. G. Mesquida & N. I. Wiener, *Human collective aggression: A behavioural ecology perspective*, 17 ETHOLOGY & SOCIOBIOLOGY 247 (1996)). As for gender, military historian John Keegan observes that "[i]f warfare is as old as history and as universal as mankind, we must enter the supremely important limitation that it is an entirely masculine activity." JOHN KEEGAN, *A HISTORY OF WARFARE* 76 (1993); a more nuanced and detailed evaluation, reaching roughly the same conclusion, may be found in GAT, *supra* note 85, at 79–86. Outside of war, anthropological evidence indicates that "violence is mostly committed by men." SAPOLSKY, *supra* note 45, at 323 (summarizing findings in BOEHM, *supra* note 45, about contemporary hunter-gatherer societies—thought by many anthropologists to be the closest socially and behaviorally to the hunter-gatherer societies that were all humans' evolutionary ancestors; *see also* GAT, *supra* note 85, at 3–55). Pinker's discussion of gender and violence, PINKER, *supra* note 45, at 684–89, concurs on "the most fundamental empirical generalization about violence, that it is mainly committed by men." *Id.* at 684.

On age differences, "late adolescence and early adulthood are when violence peaks". SAPOLSKY, *supra* note 45, at 170. "As has been said, the greatest crime-fighting tool is a thirtieth birthday." *Id.* Contemporary US crime statistics bear this out. In 2018, for example, 40 percent of arrests for murder and manslaughter and 25 percent of arrests for aggravated assault were of suspects between the ages of 15 and 24. OFF. OF JUV. JUST. AND DELINQ. PREVENTION, *Arrests by offense, age, and gender*, https://www.ojjdp.gov/ojstatbb/crime/ucr.asp?table_in=1.

These statistics lump together all arrests of individuals 25 or older; one supposes that 25-to-30 year olds make up an additional sizable share of the murder and aggravated assault arrests. Of these arrests, male aggravated assault arrests outnumbered female arrests three-to-one, and male murder arrests outnumbered female arrests by more than seven-to-one. *Id.*

89. This was already evident decades ago. *See* SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (2006) (analyzing the backlash against feminism).

demobilized soldiers and militiamen who have no skills except fighting pose a perpetual menace.⁹⁰ Meanwhile, the aging population strains the resources of the developed world.

B. Urbanization

Next, consider the worldwide tendency toward intense urbanization. Already, city-dwellers outnumber rural populations, and some demographers predict that by 2045 seventy percent of the world's population will live in cities.⁹¹ The Chinese government forecasts that in China alone, somewhere between 250 and 300 million people will move from rural to urban areas in the next fifteen years.⁹² The number of mega-cities, that is, cities with populations over 10 million, has tripled in the last quarter century. Furthermore, the UN predicts that, by 2030 there will be 41 mega-cities, mostly in the global South (there were 31 mega-cities in 2016).⁹³

The problem, based on extrapolating current trends, is that many of these cities will contain vast slums and shantytowns, with distressed infrastructure and impure water. In regions where central governments are weak, these slums will be nearly ungovernable, plagued by crime and violence, and filled with desperate, restless people.⁹⁴ Overcrowding makes disease more likely to spread, and we are now living through the proof that travelers can swiftly turn local epidemics into global pandemics. Pandemics are not only devastating threats to well-being; they are threats to global stability as well, carrying the possibility of panics and military responses.⁹⁵

C. Climate Change, Inequality, and Global Migration

The threat that climate change poses to individual well-being and international peace is well known. In its broadest terms, climate change will make

90. This was a matter of particular concern to humanitarian organizations trying to reintegrate demobilized soldiers, especially child soldiers, in the wake of West African wars. *See generally* MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2012).

91. GST 5, *supra* note 77, at 17.

92. *Id.*

93. U.N., DEP'T OF ECON. AND SOC. AFFS., POPULATION DIV., THE WORLD'S CITIES IN 2016 – DATA BOOKLET ii, 2, https://www.un.org/en/development/desa/population/publications/pdf/urbanization/the_worlds_cities_in_2016_data_booklet.pdf.

94. *See, e.g.*, GST 5, *supra* note 77, at 17–19.

95. The pandemic has certainly caused panic, and some heightened military tension, although not direct military responses such as militarily-enforced quarantines. For further discussion of the COVID-19 pandemic, including the heightened military tension, see the Epilogue to this Essay, *infra*. On pandemics as security threats, *see, e.g.*, JOE 35, *supra* note 77, at 9, 38; GST 6, *supra* note 77, at 56, 66–67. The Obama administration recognized global pandemics as a security threat in its national security strategies. *See, e.g.*, WHITE HOUSE, NATIONAL SECURITY STRATEGY 16, 48–49 (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

some parts of the Earth, especially the poorest, unable to sustain their human populations. Coastal plains will flood; semi-arid regions will become deserts.⁹⁶ If catastrophic storms proliferate, ever-larger numbers of people will be internally displaced.⁹⁷ Other forms of environmental degradation and pollution threaten water supplies. For example, one research team claims that two-thirds of the world's people currently face severe water shortages.⁹⁸ Already, the Chinese government reports that four-fifths of the well water in China is unfit to drink or bathe in.⁹⁹

The threat to peace arising from these developments is obvious: as resources and living space become more scarce, environmental and climate refugees will flee from unlivable regions into countries that do not want them, and, in some cases, cannot support them. This will serve as an invitation to violence, confinement, or even genocide. Those who cannot leave may plunge their countries into civil conflicts, as some believe was the case in Darfur during the drought of the early 2000s.¹⁰⁰ Civil conflicts themselves can and do create mass migrations of refugees. Today, there are 20 million refugees, and twice that number of internally displaced persons.¹⁰¹

Growing economic inequality between rich and poor States is also likely to intensify migration. For that matter, growing inequality within States is a worldwide phenomenon.¹⁰² Endemic corruption contributes to inequality in many parts of the world.¹⁰³ A US military forecast warns that weak States will collapse into failed States through "a mix of real or perceived corruption, economic inequality, and ethnic/religious discrimination."¹⁰⁴ As a result, "violence is likely

96. See, e.g., GST 5, *supra* note 77, at 33–34 and sources cited therein.

97. Current research suggests that while climate change will not necessarily increase the frequency of hurricanes, it is likely to increase their intensity. Union of Concerned Scientists, *Hurricanes and Climate Change* (June 25, 2019), <https://www.ucsusa.org/resources/hurricanes-and-climate-change>.

98. Nicholas St. Fleur, *Two-Thirds of the World Faces Severe Water Shortages*, N.Y. TIMES (Feb. 12, 2016), <https://www.nytimes.com/2016/02/13/science/two-thirds-of-the-world-faces-severe-water-shortages.html>.

99. *Four-fifths of China's water from wells 'unsafe because of pollution'*, THE GUARDIAN (Apr. 12, 2016), <https://www.theguardian.com/environment/2016/apr/12/four-fifths-of-chinas-water-from-wells-unsafe-because-of-pollution>.

100. See U.N. ENV'T PROGRAMME (UNEP), SUDAN: POST-CONFLICT ENVIRONMENTAL ASSESSMENT 8 (2007), https://postconflict.unep.ch/publications/UNEP_Sudan.pdf. This report can be faulted for ignoring the political and social causes of the conflict.

101. UNHCR, *Figures At A Glance*, <http://www.unhcr.org/en-us/figures-at-a-glance.html>. The 20 million figure refers to those under UNHCR's mandate, with an additional 5.6 million Palestinian refugees under UNRWA's mandate. *Id.*

102. See generally Thomas Piketty & Emmanuel Saez, *Inequality in the Long Run*, 344 SCI. 838 (May 23, 2014), <http://science.sciencemag.org/content/344/6186/838.full>.

103. JOE 2035, *supra* note 77, at 8.

104. *Id.*

to occur in the form of sectarian strife, insurgency, or civil war."¹⁰⁵ Thomas Piketty, perhaps the most comprehensive student of economic inequality, warns of "the violent political conflict that inequality inevitably instigates."¹⁰⁶

D. *The Democratization of Violence*

The final threat to peace that I want to discuss is the development of new military technologies. In doing so, I will set aside the dangers of nuclear war, not because they are unimportant, but because they are obvious.¹⁰⁷ Instead, I will focus on a different set of developments: the proliferation of inexpensive, dangerous, and small-scale technologies outside of the control of States. Gabriella Blum and Benjamin Wittes label this proliferation the "[d]emocratization of [v]iolence."¹⁰⁸

The most obvious democratizers of violence are small arms and explosives. These are hardly novel technologies, although their proliferation was greatly accelerated by the vast sell-off of Soviet arsenals after the collapse of the Soviet Union.¹⁰⁹ But advanced hacking tools are a relatively new development, and the more societies come to depend on computers to control their infrastructures, the more vulnerable they become to cyberattacks.¹¹⁰ Cybertheft and ransomware already assault individuals and businesses, including in ways that have nothing to do with the theft of money. For example, internet predators extort sexual favors and photos by threatening to release embarrassing information obtained from indiscreet victims, often children—a crime common enough to have acquired its own name, sextortion.¹¹¹ These are all threats to individual rights, but they are

105. *Id.*

106. THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 3 (Arthur Goldhammer trans., 2013). This is a recurrent theme in Piketty's long book.

107. What is far from obvious is whether the existential deterrence that worked in the bilateral world of the Cold War can also work in a world with multilateral nuclear antagonists. In any event, uncertainty about rivals' nuclear capabilities gives nuclear-armed States incentives to continue nuclear arms races, and current US nuclear superiority may cause fearful rivals to compete fiercely in other arenas. *See generally* KEIR A. LIEBER & DARYL G. PRESS, *THE MYTH OF THE NUCLEAR REVOLUTION: POWER POLITICS IN THE ATOMIC AGE* (2020); Lieber & Press, *The New Era of Counterforce: Technological Change and the Future of Nuclear Deterrence*, 41(4) *INT'L SEC.* 9 (2017). These issues are beyond the scope of this Essay.

108. *See* BENJAMIN WITTES & GABRIELLA BLUM, *THE FUTURE OF VIOLENCE: ROBOTS AND GERMS, HACKERS AND DRONES* 115 (2015).

109. *Soviet Small Arms Land in Wrong Hands*, ABC NEWS (May 29, 2002), <https://abcnews.go.com/International/story?id=79968&page=1>.

110. BLUM & WITTES, *supra* note 108, at 54.

111. *See* U.S. FBI, *SEXTORTION IN THE UNITED STATES: A FACT SHEET FOR PARENTS AND CHILDREN* (July 2015) (defining "sextortion" as "a criminal act that occurs when someone demands something of value, typically images of a sexual nature, sexual favors, or money from a person"), <https://www.douglascountys.org/sites/default/files/media/depts/district-attorney/pdf/fbi-brochure-sextortion-of-children-united-states-fact-sheet-parents-and-children.pdf>, On this and related threats such as cyberstalking and cyberharassment, *see generally* DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* (2014).

also threats to peace if States suspect that hackers might be other hostile States concealing themselves as private criminals, or if hacker host-states are unwilling to repress their activity. State-against-State cyberwarfare has so far proven impossible to regulate, for both technical and strategic reasons.¹¹² If carried out on a large scale, cyberattacks on hospitals, power grids, cell phone networks, GPS systems, aircrafts, and computer-regulated dams and water stations could create mass casualties.¹¹³ Both State and non-State actors could carry out such attacks. On an entirely different technological front, biological weapons that attack food crops could cause famines, and the science needed to develop these weapons is already available to non-State actors.¹¹⁴ Electromagnetic pulse weapons may be capable of disabling communications satellites and GPS devices, as well as shutting down electrical grids.¹¹⁵

Closely related to other cyber-threats are the information wars that exploded into public consciousness in the wake of the 2016 US election. The possibility of hostile State or non-State actors manipulating big data and social media to sway elections, sow public discord, and spread fake facts is a painful reality.¹¹⁶ Visual images and videos can be altered, human voices can be impersonated, and the

112. The group of legal experts who wrote the most thorough treatment of international law and cyberwarfare, the Tallinn 2.0 Manual, left many areas of disagreement, even on the foundational question of whether respect for State sovereignty is a binding legal rule, rather than a non-binding principle.

113. BLUM & WITTES, *supra* note 108, at 23.

114. Tom Daschle & Richard B. Myers, *A Threat to the Food System*, U.S. NEWS & WORLD REP. (Oct. 17, 2016), <https://www.usnews.com/opinion/articles/2016-10-17/americas-food-supply-and-national-security-are-at-risk-to-bioterrorism>. On the more familiar issue of bioterrorism against humans, see, e.g., Christopher Chyba, *Biological terrorism and public health*, 43 SURVIVAL 93 (2001).

115. See, e.g., Robert Beckhusen, *Military Looks to Shield Its Satellites from Electromagnetic Attacks*, FOREIGN POL'Y (Jan. 3, 2014), <https://foreignpolicy.com/2014/01/03/military-looks-to-shield-its-satellites-from-electromagnetic-attacks/>; Trevor English, *What Are EMPs and How Are They Used in Warfare?*, INTERESTING ENG'G (Dec. 29, 2019), <https://interestingengineering.com/what-are-emps-and-how-are-they-used-in-warfare>. Some readers may be aware of the menace of EMPs from WILLIAM R. FORSTCHEN, *ONE SECOND AFTER* (2009), a techno-thriller about an EMP attack.

116. A knowledgeable and (frankly) terrifying overview is P.W. Singer & Emerson T. Brooking, *LIKEWAR: THE WEAPONIZATION OF SOCIAL MEDIA* (2018). Reportedly, both Russia and China have intentionally sowed disinformation in the United States regarding the coronavirus crisis. See, e.g., Julian E. Barnes et al., *As Virus Spreads, China and Russia See Openings for Disinformation*, N.Y. TIMES, (Mar. 28, 2020) (updated Apr. 10, 2020), <https://www.nytimes.com/2020/03/28/us/politics/china-russia-coronavirus-disinformation.html>; Robin Emmott, *Russia Deploying Coronavirus Disinformation to Sow Panic in West, EU Document Says*, REUTERS, (Mar. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-disinformation/russia-deploying-coronavirus-disinformation-to-sow-panic-in-west-eu-document-says-idUSKBN21518F>; DEUTSCHE WELLE (DW), *Is Russia running a coronavirus disinformation campaign?*, (Mar. 20, 2020) <https://www.dw.com/en/is-russia-running-a-coronavirus-disinformation-campaign/a-52864106> (reporting Russian news media blaming Latvian biologists and the British military for developing coronavirus); Edward Wong et al., *Chinese Agents Helped Spread Messages That Sowed Virus Panic in U.S., Officials Say*, N.Y. TIMES (Apr. 22, 2020), <https://www.nytimes.com/2020/04/22/us/politics/coronavirus-china-disinformation.html>.

very fact that these "deepfake" technologies are matters of public knowledge itself contributes to a mistrust of shared public reality.¹¹⁷ As Hannah Arendt observed decades ago, the real problem with large-scale public lying is not that it persuades us of falsehoods, but that it leads to "a peculiar kind of cynicism—an absolute refusal to believe in the truth of anything, no matter how well this truth may be established."¹¹⁸ Information warfare is particularly difficult for democracies to deter, regardless of cyber superiority, because their openness creates vulnerabilities that are hard to defend.¹¹⁹

As for State-on-State "kinetic" wars, they are likely to be quick and lethal.¹²⁰ Missiles fly fast, and short-range missile defense systems like Israel's Iron Dome will respond by becoming automated, creating the prospect of "machine-driven escalation[s]" comparable to machine trading duels on the stock market.¹²¹

Next, consider robotics.¹²² Miniaturized drones, the size of insects, already exist; I found one for sale on the Internet for \$119.¹²³ Soon, experts predict, they will be equipped with surveillance cameras or, potentially, with weapons.¹²⁴ Governments will have access to them, but so will extremist groups and mafias. For that matter, as Blum and Wittes warn, so will your creepy neighbor who uses

117. See, e.g., Cristian Vaccari & Andrew Chadwick, *Deepfakes and Disinformation: Exploring the Impact of Synthetic Political Video on Deception, Uncertainty, and Trust in News*, SOC. MEDIA & SOC. (Feb. 19, 2020), <https://journals.sagepub.com/doi/10.1177/2056305120903408>; Garfield Benjamin, *Deepfake videos could destroy trust in society – here's how to restore it*, THE CONVERSATION (Feb. 6, 2019), <https://theconversation.com/deepfake-videos-could-destroy-trust-in-society-heres-how-to-restore-it-110999>; Simon Kuper, *The age of scepticism: from distrust to 'deepfake'*, FIN. TIMES MAG. (Oct. 18, 2018), <https://www.ft.com/content/2fc9c1fa-d1a2-11e8-a9f2-7574db66bcd5>.

118. Hannah Arendt, *Truth and Politics*, in BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT 257 (rev. ed. 1968).

119. Jack Goldsmith & Stuart Russell, *Strengths Become Vulnerabilities* 8 (Hoover Institution Aegis Series Working Paper No. 1806 (2018)), <https://www.hoover.org/research/strengths-become-vulnerabilities> (arguing that the United States does not retaliate against cyberattacks because of "the fear of losing in escalation due to asymmetrical digital dependence"); see also Jack Goldsmith, *The Failure of Internet Freedom*, KNIGHT FIRST AMEND. INST. (Jun. 13, 2018), <https://knightcolumbia.org/content/failure-internet-freedom>.

120. In this connection, the sobering techno-thriller GHOST FLEET: A NOVEL OF THE NEXT WORLD WAR (2016), co-written by military analysts P. W. SINGER and AUGUST COLE, offers a fictional glimpse of a future China-US war, and the authors include a full set of footnotes documenting the technologies their novel incorporates into its story line.

121. See LUCAS KELLO, THE VIRTUAL WEAPON OF INTERNATIONAL ORDER 252 (2017).

122. In addition to BLUM & WITTES, *supra* note 108, see generally P. W. SINGER, WIRED FOR WAR: THE ROBOTICS REVOLUTION AND CONFLICT IN THE 21ST CENTURY (2009).

123. Jon Gabay, *Tiny, insect-like drones may be the future of surveillance*, ELEC. PRODS. (Mar. 30, 2017), http://www.electronicproducts.com/Robotics/Futurism/Tiny_insect_like_drones_may_be_the_future_of_surveillance.aspx.

124. SINGER, *supra* note 122, at 118.

his mini-drone to watch you on his smartphone as you undress, and then posts the video on Facebook.¹²⁵

Militaries are researching biological and mechanical enhancers that can make soldiers stronger, faster, unsleeping, and nearly impervious to pain.¹²⁶ Cognitive enhancements and drugs that deaden sympathetic emotions are also on the table.¹²⁷ It is hard to determine whether the US government is pursuing such weapons, but in 2015 a US defense official stated that "[o]ur adversaries, quite frankly, are pursuing enhanced human operations. And it scares the crap out of us, really. We're going to have to have a big, big decision on whether or not we are comfortable going that way."¹²⁸ Once enhancements come into State military use, it will be hard, if not impossible, to keep them out of the hands of warlords, mercenaries, and criminal cartels. Non-State actors will churn out weapons with 3D printers. Their enhanced foot soldiers will wear night-vision goggles and lightweight graphene body armor stronger than steel.¹²⁹ States may respond with autonomous weapons systems that choose their own targets—"killer robots," the regulation of which UN-sponsored experts are only beginning to explore.¹³⁰

Taken singly, each of these threats is worrying; together, they are the stuff of nightmares.

On the other hand, Blum and Wittes observe that defensive capabilities will also be widely dispersed among private actors.¹³¹ Governments already rely on private security firms to fight hackers, and NGOs operating in conflict zones hire private military contractors to protect them.¹³² You can defend yourself against insect drones with an electric fan or a fly-swatter (if you know the drone is there).

125. BLUM & WITTES, *supra* note 108, at 44.

126. See GST 5, *supra* note 77, at 89; PETER EMANUEL ET AL., U.S. ARMY DEVCOM, CYBORG SOLDIER 2050: HUMAN/MACHINE FUSION AND THE IMPLICATIONS FOR THE FUTURE OF THE DOD (2019).

127. JONATHAN D. MORENO, MIND WARS: BRAIN SCIENCE AND THE MILITARY IN THE 21ST CENTURY 135–62 (2012); see also *Creating Supermen: battlefield performance enhancing drugs*, ARMY TECH. (Apr. 14, 2013), <https://www.army-technology.com/features/featurecreating-supermen-battlefield-performance-enhancing-drugs/>.

128. Bob Work, *Deputy Secretary of Defense Speech*, CNAS DEF. F. (Dec. 14, 2015), <https://www.defense.gov/News/Speeches/Speech-View/Article/634214/cnas-defense-forum/>.

129. On graphene body armor, see Rebecca Boyle, *Bulletproof graphene makes ultra-strong body armour*, NEW SCIENTIST (Nov. 27, 2014), <https://www.newscientist.com/article/dn26626-bulletproof-graphene-makes-ultra-strong-body-armour/>. Graphene body armor is readily available for purchase on the internet.

130. The Convention on Conventional Weapons (CCW) has convened an expert group that, after three meetings, has come up with only tentative suggestions and inconclusive results.

131. BLUM & WITTES, *supra* note 108, at 56–73.

132. *Id.* On humanitarian organizations' use of private military contractors (PMCs), see P. W. SINGER, CORPORATE WARRIORS 82 (2003) (noting use of PMCs to protect World Vision International humanitarian operations in Sierra Leone and UNHCR operations on the Afghanistan border, and predicting increased reliance by humanitarians on PMCs).

E. Consequences

The net result of all these developments is an enormous challenge to the sovereign nation-state's monopoly on the legitimate means of violence. As Hobbes foresaw, that monopoly rests on a promise that Leviathan will protect our security.¹³³ But what if Leviathan cannot protect us, while private entities sometimes can? The UK Ministry of Defence predicts a long-term "erosion of [S]tate sovereignty,"¹³⁴ and Blum and Wittes ask a cogent question: "Can the [S]tate endure once it is unable to prevent the electrical grid from being shut down, the lethal spider drone from attacking you in the shower, or new or manipulated biological agents produced in garages anywhere in the world from threatening your health?"¹³⁵ Within a few years, the answer may be no.

The fact is that territorial sovereignty and the public-private distinction, both basic conceptual features of the sovereign nation-state, have already eroded to a significant degree. In many States, including strong States, traditional public functions are contracted out to private corporations—and large multinational corporations do not respect territorial boundaries. Neither, for that matter, do transnational criminal networks (some of which perform some of the social welfare functions of the State). Nor, obviously, does climate change. While States will remain the preeminent actors on the world stage for the foreseeable future, the image of more or less self-contained territorial sovereigns is no longer accurate.

This would be true *even if States did their best to keep the promise of respecting, protecting, and fulfilling their inhabitants' human rights*. The threats to peace brought on by climate change, mass migration, pandemics, and the democratization of violence transcend national boundaries. Other social generators of conflict—youth unemployment, intense urbanization in failing States, rising inequality, and backlash against women's rights—may lie beyond the power of any State to control unilaterally. For example, Piketty has argued that the best way to tackle rising economic inequality is through a global tax on capital.¹³⁶ Relying solely on local wealth taxes would fail because wealth can flee elsewhere. Piketty's proposal can be accused of political utopianism, but suppose we were to take it seriously, on the ground that ballooning inequality poses a threat to peace.¹³⁷ Obviously, such a global tax would require international cooperation and coordination.

133. See THOMAS HOBBS, *LEVIATHAN* 109–20, chs. 17 and 18. (Michael Oakeshott ed., 1957) (1651).

134. GST 6, *supra* note 77, at 16, 108.

135. *Id.* at 107. On this same theme, see MARTIN VAN CREVELD, *THE RISE AND DECLINE OF THE STATE* 354–414 (1999).

136. PIKETTY, *CAPITAL*, *supra* note 106, ch. 15.

137. See *supra*, Part IV.C.

V.

TWO OBJECTIONS

I foresee two objections to the above description of upcoming threats to peace: that it ignores issues of injustice, and that the threats are all, at bottom, threats to human rights—so that the project of guarding against them is simply an updated version of the UN project of peace through human rights.

Start with the first. You may have noticed that the words "justice" and "injustice" were absent from the preceding Part's catalogue of nightmares. I spoke only of future violence and what might instigate it, not of whether the violence might be justified. If young workers don't have jobs, if millions of people live in desolate shantytowns with no way out, and if inequalities cascade, are not anger and disruption justified? Even the UDHR, which is hardly a militant manifesto, warns that in the face of such deprivations, "man [may be] compelled to have recourse, as a last resort, to rebellion."¹³⁸ By contrast, antiseptic terms like "stability" and "instability" seem like the amoral vocabulary of defense intellectuals on the side of the status quo.

I accept that violence can sometimes be just; elsewhere, I have argued that the struggle for basic human rights can be a just cause for war.¹³⁹ But it hardly follows that the violence arising from the forecasts catalogued above will be in the service of justice. Ransomware hackers are not freedom fighters. Biologically-enhanced mercenary soldiers will fight for whomever pays them to fight. Criminal gangs armed with high-tech weapons will kill for the reasons criminal gangs have always killed. And States have never waged wars to rectify economic injustices.

The point is not that justified violence could not happen—it is that much of the violence that *will* happen, even in the pursuit of a just cause, will not be justified. Indeed, it may be nearly impossible for a just rebellion to succeed without inflicting unjustified violence—for example, by forcibly conscripting foot soldiers, deliberately provoking government atrocities, or murdering rival rebel leaders.¹⁴⁰ Even a just war or rebellion waged in accordance with the *jus in bello* will be a human rights catastrophe. Homes are ruined, health care collapses, and decades of economic development are destroyed in a matter of weeks.

The second objection is that all the scary trends just described are fundamentally human rights problems, so that revising the existing conception of sovereignty as responsibility to protect human rights is unnecessary. Economic rights, environmental rights, and the right to nationality are human rights on par with rights to security against violence. If threats to these human rights are the future causes of violence and warfare, then the solution is what the UN order

138. See UDHR, *supra* note 12, Preamble, para. 3. Recall that the UDHR enshrines economic rights and rights to well-being, as well as civil and political human rights. *Id.* at art. 22–25.

139. David Luban, *Just War and Human Rights*, 9. PHIL. & PUB. AFF. 160 (1980).

140. Allen Buchanan, *The Ethics of Revolution and Its Implications for the Ethics of Intervention*, 41 PHIL. & PUB. AFF. 294 (2013).

already aims at: to respect, protect, and fulfill those rights. Recall that the rights-peace hypothesis claims that human rights will contribute to peace. Rather than challenging the rights-peace hypothesis, one might argue that today's threats confirm it.

Again, it is hard to disagree in the abstract, although I suspect that labeling climate change or pandemics as human rights violations is not a helpful extension of the core concept of human rights. Even if it were, the problem is that even conditional sovereignty envisages that each State will keep its own human rights house in order, with the international community functioning only as a complementary backstop—a point I elaborate in Part VII below.¹⁴¹ This model is palpably inadequate when the future threats to peace are thoroughly transnational and will require cooperative international responses. Whatever political structures evolve to cope with these threats will require a different way of conceptualizing State sovereignty and State responsibility.

VI.

SOVEREIGN RESPONSIBILITY TO HUMANITY: R2H

Today we cannot know what those institutional structures will be any more than those who first conceptualized the United Nations knew what the UN order with its many satellite institutions would look like half a century later. But it does seem possible to search for a legal and philosophical conception of State sovereignty suitable for the world we are rapidly approaching. It must be a form of sovereignty as responsibility not only for the human rights of a State's own citizens, but also responsibility for cooperating to control transnational threats to peace. Put another way, it is conditional sovereignty with an added condition: not only human rights protection at home, but also transnational cooperation to control emerging threats to peace (which may include cooperation to protect human rights abroad). My label for sovereignty understood on these lines is sovereignty as responsibility to humanity. I will use the abbreviation "R2H," in parallel with the "R2P" abbreviation for the Responsibility to Protect doctrine.

A few international lawyers have begun to conceptualize sovereignty along these lines. One proposal is Eyal Benvenisti's conception of sovereigns as trustees of humanity.¹⁴² Evan Criddle and Evan Fox-Decent develop a closely related

141. I use the word "complementary" deliberately. In the Rome Statute of the International Criminal Court, "complementarity" means that States themselves are the first resort for investigating and prosecuting ICC crimes committed on their territory or by their nationals. *See* art. 1, 17. The ICC can admit only those cases that states are unwilling or unable to prosecute. In the same way that the ICC is "complementary to national jurisdiction" (art. 1), the UN scheme of conditional sovereignty envisages international human rights enforcement solely as a complement to national enforcement.

142. Benvenisti, *supra* note 5. This proposal is the one that has most influenced my own thinking. Benvenisti summarizes his arguments in his Hague Academy lectures: EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* 121–44 (2014).

proposal under the title "fiduciaries of humanity."¹⁴³ There are differences between these proposals: Criddle and Fox-Decent focus principally on international organizations as fiduciaries of humanity, while Benvenisti focuses on States.¹⁴⁴ As a legal matter, the concept of fiduciary responsibilities has a wider scope than that of trusteeship, which exists only when a legal trust is formally established.¹⁴⁵ For present purposes, though, this difference is not crucial, because the heart of the responsibility is more or less the same: it involves responsibility to care for the interests of outsiders beyond the duty not to inflict unjustified harm, and beyond ordinary market relations between the parties.

In Benvenisti's imagery, "[i]n past decades the predominant conception of sovereignty was akin to owning a large estate separated from other properties by rivers or deserts. By contrast, today's reality is more analogous to owning a small apartment in one densely packed high-rise that is home to two hundred separate families."¹⁴⁶ Living in a global apartment building imposes responsibilities on each resident to others in the condominium, as well as mutual stewardship of the condominium as a whole.¹⁴⁷ What those responsibilities entail may be unclear, but at the very least, the residents are responsible for working together to alleviate threats to peace.

The question for us to consider is whether concepts like "trustee of humanity" or "fiduciary of humanity" offer a cogent expression of these responsibilities. Some of Benvenisti's critics complain that the concept of trusteeship reeks of colonialism and empire.¹⁴⁸ Historically, greedy European powers used trusteeship as legal cover to rule the lives and territories of indigenous people. The foreign trustee governed a territory for the supposed benefit of an allegedly "immature" native population, until it gained the maturity needed for self-

143. EVAN J. CRIDDLE & EVAN FOX-DECENT, *FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY* (2016).

144. On international organizations, see *id.* at 283–317. Criddle and Fox-Decent take States' most basic fiduciary obligations to run to their own people, not to humanity at large; but they do allow that under existing international law, sovereign States can be thought of as fiduciaries of humanity in certain contexts. These include international humanitarian law, *id.* at 171–74; the law governing detention of foreign nationals, *id.* at 212–14; and refugee law, *id.* at 265–81. See also Criddle & Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, in *FIDUCIARY GOVERNMENT* (forthcoming), available on SSRN at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040152. Cf. Benvenisti, *supra* note 5.

145. I am grateful to Criddle and Fox-Decent for clarifying the relationship. Private communications, Dec. 11, 2018.

146. Benvenisti, *supra* note 5, at 295.

147. In conversation, Benvenisti has proposed "stewardship" as an alternative word for "trusteeship," and I gratefully take the word from him.

148. CRIDDLE & FOX-DECENT, *FIDUCIARIES OF HUMANITY*, *supra* note 143, at 15–16; Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 *THEORETICAL INQUIRIES IN L.* 447 (2015); Evan Fox-Decent & Ian Dahlman, *Sovereignty as Trusteeship and Indigenous Peoples*, 16 *THEORETICAL INQUIRIES IN L.* 511 (2015). Benvenisti responds to these critiques in *The Paradoxes of Sovereigns as Trustees of Humanity: Concluding Remarks*, 16 *THEORETICAL INQUIRIES IN L.* 535 (2015).

determination. In reality, trusteeship was a system of exploitation and condescension, masquerading as benevolence.

But it is only the historical connotations of the word "trusteeship" that are objectionable, not the concept itself. That is because the model changes dramatically once we think of sovereigns as trustees not of a colonized people, but of *humanity* as a whole. Today, those former colonies are themselves sovereign States. Like all other States, they too would continue to exercise sovereignty over their own territory; but as trustees of humanity, they would do so with due regard for the legitimate interests of outsiders—as would all other States. To say sovereigns are trustees of humanity means that each and every State is now the trustee, not only the beneficiary, in the relationship. Sovereign trustees of humanity are therefore nobody's colonial or imperial subject, so the fear of imperialism or colonialism is unfounded. This is not to deny that sovereignty as responsibility to humanity could be invoked by powerful States as a pretext for international bullying or aggression. But that is equally true of other conceptions of sovereignty, including Westphalian sovereignty and sovereignty as responsibility. There are few legal or political ideas that cannot be abused; this should not prevent us from examining their merits and drawbacks in situations where they are not abused.

Whether the terminology is trusteeship, fiduciary obligation, or something else altogether, the root idea of R2H is an understanding that sovereignty entails responsibilities that transcend national borders. This Essay focuses on one special case: the responsibility to cooperate transnationally to manage threats to peace. But the more generalized conception of sovereignty underlying R2H seems well worth elaborating.

VII. FROM R2P TO R2H

It will assist our understanding of R2H to compare it with R2P. Recall that R2P originated with ICISS, a group of experts exploring the legitimacy of humanitarian intervention in the wake of the Balkan wars and Rwandan genocide.¹⁴⁹ The UN General Assembly quickly picked up ICISS's idea that States have a responsibility to protect their own people from "genocide, war crimes, ethnic cleansing, and crimes against humanity"—the four core crimes in the Balkan and Rwandan calamities. The Security Council affirmed this doctrine.¹⁵⁰ According to the official UN version of R2P, the responsibility to protect against core crimes has three "pillars."¹⁵¹ First, States themselves bear the

149. *See supra*, Part III. of this Essay.

150. 2005 World Summit Outcome, UNGA Res. 60/1, A/Res/60/1 (Oct. 24, 2005), §§ 138–39; UNSCR 1674 (2006), § 4.

151. Ban Ki-Moon, Implementing the Responsibility to Protect: Report of the Secretary-General, Jan. 12, 2009, UNGA A/63/677, § 11 (discussing three "pillars").

primary responsibility to protect their people from the core crimes.¹⁵² Second, the UN and its members carry out the international community's responsibility "to use appropriate diplomatic, humanitarian and other peaceful means . . . to help to protect populations" against these crimes.¹⁵³ Third, R2P authorizes States "to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter" if all else fails.¹⁵⁴ Such collective action includes military intervention as a last resort. The Security Council invoked R2P when it authorized the use of force to protect civilians in Libya, as well as to restore order in the Central African Republic and in Mali.¹⁵⁵

Whatever its virtues, R2P has conspicuous limitations and weaknesses. The UN version of R2P is narrower than the original ICISS proposal: the latter did not limit itself solely to the four core crimes (genocide, war crimes, ethnic cleansing, crimes against humanity), but spoke more generally of "deadly conflict and other forms of man-made catastrophe."¹⁵⁶ Furthermore, ICISS emphasized the proactive responsibility to *prevent* humanitarian catastrophes, not merely to react to them; and it called on the international community to help distressed States alleviate the root causes of violent internal conflict through development aid and rule of law assistance.¹⁵⁷ By contrast, the version of R2P endorsed by the Security Council is reactive, not proactive.

Notwithstanding the pages it rightly devotes to prevention, the ICISS report unmistakably focuses on humanitarian military intervention when States fail in their responsibility to protect.¹⁵⁸ That focus proved unfortunate. It means that in public discussions, R2P seems inevitably yoked to the last-resort remedy for humanitarian catastrophes: military force, prong three.¹⁵⁹ Debates over humanitarian military interventions will always eclipse the less exciting responsibility to prevent catastrophes by alleviating their root causes. This should hardly surprise us; as the journalistic maxim puts it, if it bleeds it leads, and military intervention bleeds in a way that rule-of-law or development assistance never will. Unfortunately, coupling R2P with humanitarian military intervention plays into the hands of cynical politicians who dislike the very idea of sovereignty

152. 2005 World Summit Outcome, *supra* note 150, § 138.

153. *Id.* § 139.

154. *Id.*

155. *See generally* UNSCR 1973 (2011) (Libya), 2085 (2012)(Mali), 2127 (2013)(Central African Republic).

156. ICISS Report, *supra* note 43, at 19, § 3.2. Later, however, the Report suggests that the important norm of non-intervention gives way only in the exceptional circumstances of core crimes. *Id.* at 31, §§ 4.12–13.

157. *Id.* §§ 3.3–.8, 3.18–.24.

158. *See id.* §§ 4.1–4.43.

159. *See* SIKKINK, *supra* note 11, at 189. JEAN L. COHEN warns that R2P "opens a Pandora's box" of "maximalist" claims, inviting "strategic, self-serving 'humanitarian' and 'democratic' interventions" in GLOBALIZATION AND SOVEREIGNTY 176–77 (2012).

as responsibility: it allows them to oppose R2P on the ground that it is a cover for military aggression.¹⁶⁰

The ICISS report focused on internal ("intra-state") conflicts, and this too narrows its scope.¹⁶¹ Certainly genocide and ethnic cleansing within a State represent the most dramatic failure of the State's responsibility to protect its people. But restricting R2P to internal conflicts suggests by negative implication that sovereigns have no responsibility to prevent *inter*-state (that is, international) conflicts, except via the UN Security Council, which is easily gridlocked by the P-5 veto power.¹⁶²

Thus, despite the worthy intentions of ICISS, R2P is too narrow, in the three ways just identified:

1. it focuses only on protection against core crimes,
2. principally in internal conflicts;

160. I do not mean to suggest that it is only cynical politicians who have this view. In 2019, Alfred de Zayas, a former Independent Expert appointed by the UN's Human Rights Council, tweeted: "The R2P 'doctrine' is nothing but a pretext for military aggression, which remains prohibited and a crime under the ICC statute, because #R2P cannot replace the #UN Charter and a pertinent Security Council resolution. But the media still peddles the 'fake legality' of R2P[.]" Twitter, March 2, 2019, <https://twitter.com/Alfreddezayas/status/1101829152045441027>. The tweet was in connection with US pressure on Venezuela, about which Zayas had written a scathing anti-intervention report. See UN Human Rights Council, Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order on His Mission to the Bolivarian Republic of Venezuela and Ecuador, Aug. 3, 2018, UNGA A/HRC/39/47/Add.1.

The tweet itself is built on a falsehood, because the R2P doctrine does not replace the UN Charter or bypass the Security Council. On the contrary, it permits military intervention only when authorized by the Security Council under its Chapter VII powers. World Summit Outcome, *supra* note 150, § 139; UNSCR 1674, *supra* note 150, § 4. Deceptive or not, the equation of R2P with military intervention is a view shared by others who suspect R2P is a pretext for Great Power aggression. See, e.g., Edward S. Herman, "Responsibility to Protect" (R2P): An Instrument of Aggression. *Bogus Doctrine Designed to Undermine the Foundations of International Law*, GLOB. RES. (Oct. 30, 2013), <https://www.globalresearch.ca/r2p-as-an-instrumt-of-aggression/5356195>.

161. ICISS Report, *supra* note 43, at 20, § 3.6.

162. The Security Council has indeed "identified potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction and the proliferation and illicit trafficking of small arms and light weapons." UNITED NATIONS SEC. COUNCIL, *Frequently Asked Questions*, Question 12 ("How does the Security Council determine the existence of any threat to the peace, breach of the peace, or act of aggression?"), at <http://www.un.org/en/sc/about/faq.shtml#threat>. But, except in the case of terrorism, it has taken no decisive action against generic threats. On terrorism, see, e.g., UNSCR 1373 (2001).

In 2008, Myanmar (Burma) refused to permit international aid to assist in the wake of a devastating cyclone. France called on the Security Council to compel Myanmar to grant access on the ground that such denial violated R2P. But the Security Council disagreed, with China, Russia, and South Africa as leading voices for the claim that France's proposal would violate Burmese sovereignty over a purely internal matter. See Roberta Cohen, *The Burma Cyclone and the Responsibility to Protect*, BROOKINGS INST. (July 21, 2008), <https://www.brookings.edu/on-the-record/the-burma-cyclone-and-the-responsibility-to-protect/>.

3. and—despite protestations to the contrary—it deflects too much attention to humanitarian military intervention at the expense of less drastic remedies.

Suppose, as a thought experiment, that we relax these limitations. Suppose that sovereignty as responsibility meant that sovereigns are responsible not just for atrocity-prevention but for broader enhancement of peace and human rights—and not just for peace and human rights domestically, but internationally as well. Indeed, suppose that sovereignty as responsibility includes States' responsibility to consider the global condominium in the conduct of all their affairs. In other words, expand the international community's responsibilities under the second prong of R2P beyond humanitarian catastrophes to all matters of grave international concern. Finally, suppose that the modal response to States that violate their responsibility is legal and political, not military.

That is R2H. If, gradually, R2H were to become our new "political imaginary" of sovereignty, State responsibility to cooperate transnationally in order to manage emerging lethal threats would follow as a corollary.

VIII.

R2H AND DEMOCRACY

Like other features of the political imaginary, sovereignty concepts do not change overnight, and they obviously do not change at the say-so of jurists and philosophers. They transform gradually and by inches, one micro-context at a time, responding to tangible needs. Each change presents itself as an unexciting tweak of the existing order, not a dramatic metamorphosis. For example, the World Trade Organization's (WTO) dispute-settlement tribunals have interpreted treaty language prohibiting members from discriminating against foreigners ambitiously, as an other-regarding obligation to take the interests of foreigners into account in policymaking.¹⁶³ For trade specialists, this was perhaps a big deal; but for everyone else it was a small technocratic adjustment, or a "my eyes glaze over" minor news item. And yet, if in a few decades R2H were to emerge as a coequal conception of sovereignty, on a par with sovereignty as control and conditional sovereignty, this line of WTO cases might in hindsight seem like a significant precursor. Viewed one way, this is a baby step. Viewed another way, the gradual accretion of baby steps can take us long distances.

Climate change offers an even more compelling illustration of the difference between R2H and a more nationalistic conception of State responsibility. The United States subjects federal regulations, including environmental regulations

163. Eyal Benvenisti & Sivan Shlomo Agon, *The Law of Strangers: The Form and Substance of Other-Regarding International Adjudication*, (GlobalTrust Working Paper 08/2017), <http://globaltrust.tau.ac.il/publications>.

pertaining to climate change, to cost-benefit analysis (CBA).¹⁶⁴ But in doing CBA, whose costs and benefits count? In the Obama administration, the CBA methodology used the *global* cost of methane and nitrous oxide emissions in its calculations.¹⁶⁵ That is because "climate change presents a problem that the United States alone cannot solve," and "adverse impacts on other countries can have spillover effects on the United States," including national security and humanitarian concerns.¹⁶⁶ Taking into account costs to other countries is a paradigmatic example of R2H thinking. By contrast, the more nationalistic Trump administration counts only domestic costs of greenhouse gas emissions, which dramatically tilts the CBA away from regulation because the benefits of abating emissions is less—not because the world is different, but because the CBA methodology is different.¹⁶⁷ Again, the difference is in regulatory minutiae, although, in this case, the impacts may be far greater than the WTO decisions, and the US policy change moves *away* from R2H rather than toward it.

The notion of sovereigns as trustees or fiduciaries of humanity raises thorny questions of political theory, which are the subject of a vast literature that I do not discuss here.¹⁶⁸ These questions include those of global governance, sovereignty, and the rule of law. R2H also raises thorny questions of practice. One, of course, is what incentive any State would have to fulfill its fiduciary obligations. The

164. The requirement to subject regulations to cost-benefit analysis comes from Exec. Order No. 12291, 3 C.F.R. 127 (1981); the requirement to regulate greenhouse gases was established in *Massachusetts v. EPA*, 549 U.S. 497 (2007).

165. INTERAGENCY WORKING GRP. ON SOC. COST OF GREENHOUSE GASES, ADDENDUM TO TECHNICAL SUPPORT DOCUMENT ON SOCIAL COST OF CARBON FOR REGULATORY IMPACT ANALYSIS UNDER EXECUTIVE ORDER 12866: APPLICATION OF THE METHODOLOGY TO ESTIMATE THE SOCIAL COST OF METHANE AND THE SOCIAL COST OF NITROUS OXIDE, (Aug. 2016), https://19january2017snapshot.epa.gov/sites/production/files/2016-12/documents/addendum_to_sc-ghg_tsd_august_2016.pdf, at 5.

166. *Id.*

167. Niina Heikinen, *EPA Revises the Social Cost of a Potent Greenhouse Gas*, SCI. AMER., (Nov. 20, 2017), <https://www.scientificamerican.com/article/epa-revises-the-social-cost-of-a-potent-greenhouse-gas/>. An op-ed writer harshly condemns this and other technical changes in CBA methodology as "accounting gimmicks" that "cooked the books." Catherine Rampell, *Forget the Trump Tweets. This is the Trump action that might actually kill us.*, WASH. POST, (Aug. 17, 2020), https://www.washingtonpost.com/opinions/forget-the-trump-tweets-this-is-the-trump-action-that-might-actually-kill-us/2020/08/17/e912c0ae-e0b8-11ea-b69b-64f7b0477ed4_story.html.

168. *E.g.*, COHEN, GLOBALIZATION AND SOVEREIGNTY, *supra* note 159; FRIEDRICH KRATOCHWIL, THE STATUS OF LAW IN WORLD SOCIETY: MEDITATIONS ON THE ROLE AND RULE OF LAW (2014); HANS LINDAHL, FAULT LINES OF GLOBALIZATION: LEGAL ORDER AND THE POLITICS OF A-LEGALITY (2013); Steven Bernstein, *Legitimacy in intergovernmental and non-state global governance*, 18 REV. INT'L POL. ECON. 17 (2011). Ethan J. Leib and Stephen R. Galoob have argued forcefully that fiduciary political theory is a bad fit with international law, because the former implies not only obligations on how States behave, but also how they deliberate, giving the beneficiary's interests pride of place in their deliberations. International law, by contrast, cares solely about compliance, not compliance for the right reasons. Leib & Galoob, *Fiduciary Political Theory: A Critique*, C 125 YALE L.J. 1820, 1825–44, 1868–77 (2016). Criddle and Fox-Decent respond in *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 YALE L.J. F. 192 (2016). They argue that Leib and Galoob have constructed an inaccurate model of fiduciary relations.

answer implicit in my argument is a form of enlightened self-interest: it is the only way to keep the peace in the face of transnational threats that States cannot manage unilaterally. But as with many schemes of collective action, participants have rational incentives to defect and free ride, as climate change treaties illustrate.¹⁶⁹ It will take great ingenuity in institutional design to overcome those incentives.

A deeper question is whether responsibility to humanity is consistent with responsibility to one's own people. What if a State's responsibility to its own citizens' welfare conflicts with its cosmopolitan responsibility as trustee of humanity? As France's Yellow Vests complained about Emmanuel Macron's environmentalism-guided gasoline tax, he's worried about the end of the world; we're worried about the end of the month.¹⁷⁰

How should sovereign trustees weigh the interests of their own citizens against those of "humanity"? Benvenisti avoids this question by restricting his proposal to cases where sovereigns can benefit outsiders at no cost to their own peoples.¹⁷¹ But what if satisfying cosmopolitan responsibilities cannot be done costlessly to one's own people?

The short answer is that one's own people are themselves part of humanity—they, too, are the beneficiaries of sovereign trustees' faithful stewardship. This Essay has emphasized State responsibilities to cooperate in managing threats to peace that transcend national borders. Managing emerging threats is in the medium-term self-interest of all peoples, even if cooperation requires short-term sacrifices and disruptions. The fiduciary responsibilities of States to their own people, like all fiduciary responsibilities, sometimes require balancing of the beneficiaries' short-term and longer-term interests, and sometimes that requires making short-term sacrifices to preserve the beneficiaries' situation over the long term.¹⁷² Doubly so when we consider that a sovereign's responsibility to its own people includes future generations, whose interests must not be discounted simply because they are temporally distant.¹⁷³ The sovereign fiduciary's beneficiary

169. See, e.g., David Roberts, *The Paris climate agreement is at risk of falling apart in the 2020s*, VOX (Nov. 5, 2019) (discussing collective action problems hampering Paris, Kyoto, and Copenhagen efforts at international agreements to alleviate climate change); Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?* 46 *ECOLOGY L. Q.* 865 (2019) and sources cited in *id.* at 870 n. 20 (discussing collective action problems in climate change mitigation efforts).

170. See Peter S. Goodman, *Inequality Fuels Rage of 'Yellow Vests' in Equality-Obsessed France*, N.Y. TIMES (Apr. 15, 2019), <https://www.nytimes.com/2019/04/15/business/yellow-vests-movement-inequality.html>.

171. Benvenisti, *supra* note 5, at 320–25. As he notes, this limitation corresponds to the requirement of weak Pareto efficiency.

172. Here I have in mind such everyday examples of fiduciary responsibility as a corporate board's balancing of short-term profits against long-term gains, or similar decisions by a trustee managing a minor's trust.

173. On this point, see Derek Parfit, *Energy Policy and the Further Future: The Social Discount Rate*, in *ENERGY AND THE FUTURE* 31 (Douglas MacLean & Peter Brown eds., 1983),

includes the grandchildren of current citizens—grandchildren who face threats to peace that grow more terrifying the longer governments delay managing them. But politicians notoriously focus on the near-term, not the further future—in part, no doubt, because the further future is hard to predict and therefore to plan for, but also for the less principled reason that unborn generations don't vote. And voters are unlikely to support tangible sacrifices on behalf of intangible descendants.

In that case, why not reject the idea that the democratic sovereign's responsibilities to its people includes distant generations, including distant generations of its own people?¹⁷⁴ To be sure, Edmund Burke wrote of "the great primeval contract of eternal society," calling it a "partnership not only between those who are living, but between those who are living, those who are dead, and those who are to be born."¹⁷⁵ Burke's rhetoric is powerful, but is it true? Set aside the Burkean partnership with one's ancestors ("those who are dead"); our question is about the alleged partnership with one's descendants—"those who are to be born." Do the living really have a "partnership" or "primeval contract" with them? What if the living don't recognize any such partnership?

It seems clear, though, that most people do care about future generations, even if worries about the end of the month inevitably crowd that sentiment out of consciousness. Perhaps it is obvious that future generations matter to us, but, if not, then consider a thought experiment proposed by the philosopher Samuel Scheffler.¹⁷⁶ Imagine that you somehow learned that thirty days after your own death an asteroid would destroy all human life—the "doomsday scenario."¹⁷⁷ What effect would that knowledge have on the meaningfulness of your daily strivings—everything from saving for your children's education, to having children at all, to curing cancer, to voting, to prayer (other than prayer for a world-saving miracle that will spare humanity)? Scheffler believes that it would destroy that meaningfulness, even though the hypothetical is constructed so that the asteroid would have no personal effect on you.¹⁷⁸ If Scheffler is right, as seems plausible, the doomsday thought experiment dramatizes how much the fate of future generations matters to our current lives and projects, even if we barely

<https://wmpeople.wm.edu/asset/index/cvance/parfit>. Economists standardly discount the value of investments in the further future because of lost opportunities in the nearer future. Parfit shows that using such a "social discount rate" to devalue future harms inflicted by our current practices is morally indefensible on any of the main arguments that might support it. "The moral importance of future events does *not* decline at *n* percent per year. A mere difference in timing is in itself morally neutral." *Id.*

174. See generally EDITH BROWN WEISS, IN FAIRNESS TO FUTURE GENERATIONS: INTERNATIONAL LAW, COMMON PATRIMONY AND INTERGENERATIONAL EQUITY (1989); OBLIGATIONS TO FUTURE GENERATIONS (R. I. Sikora & Brian Barry eds., 1979).

175. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE, ¶ 165 (many editions).

176. SAMUEL SCHEFFLER, DEATH AND THE AFTERLIFE 18–27 (2013).

177. *Id.* at 18–19.

178. *Id.* at 23–27.

recognize it.¹⁷⁹ Their fate matters to us, in the precise sense that Scheffler identifies: the meaningfulness of much that we do presupposes future generations.¹⁸⁰ Perhaps those that matter most are not the future generations of all people ("humanity"), but only "our" people—members of our own community, however broadly or narrowly we define it. That merely reinforces the point Burke was getting at: even though we cannot begin to guess how they will live or take up the heritage we bequeath them, the future generations of our community give meaning to our everyday projects.¹⁸¹

All this is to say that the Burkean contract with future generations expresses something deeply rooted in the human condition. Few doubt that a sovereign's responsibility to its people includes responsibility to those future generations—regardless of voters' and politicians' myopic short-termism. And so the argument that a democratic sovereign's responsibilities do not run to future generations falters, because it places weight only on voter's short-term preferences, excluding their less immediate but no less authentic tie to future generations.

But what if a State's own voters aren't on board with R2H because they are indifferent or hostile to outsiders? If a country's voters despise globalism, then R2H seems on a collision course with democratic self-governance. To this, too, there is a response: even under current international law there is no blanket right of democratic self-governance, if that implies that democratic majorities get to do whatever they want. If a country's voters want to launch an aggressive war or violate human rights, they cannot do it, regardless of their democratic will. Concededly, the "trustee of humanity" proposal is inconsistent with a robust right of democratic governance across the board. But there *is* no such a robust right. The examples of democratic majorities voting to launch aggressive war, or to massively violate human rights, show that international law recognizes no unrestricted and content-neutral human right of democratic decision-making: it depends on the decision.

When Thomas Franck wrote his pioneering article on the emerging right of democratic governance in international law, he understood it as a right to democratic multi-party elections, accompanying the rights to self-determination and free expression.¹⁸² He did not intend it as a right of democratic majorities to do whatever they choose, heedless of the interests of the rest of the world.¹⁸³

179. *See id.*

180. *Id.*

181. BURKE, *supra* note 175, at ¶ 165.

182. Thomas M. Franck, *The Emerging Right to Democratic Self-Governance*, 86 AJIL 63 (1992).

183. *Id.*

IX.

THE FALSE PROMISE OF REACTIONARY NATIONALISM

So far, I have argued that contemporary security threats require a different way of thinking about State responsibilities, and I have proposed responsibility to humanity as a political and legal reconception of sovereignty that embodies that way of thinking. Yet it would be obtuse to deny that in many countries nationalist fervor and mistrust of globalism push in just the opposite direction. The issue raised in the preceding Part about voter hostility to globalism requires us to consider in greater depth the allure of nationalism. If the preceding argument is right, nationalism in its present reactionary form is exactly the wrong direction for a realistic politics of peace.

By "reactionary nationalism," I mean a form of nationalism defined by most or all of the following:

1. An ethnic, racial, or religious definition of "nation" along the lines of the romantic view of the State, regardless of the ethnic mix that actually lives there.
2. An exaggerated focus on national pride and dignity, often paired with a prickly sense of (real or imagined) historical grievance.
3. A view of international affairs as overwhelmingly competitive and zero-sum, rather than cooperative, leading to . . .
4. . . . a mistrust of internationalism and globalism, often coupled with . . .
5. . . . a suspicion that internationalist projects, including international human rights and international criminal justice, are the handiwork of self-interested and predominantly Western elites, coupled with . . .
6. . . . a rejection of sovereignty as responsibility in favor of Westphalian sovereignty as control, including . . .
7. . . . a propensity to denounce all forms of external pressure, or even criticism from outsiders (especially about human rights), as an affront to sovereignty.
8. Illiberalism, receptiveness to strong-man rule, and concomitant disdain for rule-of-law values.
9. Cultural conservatism, especially anti-feminism, under the rubric of protecting the nation's religious and historical traditions.
10. Xenophobia.

Another name for this syndrome might be "populism," which Jan Werner-Müller defines as anti-elitist, anti-pluralist movements that claim the right to speak for "the people" and demonize those who disagree as enemies of the people.¹⁸⁴ However, not all reactionary nationalisms are populist—some, notably

184. See JAN WERNER-MÜLLER, *WHAT IS POPULISM?* 3–4 (2016). See also WILLIAM GALSTON, *ANTI-PLURALISM: THE POPULIST THREAT TO LIBERAL DEMOCRACY* (2018).

Chinese nationalism, are top-down. Contemporary reactionary nationalism bears a notable resemblance to the deadly "tribal nationalism" analyzed by Hannah Arendt in *The Origins of Totalitarianism*.¹⁸⁵ Domestically, tribal nationalism expresses a "perversion of the state into an instrument of the nation and the identification of the citizen with the member of the nation."¹⁸⁶ By "nation," Arendt means the dominant nationality, rather than all the State's inhabitants.¹⁸⁷ In foreign affairs, "[n]ational sovereignty, accordingly, lost its original connotation of freedom of the people and was being surrounded by a pseudomystical aura of lawless arbitrariness."¹⁸⁸ "Ethno-nationalism" comes closer than "populism," although it is not entirely accurate. Today's reactionary nationalism in India, for example, focuses on the Hindu religion, not on ethnicity.

Some may protest that all these negative-sounding labels are unfair to nationalism. "Moderate self-preference is the moral core of a defensible nationalism," William Galston writes, and nothing is wrong with moderate self-preference.¹⁸⁹ But "nationalism" is a slippery word that changes its meaning over time, and its past meanings give it a better reputation than contemporary reactionary nationalisms deserve. I noted that early state-making involved not only consolidating territories, but forging a "people"—a nation to go with the nation-state.¹⁹⁰ Forging a nation-state meant overcoming local rivalries in the name of unification, and "nationalism" was a nineteenth-century label for national consciousness.¹⁹¹ Creating a nation-state also required dismantling the vestiges of fiefdoms and feudalism, a project that harmonized nicely with liberal revolutions and the rule of law. In other parts of the world, nationalism means subordinating tribal loyalties to larger loyalties. In anti-colonial struggles, nationalism meant independence and self-determination. Nationalism understood in any of these ways can be thought of as a progressive ideology, wholly

185. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 226–36 (3d ed., 2004). Arendt's analysis of tribal nationalism is remarkably relevant to modern-day reactionary nationalism.

186. *Id.* at 231.

187. *Id.* at 229–30.

188. *Id.* at 230.

189. GALSTON, *supra* note 184, at 5. Prominent defenses of non-reactionary nationalism include CHAIM GANS, *THE LIMITS OF NATIONALISM* (2003), DAVID MILLER, *ON NATIONALITY* (1995), and YAEL TAMIR, *LIBERAL NATIONALISM* (1995). Recently, Tamir published further reflections on nationalism in *WHY NATIONALISM* (2019). Tamir, who is both an academic and a former Israeli Labor Party politician, continues to defend nationalism, even as her own country increasingly rejects her liberal version in favor of reactionary nationalism. Tamir does not address nationalist foreign policy, and thus discussing her argument is beyond the scope of this Essay.

190. At the beginning of the sixteenth century, the inhabitants of France did not call themselves "the French." Their local identities as, say, Norman or Valois came first. By that century's end, they called themselves *bon français*. FREDERICK J. BAUMGARTNER, *FRANCE IN THE SIXTEENTH CENTURY* 4–7 (1995).

191. The OED finds the earliest English usages of "nationalism" in the nineteenth century. OXFORD ENGLISH DICTIONARY (1971), letter "N" at 31.

consistent with liberalism and the rule of law, and especially salutary when we recall the peacekeeping virtues of the nation-state.

But, with a few notable exceptions, the most assertive nationalist parties and movements today are reactionary, and there is nothing moderate about them.¹⁹² As the criteria listed above indicate, they are illiberal (criterion 8), and not at all friendly to the agenda of human rights (criterion 5). In those places where reactionary nationalism allies with traditionalist religions, it can be deeply anti-feminist or downright misogynist (criterion 9).¹⁹³ As for responsibilities beyond borders, reactionary nationalists recognize few or none (criteria 3-6). Borrowing an idea from Imre Lakatos's philosophy of science, I am tempted to describe nationalism with these characteristics as a *degenerating political program*, parallel to Lakatos's degenerating research programs—research programs that were once promising and productive, but are now dead ends.¹⁹⁴ Let me explain why.

The strongest arguments in favor of nationalism appeal to communitarian values such as civic affection for one's own people in one's own territory, an idea as old as Aristotle's proposition that friendship lies at the foundation of the polis. Unfortunately, contemporary realities don't align with this communitarian vision of nationalism. Today's reactionary nationalisms are not about expressing affection for one's own, but instead about exhibiting hatred towards others—militant anti-pluralism.¹⁹⁵ With few exceptions, reactionary nationalist parties arise in States with significant minority groups, distinguished from the majority by race or religion, that the nationalists wish to exclude from the nation as they define it.¹⁹⁶ The despised minority may be recent immigrants, but they need not

192. Prominent examples of reactionary nationalist parties and movements outside the United States are Germany's Alternative für Deutschland, France's National Front, Italy's Liga, Brazil's Aliança, the UK's Brexit Party, Jobbik and Fidesz in Hungary, Austria's Freedom Party, Yisrael Beytenu and Yamina in Israel, Poland's Law and Justice Party, and the Bharatiya Janata Party in India; needless to say, the examples could be multiplied. Examples of nationalist parties that are neither populist nor reactionary include the ruling Liberal Democratic Party in Japan, the social-democratic Scottish National Party, and the Chinese Communist Party (although the latter exhibits some of the characteristics of reactionary nationalism catalogued above—numbers 2 through 8).

193. A telling recent example is the Vox Party in Andalusia, the platform of which includes anti-immigrant measures as well as repeal of a gendered domestic violence law, prosecution of false complaints against men, suppression of radical feminist organizations, and an organic law that recognizes the "natural family" as an institution prior to the State. VOX, *100 medidas para la España Viva*, §§ 70–71, https://www.voxespana.es/biblioteca/espana/2018m/gal_c2d72e181103013447.pdf.

194. Imre Lakatos, *Criticism and the Methodology of Scientific Research Programmes*, 69 PROC. ARISTOTELIAN SOC. 149 (1969), reprinted in CRITICISM AND THE GROWTH OF KNOWLEDGE (Imre Lakatos & Alan Musgrave eds., 1970).

195. This is a principal theme in WERNER-MÜLLER and GALSTON, *supra* note 184.

196. Significantly, under the anti-immigrant Trump administration, the United States changed the mission statement of its customs and immigration agency to delete a previous reference to "America's promise as a nation of immigrants" and substitute the mission of "protecting Americans, securing the homeland, and honoring our values" – values that apparently no longer include pride in

be. This ideology has little to do with civic solidarity, national history, or patriotism, except in a distorted form. It calls to mind a cynical definition of a nation sometimes attributed to Ernest Renan: "a group of people united by a mistaken view about the past and a hatred of their neighbors."¹⁹⁷ Today, that includes not only foreign neighbors, but also the family next door who speaks a different language at home or whose skin is a different color.

Defining "the nation" to exclude resident minority groups is fundamentally anti-communitarian. If I am right that the most powerful case for nationalism is a communitarian appeal to the State as a political expression of its people, possibly along the lines of the romantic view, then much of today's nationalism is a fraud.

Perhaps the most prominent recent defense of nationalism along reactionary and romantic lines comes from Yoram Hazony's prize-winning book *The Virtue of Nationalism*.¹⁹⁸ It is worth examining his argument in some detail, especially because he claims that a world order of Westphalian nation-states is the best ever devised to banish violence and war "to the periphery of human experience."¹⁹⁹ Obviously, that runs directly contrary to the arguments of this Essay.

Hazony envisions a world of peaceable self-determining nation-states, united internally by civic affection for one's own, and harboring no aggressive ambitions toward other nation-states. In the most distinctive thesis of his book, Hazony contends that imperialism is the sole historical alternative to the system of national states.²⁰⁰ Imperialism, he warns, is the hidden agenda of internationalists and cosmopolitans.²⁰¹ That makes internationalism the enemy of the self-determination of peoples. Yet, as Daniel Luban points out, Hazony's nationalism/imperialism distinction is remarkably ahistorical: the three centuries of the nation-state system were also "the zenith of the great European empires."²⁰²

Nor is the self-determination of peoples a consistent and workable principle. The number of ethnicities far exceeds the number of States, and Hazony acknowledges that nation-states would be "protectorates" for their

ourselves as a nation of immigrants. Richard Gonzales, *America No Longer a 'Nation of Immigrants,' USCIS Says*, NPR (Feb. 22, 2018), <https://www.npr.org/sections/thetwo-way/2018/02/22/588097749/america-no-longer-a-nation-of-immigrants-uscis-says>. There are exceptions to the rule that contemporary nationalism arises in reaction to significant minority groups, for example nationalist movements in Japan and Scotland.

197. It is not from Renan, but I have been unable to track down the original source.

198. YORAM HAZONY, *THE VIRTUE OF NATIONALISM* (2018). The book won the 2019 Conservative Book of the Year Award. <https://isi.org/blog/conservative-book-of-the-year-award/>.

199. *Id.* at 110.

200. *Id.* at 3, 16. Hazony explains that he avoids the term "nation-state," but only because it suggests "that the nation consists of those individuals living in a given state." *Id.* at 239 n. 9. The clear implication is that the nation consists only of some individuals living in the state, excluding others—although Hazony is not explicit on who is in and who is out.

201. *Id.* at 3–4.

202. Daniel Luban, *The Man Behind National Conservatism* (review of Hazony, *The Virtue of Nationalism*), *THE NEW REPUBLIC* (July 26, 2019), <https://newrepublic.com/article/154531/man-behind-national-conservatism>.

minorities²⁰³—reducing them to a status that is, in fact, a hallmark of empires.²⁰⁴ The self-determination Hazony extols is on his account a prize awarded to only a few militarily powerful peoples whose States will, when necessary, suppress restive minorities by force.²⁰⁵ A world of national States, as Hazony depicts it, will not be as peaceable as he claims, nor does history suggest it will be different in principle from empire in its treatment of minorities with their own aspirations.

For internationalists, there is an attractive alternative to nationalism and imperialism: federations of States, of which the European Union is an exemplar; Hazony traces the idea to Kant, Wilson, and Hayek among others.²⁰⁶ He therefore devotes a section to criticizing “the myth of the federal solution,” the argument of which is that federal structures are a Trojan horse for empires.²⁰⁷ Surely, however, to describe the European Union as an empire, as Hazony does, is hyperbole.²⁰⁸ This is doubly so given his warning that an imperial state “is always a despotic state.”²⁰⁹ The critique seems driven by theory, not reality. Hazony’s theory shoehorns every political arrangement into a simplistic nationalism-or-empire binary. In that case, the EU’s anti-nationalist federal structure must be an empire. Empires are despotic; ergo, the EU must be a despotism. No doubt the most rabid Euroskeptics and Brexiteers think in such apocalyptic terms. In reality, of course, the president of the European Commission is hardly a Caesar or Napoleon, and the EU has no military arm.²¹⁰ It would be even more hyperbolic

203. HAZONY, *supra* note 198, at 170, 183–84.

204. See Luban, *supra* note 202.

205. Political independence is only for “nations that are cohesive and strong enough to secure it.” HAZONY, *supra* note 198, at 176. Hazony’s ideal international order would be “parsimonious” about subdividing States into smaller units to accommodate minorities who desire self-determination. *Id.* at 182–83. And, he warns, if foreigners stir up “disaffection” among those minorities, “there is no choice but for the national [S]tate to use more rigorous measures to deprive imperialist and anarchic elements of their aspirations by force.” *Id.* at 183–84.

206. *Id.* at 141.

207. HAZONY, *supra* note 198, at 142 (asserting that “[t]he idea of an international federation simply is the idea of empire,” which “should be deplored and rejected”). Tellingly, Hazony regards Kant’s proposal for a federal structure as “yet another version of the German-led Holy Roman Empire,” in which “the national states of Europe were dismantled in favor of a single government.” *Id.* at 41. In reality, what Kant says is precisely the opposite. “The right of nations shall be based on a *federalism* of free states.” Kant, *Perpetual Peace*, *supra* note 47, at 8:354. Contrary to Hazony, Kant explains that this “league of nations” (*Völkerbund*) would not be a “State of nations” (*Völkerstaat*), for the latter would subordinate the nations and contradict the principle of federalism of free States, which “are not to be fused into a single state” (*nicht in einem Staat zusammenschmelzen sollen*). *Id.*

208. HAZONY, *supra* note 198, at 154 (describing the EU as “a German imperial state in all but name”).

209. *Id.* at 125, repeated at 139.

210. The president of the Commission is chosen by the governments of the Member States with Parliamentary consultation. European Union, *Treaty on European Union (Consolidated Version)*, *Treaty of Maastricht*, Feb. 7, 1992, Official Journal of the European Communities C 325/5 (Dec. 24, 2002), <https://www.refworld.org/docid/3ae6b39218.html>, art. 10. The president serves a five-year term that is renewable. *Id.* On the limited powers of the presidency, see EUROPEAN UNION, *EU Presidents—Who Does What?*, https://europa.eu/european-union/about-eu/presidents_en.

to describe an international order of sovereign States committed to reducing transnational threats to peace through mutual cooperation as a kind of empire.

Hazony knows this, but he replies that the absence of a powerful executive and military in the EU is nothing more than happenstance: Europe can afford a weak executive because US military might protects Europe.²¹¹ Indeed, the US president "in effect, plays the role of emperor in today's Europe."²¹² The alternative is "German rearmament and a German emperor," because already "[t]he European Union is a German imperial state in all but name."²¹³ Without the US military umbrella, "a strong European executive will be appointed by Germany," and "the reconstitution of the medieval German empire in Europe will be complete."²¹⁴ Hazony offers no supporting evidence for the exaggerated—and, it must be said, contradictory—propositions that the EU is a German imperial state and its emperor is the US President.

For Hazony, the United States is further proof that there can be no federalist halfway point between coercion and self-determination for more culturally homogeneous units ("tribes" in his terminology).²¹⁵ The culprit seems to be the Fourteenth Amendment, under which "the original promise of a broad self-determination at the level of states has been gradually revoked."²¹⁶ In the US, "the rights and powers" of "the federated tribes and subdivisions . . . will be reduced and abrogated, by coercion if necessary."²¹⁷ Hazony's rhetoric is that of states' rights champions who mistrust the federal government; so is his analogy of the federal government with an imperial structure.

Hazony is not being careless here. He defines imperialism as a political theory "which seeks to bring peace and prosperity to the world by uniting mankind, as much as possible, under a single political regime."²¹⁸ So defined, US federalism is, indeed, "imperialist" with respect to the US states, and *The Federalist Papers* must be thought of as a brief for imperialism. It hardly follows, though, that today's US federal system has the negative attributes we associate with imperial regimes—hungry expansionism, exaction of tribute from subordinated states and peoples, and despotism.²¹⁹ To anyone other than the most fevered government-haters, the United States should count as a proof that a federal structure with vertically divided sovereignty is possible, not that it is impossible.

211. HAZONY, *supra* note 198, at 153.

212. *Id.*

213. *Id.* at 154.

214. *Id.* Note the phrasing: "will be complete" implies that the reconstitution of the medieval German empire in Europe is already underway.

215. *Id.* at 148.

216. *Id.* at 149, 266 n. 86.

217. *Id.* at 150.

218. *Id.* at 3.

219. This is not to deny that there have been episodes of each in US history.

The characteristic moral virtue associated with nationalism is patriotism, and readers may wonder whether the critique of nationalism is equally a critique of patriotism. The answer is an energetic no. Patriotism doesn't have to be xenophobic or reactionary. Love of one's country is inconsistent with identifying one sub-group within the country as "the people" and demonizing others.²²⁰ The appropriation of the label "patriot" by nationalists to tar liberals and internationalists as unpatriotic is nothing more than political propaganda.

On this point, Hazony is refreshingly forthright, and he does not resort to the patriotism dodge: "I will not waste time trying to make nationalism prettier by calling it 'patriotism,' as many do today in circles where nationalism is considered something unseemly."²²¹ Patriotism is "love or loyalty of an individual for his or her own independent nation"; nationalism is "something more."²²² Hazony's candor is admirable; what fails is his case for a nationalism that is something more than love of country. As we have seen, that "something more" consists of identifying the country with its dominant group.

We thus find ourselves in a perplexing and deeply frustrating situation. At a time when the gravest threats to peace—and to human rights—require an internationalist response, politics increasingly tilts toward reactionary nationalism.²²³ Nationalism of this sort seems attractive precisely because of the threats and confusion we see around us. Yet if I am right, reactionary nationalism is a symptom of those ailments, not their cure. The cure is adopting the standpoint of humanity and inventing political and legal institutions to make it real.

X.

HUMANITY AS A NORMATIVE PROJECT

To conclude, I wish to reflect on the philosophical question of what "humanity" might be; it's hard not to recall Carl Schmitt's warning that whoever

220. Or ignoring them. A striking feature of Hazony's book, which offers Israel as a central example of a successful nationalist State, is that not a single sentence so much as mentions the Palestinian citizens of Israel, who make up a fifth of the population. In a footnote, Hazony mentions in passing that Israel has faced "protracted internal conflict . . . in Arab-majority territories held by Israel" HAZONY, *supra* note 198, at 269 n. 104. This presumably refers to the occupied territories, whose Arab residents are not Israeli citizens. The text accompanying this footnote is Hazony's praise for "a majority nation whose cultural dominance is plain and unquestioned, and against which resistance appears to be futile." In his view, only such a nation can afford to give its minorities rights and liberties. *Id.* at 165.

221. HAZONY, *supra* note 198, at 6.

222. *Id.*

223. See the discouraging evidence marshaled by YASCHA MOUNK, THE PEOPLE VS. DEMOCRACY 105–22 (2018), drawing on Roberto Stefan Foa & Yascha Mounk, *The Danger of Deconsolidation: The Democratic Disconnect*, 27(3) J. DEMOCRACY 5 (July 2016). The European and US polls Mounk cites show diminishing commitment to democracy and increasing openness to authoritarian alternatives, including military government, more so among the young.

invokes humanity wants to cheat.²²⁴ Is "humanity" anything beyond the aggregate of all human beings?²²⁵ The aggregate of all human beings is nothing more than a mathematical set of no independent normative interest. The set of all human beings has no shared language or culture or kinship or bond of common affection. As nationalists and communitarian philosophers remind us, communities are thick but "humanity" as a mere aggregation is pathetically thin. The set of all humans is not a community and is not the famous "family of man."

Yet there are ways to think of "humanity" as something more than the set of all humans. I will borrow a metaphor from the colonial model, odious though that may have been. I propose we think of humanity as an immature people, a people that has not yet recognized itself as such. This is akin to Kant's view that the construction of humanity is a historical process that has a long way to go towards its ideal end point of lawful foreign relations and just civic orders.²²⁶ For Kant, however, our immaturity (*Unmündigkeit*) means our self-imposed inability to think for ourselves, so that we turn to others for guidance.²²⁷ What I am calling our immaturity lies in our self-imposed reluctance to recognize commonality with each other and the responsibility that comes with it. "Humanity" names the normative project of making that recognition real through the practical activity of institutionalizing shared responses to shared threats.²²⁸ I call it a *project* to emphasize that it carries no guarantees of success; it depends on choices citizens as well as leaders make that are anything but inevitable.²²⁹ It is a *normative* project because it proposes a conception of sovereignty, which is an inherently normative and not purely descriptive political and legal concept.

The project emphatically does not require that at some future point we must have a world government reigning over all humanity. As philosophers, including Kant, have well understood, in practice, a world government would be a top-heavy

224. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab trans., 1996).

225. For present purposes, we can ignore the Burkean question of whether that set should consist of all human beings alive at any given time, or the trans-temporal set of human beings plus their ancestors and descendants.

226. Kant, *Idea of a Universal History with Cosmopolitan Purpose*, in *KANT'S POLITICAL WRITINGS* (Hans Reiss ed., H. B. Nisbet trans., 1970), especially propositions 5-7. *Id.* at 45-49. Kant regards humanity as "little beyond the half-way mark in its development." Proposition 7, 8:26.

227. Kant, *An Answer to the Question: What Is Enlightenment?*, in *KANT, PRACTICAL PHILOSOPHY* 8:35 (The Cambridge Edition of the Works of Immanuel Kant) (1996).

228. I explore this idea further, in the context of international criminal justice, in Luban, *The Enemy of All Humanity*, 47 *NETH. J. LEG. PHIL.* 8 (2018) and Luban, *On the Humanity of the Enemy of Humanity: A Response to My Critics*, 47 *NETH. J. LEG. PHIL.* 83 (2018). The former paper will also appear as a chapter in the *OXFORD COMPANION TO INTERNATIONAL CRIMINAL LAW*, (Kevin Jon Heller, Frédéric Mégret, & Sarah Nouwen eds., forthcoming).

229. In this way my proposal differs markedly from Kant's universal history, which carries a strong whiff of determinism, suggesting that achieving "a perfect political constitution" is "a hidden plan of nature." Kant, *supra* note 226, at 50.

imperial monstrosity.²³⁰ But a people can be a people without a government of its own, and that is how we should think about humanity.

"Humanity" would, in any event, never be a community sharing a distinctive way of life the way that local, thick communities do. On the contrary, it would be deeply pluralist, and that is a fundamental reason to reject the right-Hegelian proposition that a people only attains full self-recognition in its own State.²³¹ Humanity's self-recognition of the sort proposed here would consist solely in recognition that transnational threats require collective responses—put in other words, that the standpoint of humanity implies the acceptance of transnational responsibilities. The responsibility of sovereigns as trustees or fiduciaries, what I have called R2H, would be to act on that recognition.

Other actors, including international organizations, NGOs, businesses, and individuals can also adopt the practical stance of R2H, so the claim here is not that States are uniquely suited to that role. In fact, the argument has been the opposite: threats like the democratization of violence undermine the State's capacity to fulfill its protective role, and that is precisely why the concept of sovereignty must evolve. Sovereign fiduciaries will fulfill their obligation to humanity by collaborating with private as well as public actors, including civil society—assuming those distinctions continue to make sense in a world of democratized violence.

That brings us to an obvious objection to R2H: that it is hopelessly utopian. International Relations 101 realism teaches that the explanation of State behavior is the self-interest of sovereign States and their leaders, competing for survival, if not domination, in an anarchic world. Sentimental talk of "humanity" and fiduciary obligations to it will not make national self-interest go away.

The right response to this objection—which has undeniable merit—is that *all* sovereignty concepts are utopian and anti-realist. That includes Westphalian sovereignty as control, as Steven Krasner (an arch-realist) argued forcefully twenty years ago.²³² In a world of unequal power, wealth, and resources, lesser powers will always be pushed around by great powers; Krasner might have added that in a world where asymmetric conflict becomes ever more sophisticated, the converse is sometimes true as well.²³³ Thus the Westphalian principle of sovereign equality is, in a realist sense, entirely utopian, no less so than R2H.

But that obvious fact is not an objection: it merely highlights that "sovereignty" in all its historical conceptions is an intrinsically normative concept,

230. Kant, *Toward Perpetual Peace*, *supra* note 47, at 8:354 (explaining why the right of nations must be based on a federalism of free states, not a single world-state, which would institute the relation of a superior to inferiors). Arendt puts the point forcefully, describing a world government as a "forbidding nightmare of tyranny." HANNAH ARENDT, *MEN IN DARK TIMES* 81 (1968). She attributes the thought to Karl Jaspers. *Id.*

231. *E.g.*, GIOVANNI GENTILE, *GENESIS AND STRUCTURE OF SOCIETY* (H. S. Harris trans., 1960).

232. Steven D. Krasner, *Sovereignty: Organized Hypocrisy* (1999).

233. *See* Goldsmith & Russell, *supra* note 119, at 8.

setting out some idealized picture of international politics as it ought to be. Sovereignty concepts are realist only in the sense that their idealized pictures respond to real-life disasters and the threat of their repetition; this was vividly so in 1648, 1946, and 2001. In response to the Thirty Years' War, the Peace of Westphalia imagined an order of States that make their own decisions about domestic ordering and foreign policy without outside interference.²³⁴ In response to World War II, the UN Charter imagines a world where equal sovereign States renounce the first use of force against one another, policed by the international community acting through a Security Council. And in response to the Balkan Wars and the Rwandan genocide, the R2P doctrine calls for States that effectively protect their own peoples from massive rights violations, again with the assistance of the international community. Each proposed remedy came in the wake of horrifying conflicts that exposed pathologies of sovereignty as previously understood. Each responded by reimagining the meaning of State sovereignty.

The lesson should be clear. Whenever the law takes up the S-word, explicitly or implicitly, and draws out legal consequences of State sovereignty in answering concrete practical questions, it assumes some normative ideal or other; but so long as power politics exists, the assumption that that ideal describes the actual world is untrue. Every sovereignty concept is in that sense utopian, and in a juridical context, "sovereignty" is a legal fiction. In this respect, sovereignty as responsibility to humanity is no different, and no more utopian, than sovereignty as responsibility to protect human rights, or for that matter Westphalian sovereignty. Today, however, it is far more urgent.

EPILOGUE: COVID-19 AND R2H

This Essay was already in the editing process by the time Coronavirus Disease 2019 (COVID-19) became a global pandemic; the editors and I agreed that it is important to add something about the current pandemic even though the world is still in the midst of it, with little insight into what the future holds. The Essay itself warns that pandemics are one of many threats to global security that require international cooperation.²³⁵ What are the implications of sovereignty concepts to the COVID-19 pandemic? Does the current global emergency support or fail to support R2H? What are the likely effects of the pandemic on security and human rights? These are the guiding questions.

By the end of November 2020, there were nearly 60 million reported COVID-19 cases and 1.37 million deaths.²³⁶ In the early months of the pandemic, events were unfolding with startling swiftness; each day's developments overtook the previous days' faster than most of us could process the news; it is fair to

234. *See supra*, Part II.

235. *Supra*, text accompanying note 95.

236. JOHNS HOPKINS UNIV., *Coronavirus Case Tracker*, <https://coronavirus.jhu.edu/map.html> (Nov. 21, 2020) [hereinafter JHU Case Tracker] (showing 57,952,904 cases and 1,378,063 deaths).

describe the mood of millions or perhaps billions of people as panic. The pace of events (and, thankfully, the level of COVID-19 panic) have slowed since then, but even so the comments that follow will inevitably be dated by the time of this Essay's publication. Bearing these caveats in mind, some observations nevertheless seem in order. I will focus especially (but not entirely) on the early months of the pandemic.

A major theme of this Essay is the importance of international cooperation in managing threats to peace and security. Sovereignty as responsibility to humanity—R2H—encompasses more than peace and security concerns, and, indeed, more than human rights concerns; sovereignty conceptions influence all areas of international law. But threats to peace and security, both military and social (including pandemics), have been this Essay's chief motivating illustration of why R2H matters. R2H is an outward-facing conception of state sovereignty, in the sense that it incorporates a duty to take the interests of outsiders—"humanity"—into account in national decision-making, and as a legal characteristic of national sovereignty.

Perhaps it seems paradoxical that the primary COVID-19 public health duty to others is discharged not by reaching out, but by staying away from them. This is obviously true on the individual level, but on the State level, preventing travel to and from hotspots also makes sense. Thus, an outward facing "responsibility to humanity" comes in the peculiar and unsociable guise of acquiescing to heightened border policing. Even if this looks more like isolationism than solidarity, it is no less a responsibility to humanity.

It may also seem that the pandemic is irrelevant to the theme of heightened military threats. Again, the appearance is deceptive. A distracting global health crisis provides an opportunity for States to flex muscles and seek military gains over their rivals. Early in the crisis, China stepped up naval activity in disputed South China Sea waters,²³⁷ and, reportedly, China and Russia launched COVID-19 disinformation campaigns "to aggravate the public health crisis in Western countries."²³⁸

237. See, e.g., Brad Lendon, *Coronavirus may be giving Beijing an opening in the South China Sea*, CNN (Apr. 7, 2020), <https://www.cnn.com/2020/04/07/asia/coronavirus-china-us-military-south-china-sea-intl-hnk/index.html>; Sean Quirk, *Water Wars: Coronavirus Spreads Risk of Conflict Around the South China Sea*, LAWFARE (Apr. 7, 2020), <https://www.lawfareblog.com/water-wars-coronavirus-spreads-risk-conflict-around-south-china-sea>.

238. See sources cited in note 116, *supra*. The quoted language comes from Emmott, *supra* note 116. In addition, Human Rights Watch's China director, Sophie Richardson, believes that China was "exploiting the Covid-19 pandemic" in its crackdown on Hong Kong. HUM. RTS. WATCH, *Hong Kong: Crackdown Amid Covid-19*, (Apr. 20, 2020), <https://www.hrw.org/news/2020/04/20/hong-kong-crackdown-amid-covid-19>. Notably, China has also increased its military presence at the contested border with India, leading to several violent brawls in May and June of 2020. Jeffrey Gettleman, Hari Kumar & Sameer Yasir, *Worst Clash in Decades on Dispute India-China Border Kills 20 Indian Troops*, N.Y. TIMES (June 16, 2020), <https://www.nytimes.com/2020/06/16/world/asia/indian-china-border-clash.html>.

A more genuine challenge to R2H is that in a time of local shortages of medical and safety equipment, notably during the early months of the pandemic, national leaders may rightly believe that their first duty is to secure them for their own people, not to provide them to outsiders.²³⁹ In this environment, competitive rather than cooperative behavior embodies the notion that the primary responsibility to protect the human rights of nationals falls on their own State. Here, at any rate, R2P—understood as State responsibility to protect the human rights of the State's own people—and responsibility to outsiders seem to conflict, with the advantage going to the former. A remarkable illustration of such competitive behavior is Israel's use of the Mossad, its highly effective spying and covert action service, to procure medical gear on global markets.²⁴⁰ Using tradecraft to procure medical supplies graphically illustrates the extent to which competition supplanted cooperation in the global scramble for health resources.²⁴¹

This Essay argues that accepting R2H as a sovereignty concept is in the long-term enlightened self-interest of States. But in a short-term emergency like the current pandemic, where R2H has not yet become an operative concept, nationalism comes to the fore. States, in effect, found themselves facing a kind of one-shot prisoner's dilemma, in which defecting from cooperation was arguably more rational than cooperative strategies. The *New York Times* reported in April that "[a]t least 69 countries have banned or restricted the export of protective equipment, medical devices or medicines."²⁴² Correspondingly, nationalist sentiments have intensified, most visibly in the acrimonious US-China blame game.²⁴³ President Donald Trump terminated US funding for the World Health

239. Jane Bradley, *In Scramble for Coronavirus Supplies, Rich Countries Push Poor Aside*, N.Y. TIMES (Apr. 9, 2020) (describing the difficulty faced by developing countries in acquiring protective equipment because richer countries are buying it up and imposing export controls), <https://www.nytimes.com/2020/04/09/world/coronavirus-equipment-rich-poor.html>.

240. Ronen Bergman, *Israel's Not-So-Secret Weapon in Coronavirus Fight: The Spies of Mossad*, N.Y. TIMES (Apr. 12, 2020), <https://www.nytimes.com/2020/04/12/world/middleeast/coronavirus-israel-mossad.html>.

241. In mid-April, Israel had fewer than half the COVID-19 fatalities of countries with comparable numbers of reported cases. JHU Case Tracker, *supra* note 236, (Apr. 15, 2020). Israel, with 12,200 confirmed cases at that time, reported 126 deaths. Ireland, India, and Sweden, each with fewer than 12,000 confirmed cases, reported 396, 406, and 1,203 deaths, respectively. *Id.*

242. Peter S. Goodman et al., *A New Front for Nationalism: The Global Battle Against a Virus*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/business/coronavirus-vaccine-nationalism.html>.

243. President Donald Trump insists on calling the coronavirus "the China virus," and the United States torpedoed a joint G-7 cooperation statement because other States would not use the term "Wuhan virus." Conor Finegan, *Pompeo pushes 'Wuhan virus' label to counter Chinese disinformation*, ABC NEWS (Mar. 25, 2020), <https://abcnews.go.com/Politics/pompeo-pushes-wuhan-virus-label-counter-chinese-disinformation/story?id=69797101>. US Secretary of State Pompeo was responding to a Chinese conspiracy theory that the virus originated in the United States and the US Army brought it to Wuhan. Ben Westcott & Steven Jiang, *Chinese diplomat promotes conspiracy theory that US military brought coronavirus to Wuhan*, CNN (Mar. 13, 2020), <https://www.cnn.com/2020/03/13/asia/china-coronavirus-us-lijian-zhao-intl-hnk/index.html>.

Organization (WHO), blaming it for being "China-centric," and subsequently withdrew the United States from the WHO.²⁴⁴ In China, coronavirus-related xenophobia and nationalist fervor are reportedly on the rise.²⁴⁵ In Europe as well, nationalism and old north-south tensions, dating from the debt crisis of a decade ago, again came to the fore in the early months of the pandemic.²⁴⁶

The breakdown in cooperation, however, is self-defeating and shows the virtues of R2H, with its normative thumb on the scale on behalf of cooperation. Predictably, competition for medical resources drove up prices, a phenomenon apparent as well among US states scrambling for ventilators and protective gear.²⁴⁷ Moreover, as one public health expert commented, "[t]he export bans are not helpful" because they "can disrupt supply chains of some products that are actually needed everywhere."²⁴⁸ Here, we see the mark of a genuine prisoner's dilemma: mutually cooperative conduct has a higher payoff than mutual defection, but rational actors find themselves driven to defect.

244. BBC Reality Check team, *Coronavirus: Is President Trump right to criticise the WHO?*, BBC (Apr. 15, 2020), <https://www.bbc.com/news/world-us-canada-52294623>; Michael D. Shear & Donald G. McNeil, Jr., *Criticized for Pandemic Response, Trump Tries Shifting Blame to the W.H.O.*, N.Y. TIMES (Apr. 14, 2020), <https://www.nytimes.com/2020/04/14/us/politics/coronavirus-trump-who-funding.html>. Blaming China appears to be at least in part a political strategy. Jonathan Martin & Maggie Haberman, *A Key G.O.P. Strategy: Blame China. But Trump Goes Off Message*, N.Y. TIMES (Apr. 19, 2020), <https://www.nytimes.com/2020/04/18/us/politics/trump-china-virus.html>

245. Vivian Wang & Amy Qin, *As Coronovirus Fades in China, Nationalism and Xenophobia Flare*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/16/world/asia/coronavirus-china-nationalism.html>.

246. See DEUTSCHE WELLE (DW), *Coronavirus and the EU: The nation versus the union?*, (Mar. 19, 2020), <https://www.dw.com/en/coronavirus-and-the-eu-the-nation-versus-the-union/a-52848640> (describing EU members' unilateral rather than cooperative pandemic measures); Loveday Morris & Michael Birnbaum, *European leaders warn coronavirus could lead to the breakup of their union*, WASH. POST (Apr. 3, 2020), https://www.washingtonpost.com/world/europe/coronavirus-europe-unity/2020/04/02/4c9ed8c0-743e-11ea-ad9b-254ec99993bc_story.html (describing competitive rather than cooperative behavior of EU members); Yaroslav Trofimov & Bojan Pancevski, *Coronavirus Crisis Threatens to Split an Already Fractured EU*, WALL ST. J. (Apr. 10, 2020), <https://www.wsj.com/articles/coronavirus-crisis-threatens-to-split-an-already-fractured-eu-11586525523>. See also Matina Stevis-Gridneff, *As Europe Confronts the Coronavirus, What Shape Will Solidarity Take?*, N.Y. TIMES (Apr. 8, 2020), <https://www.nytimes.com/2020/04/08/world/europe/eu-coronavirus-aid.html> (same) Keith Johnson, *Fighting Pandemic, Europe Divides Again Along North and South Lines*, FOREIGN POL'Y, (Mar. 30, 2020), <https://foreignpolicy.com/2020/03/30/coronavirus-pandemic-europe-north-south-eurobond/> (same). Germany and the Netherlands initially rejected a proposed coronavirus bond to help bail out Italy. DEUTSCHE WELLE (DW), *Coronavirus shakes foundations of the EU*, (Mar. 28, 2020), <https://www.dw.com/en/coronavirus-shakes-foundations-of-the-european-union/a-52948776>.

247. Clary Estes, *States Are Being Forced Into Bidding Wars To Get Medical Equipment To Combat Coronavirus*, FORBES (Mar. 28, 2020), <https://www.forbes.com/sites/claryestes/2020/03/28/states-have-are-being-forced-into-bidding-wars-to-get-medical-equipment-to-combat-coronavirus/#6329b2a61cde>; Nathaniel Weixel, *Shortage of medical gear sparks bidding war among states*, THE HILL (Mar. 30, 2020), <https://thehill.com/homenews/state-watch/490263-shortage-of-medical-gear-sparks-bidding-war-among-states>.

248. Goodman et al., *supra* note 242.

Or do they? It has become commonplace to liken the current pandemic to war. Economic historian Jamie Martin notes that a similarly ruinous competition for resources beset the Allies in World War I—but they were able to solve the problem by creating institutions to make joint purchases, circumventing the market.²⁴⁹ (Governors of US states took steps toward similar purchasing consortia during this pandemic, although, in the end, it proved unnecessary.²⁵⁰) Martin notes that several officials administering these joint-purchase institutions later moved into posts at the League of Nations and, later still, the EU—no coincidence, he believes.²⁵¹ They were internationalists.

The EU response to the current pandemic is a useful illustration. Although the internationalism of the EU faltered in the first months of the pandemic, as some member States proved reluctant to come to the aid of others, the EU eventually righted itself and negotiated a collective response and rescue plan.²⁵² EU Commission President Ursula von der Leyen apologized to Italy for the EU's slow initial response and vowed European solidarity: "The real Europe is standing up, the one that is there for each other when it is needed the most. . . . The one where paramedics from Poland and doctors from Romania save lives in Italy. Where ventilators from Germany provide a lifeline in Spain."²⁵³ Multilateral institutions like the EU in effect pre-commit their constituent States to more cooperative behavior. In this way, they instantiate R2H, which includes among the sovereign obligations the responsibility to take into account the interests of other States in the global condominium.²⁵⁴ Multilateral institutions are one mechanism for realizing R2H (not necessarily the only one). Creating cooperative norms like R2H is itself a way out of prisoner's dilemmas.²⁵⁵ And yet, in

249. Jamie Martin, *This Is Not the Time to Let the Market Decide*, N.Y. TIMES (Apr. 16, 2020), <https://www.nytimes.com/2020/04/15/opinion/coronavirus-trade-medical-supplies.html>. Professor Martin cites ELIZABETH GEENHAIGH, *VICTORY THROUGH COALITION: BRITAIN AND FRANCE DURING THE FIRST WORLD WAR* (2009).

250. Kristen Holmes, *Governors working on multi-state consortium to secure supplies*, CNN POL. (Apr. 9, 2020), <https://www.cnn.com/2020/04/09/politics/governors-supply-chain/index.html>.

251. Martin, *supra* note 249.

252. EUROPEAN COMM'N, *Coronavirus response*, https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response_en (last visited Aug. 17, 2020).

253. DEUTSCHE WELLE (DW), *Coronavirus: EU apologizes to Italy for initial response*, (Apr. 16, 2020), <https://www.dw.com/en/coronavirus-eu-apologizes-to-italy-for-initial-response/a-53142603>. Along the same solidaristic lines as von der Leyen's statement, see EUROPEAN UNION EXTERNAL ACTION (EUEA), *The Coronavirus pandemic and the new world it is creating*, (Mar. 23, 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/76379/coronavirus-pandemic-and-new-world-it-creating_en (stating it is "vital that the EU show it is a Union that protects and that solidarity is not an empty phrase"). The EUEA is the EU's diplomatic service.

254. Benvenisti, *supra* note 5, at 295.

255. EDNA ULLMAN-MARGALIT, *THE EMERGENCE OF NORMS* (1978) (explaining the origin of norms as solutions to prisoner's dilemmas and other games). Under some conditions, dynamic evolutionary models demonstrate that cooperation can be the optimal strategy in prisoner's dilemmas. Alessandro Bravetti & Pablo Padilla, *An optimal strategy to solve the Prisoner's Dilemma*, NATURE SCI. REPS. (Jan. 31, 2018), <https://www.nature.com/articles/s41598-018-20426-w>.

November 2020 the EU plan was at least temporarily stalled by vetoes from Hungary and Poland—two States whose reactionary nationalist governments object to attaching rule-of-law requirements to the budget.²⁵⁶

In a pandemic, the most obvious way for States to discharge their responsibility to humanity is fast and transparent sharing of knowledge—precisely what critics accuse China of not doing in the crucial winter months of 2019–20. Efficient equipment sharing is another, and so is the spreading of risks associated with financial disaster.

To illustrate, consider a legal issue on which R2H provides a useful perspective. This is the question of whether, under international law, China owes reparations for its early concealment of the COVID-19 crisis, which some argue was responsible for loosing coronavirus on the world.²⁵⁷ It is a politically incendiary issue that came to prominence in late March and early April of 2020. Much of the #ChinaMustPay agitation in the United States came from the political right.²⁵⁸ But the main legal argument is not a political one. It was set out by legal scholar James Kraska on March 23.²⁵⁹ China is a State party to the International Health Regulations (IHR), which legally obligates States parties to report in a timely manner "evidence of an unexpected or unusual public health event in its territory . . . which may constitute a public health emergency of international concern."²⁶⁰ China conspicuously failed to do so. Under the 2001 *Responsibility of States for Internationally Wrongful Acts*, which arguably represents customary international law, a State bears responsibility for breaches of its international legal

256. DEUTSCHE WELLE (DW), *EU leaders clash over Hungary and Poland budget veto* (Nov. 19, 2020), <https://www.dw.com/en/eu-leaders-clash-over-hungary-and-poland-budget-veto/a-55664684>.

257. By early April there were already domestic class actions against China filed in US courts, which will almost certainly go nowhere because of sovereign immunity. See Chimène Keitner, *Don't Bother Suing China for Coronavirus*, JUST SEC. (Apr. 8, 2020), <https://www.justsecurity.org/69460/dont-bother-suing-china-for-coronavirus/>. Meanwhile, Chinese lawyers sued the US Center for Disease Control in Chinese courts, alleging a "coronavirus coverup." RADIO FREE ASIA, *Chinese Lawyers Sue U.S. Over 'Coronavirus Cover-up'*, (Mar. 26, 2020), <https://www.rfa.org/english/news/china/wuhan-lawsuit-03262020122653.html>.

258. See, e.g., Matthew Henderson et al., *Coronavirus Compensation? Assessing China's Potential Culpability and Avenues of Legal Response*, HENRY JACKSON SOC'Y (Apr. 5, 2020), <https://henryjacksonsociety.org/publications/coronaviruscompensation/>; Lewis Libby & Logan A. Rank, *To Protect the Future, Hold China to Account*, NAT'L REV. (Mar. 21, 2020) [https://www.nationalreview.com/2020/03/coronavirus-pandemic-hold-china-accountable/#slide-1](https://www.nationalreview.com/2020/03/coronavirus-pandemic-hold-china-accountable/#slide-1;).; Marc A. Thiessen, *China should be legally liable for the pandemic damage it has done*, WASH. POST (Apr. 9, 2020), <https://www.washingtonpost.com/opinions/2020/04/09/china-should-be-legally-liable-pandemic-damage-it-has-done/>; John Yoo & Ivana Stradner, *How to Make China Pay*, NAT'L REV. (Apr. 6, 2020), <https://www.nationalreview.com/2020/04/how-to-make-china-pay/>. Fox News ran several episodes on this theme.

259. James Kraska, *China is Legally Responsible for COVID-19 Damage and Claims Could Be In the Trillions*, WAR ON THE ROCKS (Mar. 23, 2020), <https://warontherocks.com/2020/03/china-is-legally-responsible-for-covid-19-damage-and-claims-could-be-in-the-trillions/>.

260. Int'l Health Regulations, 3d ed. (2005) [hereinafter IHR], art. 7.

obligations and is required to pay reparations.²⁶¹ This is the gist of Kraska's argument: China breached an international treaty obligation, inflicted horrific harm on other States by doing so, and owes reparations under the law of State responsibility. There are other legal arguments for reparations as well,²⁶² but Kraska's seems like the most significant.

There are obvious problems with establishing causation, however, given the belated, haphazard, and inadequate responses to the pandemic by other States, conspicuously including the United States and United Kingdom. If other States had acted earlier and more decisively, the damage would be far less—there is, in the language of domestic tort law, comparative or contributory negligence. The International Law Commission explains that under the articles of State responsibility, full reparation must be made only for "the injury resulting from and ascribable to the wrongful act, rather than any and all consequences flowing from an internationally wrongful act."²⁶³ Ascribing consequences to an omission, when there is plenty of blame for State omissions to go around, would be daunting (not to mention hypocritical).

But, as David Fidler explains, the chief obstacle to reparations is a diplomatic one, rather than a legal and evidentiary difficulty: in more than a century of infectious disease treaties, States have never been willing to call each other out by reporting another State to treaty-based dispute resolution mechanisms. States "understand that, tomorrow, the shoe could be on the other foot, which creates a collective incentive among countries to avoid being legalistic about reporting obligations."²⁶⁴ Significantly, no State has reported China or any other State to the IHR dispute settlement mechanism.²⁶⁵ Even if they had, that dispute settlement mechanism merely calls on States to seek to settle disputes through "peaceful means of their own choice," such as "good offices, mediation or conciliation."²⁶⁶ The IHR contains no reparations clause.

In fact, neither of the plausible international legal mechanisms for a reparations claim—the International Court of Justice (ICJ) and the Permanent

261. United Nations, *Responsibility of States for Internationally Wrongful Acts* (2001), https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf, art. 31 (duty of reparation).

262. Russell Miller & William Starshak, *China's Responsibility for the Global Pandemic*, JUST SEC. (Mar. 31, 2020), <https://www.justsecurity.org/69398/> (finding China responsible under international law principles established in the 1941 *Trail Smelter Arbitration* between Canada and the United States).

263. Int'l Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Nov. 2001, Supplement No. 10 (A/56/10), chp.IV.E.1 <https://www.refworld.org/docid/3ddb8f804.html>, at 92, cmt. 9 on Article 31.

264. David Fidler, *COVID-19 and International Law: Must China Compensate Countries for the Damage?*, JUST SEC. (Mar. 22, 2020), <https://www.justsecurity.org/69394/>. Fidler notes, for example, that the H1N1 virus may have originated in the United States, where the first case was reported.

265. *Id.* This continues to be true six months later.

266. IHR, *supra* note 260 art. 56(1).

Court of Arbitration—has compulsory jurisdiction (and neither China nor the United States accepts the ICJ's compulsory jurisdiction).²⁶⁷ Under the traditional consensualist theory of international law, this is as it should be: sovereign States have the right not to submit themselves to tribunals to which they have not consented.²⁶⁸ For this reason, two writers have decried the ineffectiveness of international institutions and proposed US self-help to obtain reparations.²⁶⁹ They propose seizing Chinese assets. This, however, seems dangerously provocative, especially given that the United States owes over a trillion dollars of sovereign debt to China, and it is not surprising that the United States has made no move in that direction.²⁷⁰

What is the relevance of R2H to the reparations issue? It suggests, first of all, that insofar as China concealed vital coronavirus information, it breached not only the International Health Regulations, but also its fundamental responsibility to humanity. Second, the issue highlights an infirmity of Westphalian sovereignty: the incapacity of international institutions to enforce obligations. Lack of State accountability to other States is a feature, not a bug, of traditional Westphalian sovereignty: *par in parem non habet imperium*. Under R2H, lack of accountability is a bug.

It does not follow that if States recognized responsibilities to humanity, they would establish a compulsory reparations mechanism. That might or might not be a wise idea; I suspect it is the latter, and would up the temperature of nationalism and the unraveling of R2H. But compensation through tort-like mechanisms is only one way of spreading catastrophic global losses—such as those created by the COVID-19 pandemic—so that they do not fall most harshly on the most

267. ICJ, Declarations recognizing the jurisdictions of the Court as compulsory, <https://www.icj-cij.org/en/declarations>. Other potential enforcement mechanisms seem much less plausible. For discussion of such potential routes, see Henderson et al., *supra* note 258, at 23–27 (discussing actions before the World Trade Organization, and under bilateral investment treaties and the United Nations Convention on the Law of the Sea).

268. The exception is tribunals authorized by the UN Security Council under its Chapter VII powers, which were the basis for establishing the International Criminal Tribunal for Former Yugoslavia (established under UNSCR 827, S/RES/827 (1993)) and the International Criminal Tribunal for Rwanda (established under UNSCR 955, S/RES/955 (1994)). Obviously, any Security Council resolution to create a compulsory restitution tribunal could be vetoed by any member of the P-5. Readers will note that my comment in the text is similar to US complaints against the ICC that it is imposing legal obligations on States that are not parties, and in doing so is violating their sovereignty. *See supra* note 34. Lest it appear that I am endorsing this US argument, let me make clear that I think it is specious. The ICC Prosecutor is investigating only US crimes alleged to have taken place in the territories of ICC members, which possess undisputed territorial jurisdiction over such crimes and have in effect delegated that jurisdiction to the ICC by joining the Rome Statute. *See Luban, supra* note 34. No treaty or rule of customary international law prohibits such delegation. Even if, counterfactually, there had been a customary prohibition against delegating criminal jurisdiction to an international tribunal, the fact that 123 States have joined the ICC would prove that the prohibition is no longer customary international law because State practice and *opinio juris* no longer support it.

269. Yoo & Stradner, *supra* note 258.

270. U.S. DEP'T OF THE TREASURY, *Major Foreign Holders of Treasury Securities*, <https://ticdata.treasury.gov/Publish/mfh.txt>.

vulnerable people. Social insurance is a recognized alternative to tort in domestic law,²⁷¹ and at a time of catastrophe affecting many millions of vulnerable people the world over, the responsibility of States to humanity seems more pressing than it has in decades. A competitive scramble in which rich nations shoulder aside poor nations would be utterly antithetical to R2H.²⁷² Thus, a legal regime featuring R2H would almost certainly create some mechanism of shared responsibility for the horrific costs of pandemics.

In addition, the pandemic also poses a threat to human rights—most obviously, the simultaneous health and economic catastrophes jeopardize the economic and social rights of millions. But there is also a threat to civil and political rights, as autocratic leaders increasingly invoke emergency powers with sketchy or non-existent sunset provisions.²⁷³ These include surveillance and censorship measures that can easily survive the pandemic. Fionnuala Ni Aolain, the UN Special Rapporteur on Counterterrorism and Human Rights, warns, "[w]e could have a parallel epidemic of authoritarian and repressive measures following close if not on the heels of a health epidemic."²⁷⁴ Here, too, a capacious conception of sovereignty as responsibility to humanity will include human rights responsibilities, and an international community that resists opportunistic authoritarian assaults on civil and political rights.

In short, R2H seems like exactly the right medicine for the current pandemic. As we have seen, the COVID-19 crisis may initially seem irrelevant to the peace and human rights concerns that motivate R2H, but it is not so. One can perhaps hope that its reality will make R2H seem less utopian, and more a matter of pressing necessity.

271. Workers' compensation is perhaps the oldest form of insurance as an alternative to tort, and New Zealand famously substituted social insurance for tort liability in both workplace injury and auto accident cases. *See, e.g.*, Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 *YALE L. & POL'Y REV.* 187 (2008). A classic treatment is Fleming James, Jr., *Social Insurance and Tort Liability: The Problem of Alternative Remedies*, 27 *NYU L. REV.* 537 (1952). Holmes regarded strict enterprise liability as the equivalent of social insurance because companies will pass along their costs to consumers. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 467 (1897).

272. *See* Bradley, *supra* note 239.

273. Michael Birnbaum & Terrence McCoy, *As leaders seize powers to fight coronavirus, fear grows for democracy*, *WASH. POST*, (Apr. 13, 2020), https://www.washingtonpost.com/world/the_americas/coronavirus-democracy-orban-hungary-surveillance-israel/2020/04/12/ecdf214-729b-11ea-ad9b-254ec99993bc_story.html; Selam Geprekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, *N.Y. TIMES* (Mar. 30, 2020), <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>. Much attention has focused on Hungary's Victor Orbán, the reactionary nationalist champion of "illiberal democracy." *See, e.g.*, Laura Livingston, *Understanding Hungary's Authoritarian Response to the Pandemic*, *LAWFARE BLOG* (Apr. 14, 2020), <https://www.lawfareblog.com/understanding-hungarys-authoritarian-response-pandemic>.

274. Quoted in Geprekidan, *supra* note 273.

Statelessness as Rhetoric: The Case for Revisioning Statelessness in Our Statist World

Francis Tom Temprosa*

This article argues that the definition of statelessness in international law should be changed. When the international statelessness regime was instituted, the ultimate goal was the full protection of unprotected persons who are not refugees. Yet, in our statist world, the definition of statelessness—as embodied in the 1954 Convention relating to the Status of Stateless Persons—has become rhetoric. Contrary to the claim that the definition is merely declaratory of a status, this article contends that the definition lends itself to having features and facets of a discretionary design of rhetoric. It does more than accord States with discretion. It also allows them to constitute and ordain who is stateless and therefore entitled to the benefits of the statelessness regime in international law—which ensures protection and rights. Principally combining insights from critical rhetoric as theory, this article also posits that ideologies animate and persist in the determinations of statelessness: 'formalism' and 'discretionism'. The definition, instead of

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He is grateful for the comments and suggestions of David M. Hughes and the encouragement and support of Professor Steven R. Ratner and James A. Goldston. An earlier version of this piece also benefited from the very helpful and thoughtful comments of Professor James C. Hathaway. Thank you. Many of the ideas here were inspired by the author's wonderful years of working as focal point for stateless concerns of the United Nations High Commissioner for Refugees in its Philippine office, a time when the Philippines became the first country in Southeast Asia to be a party to the 1954 Stateless Convention and the first to establish a statelessness determination procedure in the region. He later on became counsel of the Commission on Human Rights before the Philippine Supreme Court in a case involving foundlings and statelessness. He is eternally grateful to the editors and entire staff of the Berkeley Journal of International Law for their hard work, patience, and comments on the piece. Without them, this piece would not have been possible. All errors are his alone.

being an emancipatory tool of international law, entrenches and reifies State power over citizenship matters.

Drawing on an analysis of the legal definitions of statelessness all over the world and different cases of stateless status determination, this article is the first to directly question and critically engage with the definition of statelessness in international law, theorizing on the definition in rhetoric and building the case for why it should be changed. It develops the connection between the definition of statelessness to ideographs, ideologies, and categories in order to analyze statelessness determinations. Existing literature on categories, labels, and definitions in the social sciences, refugee studies, and migration studies are incorporated in an interdisciplinary analysis.

This article thereafter proposes that the definition be 'revised'. A two-pronged protection framework that recalibrates the definition is suggested. The first prong turns the attention of the definition from formal protection to substantive and functional protection. A determiner of stateless status is allowed to look beyond mere formal protection, encouraging the piercing of the veil of citizenship in certain cases and placing nondiscrimination as a core tenet. The definition should also be tied to the right to nationality. The second prong reorients State responsibilities and duties in statelessness determinations, limiting the discretion of the State and assigning more duties to the international community as a whole. It takes into account the goal-oriented dimensions of the 1954 Convention relating to the Status of Stateless Persons and recommends ways forward to reimagine the concept of statelessness. If a State is allowed to consider who its citizens are and are not, as well as who is entitled to rights under the treaty on statelessness, then the State is more than a determiner of status; it is the giver of status, rights, and even life. The definition has to respond to this reality.

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"Before the law sits a gatekeeper. To this gatekeeper comes a man from the country who asks to gain entry into the law. But the gatekeeper says that he cannot grant him entry at the moment . . . The man from the country has not expected such difficulties: the law should always be accessible for everyone, he thinks, but . . . he decides that it would be better to wait until he gets permission to go inside. The gatekeeper gives him a stool and allows him to sit down at the side in front of the gate. There he sits for days and years."

– Excerpt from Franz Kafka's "Before the Law"¹

INTRODUCTION: CITIZENSHIP (OR THE LACK OF IT) IN OUR STATIST WORLD

Over the last two and a half centuries, the State and its forerunners have held power over norms that regulate access to citizenship,² which includes the rights

1. THE COMPLETE STORIES 5 (Nahum Glatzer ed., 1971).

2. Used in this Article, citizenship is nationality in its legal sense as most legal documents and theorists refer to it as one and the same concept.

and duties associated with being a citizen of a State.³ Scholars argue that this discretion over citizenship is declining.⁴ Everyone has the right to nationality under international law, and citizenship is slipping out of the State's control.⁵ Yet, the State still controls much of citizenship and the lack of it—statelessness. The State is the overwhelming gatekeeper of citizenship. Even in today's globalized world, the State continues to possess authority to govern its borders.⁶ The authority is not reposed upon an international parliament or people. In fact, since 9/11, there is a steady rise of laws opening up citizenship to the privileged, while restricting access to or stripping citizenship for the disadvantaged in the name of national security, the economy, national unity, and a host of other reasons.⁷

The inclusion and exclusion of collectives from political communities is an enduring theme of history. In the United States, perhaps no other case has so captured disdain for utter racism than *Dred Scott v. Sandford*, where the US Supreme Court declared that black people "are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States."⁸ By a stroke of the racist pen, the court condemned countless African-Americans lives to slavery. Today, there are moves at exclusion, including a reconfiguring of birthright citizenship and border controls. The US Supreme Court declared as arbitrary and capricious the decision to rescind the Deferred Action for Childhood Arrivals program that protected undocumented immigrants brought to the United States as children.⁹ Elsewhere, exclusionary regimes reign and threaten peoples' livelihood. The case before the ICJ against Myanmar claims that the persecution of the Rohingya for decades had been made possible, among others, by the enactment of a citizenship law that stripped the Rohingya of citizenship.¹⁰ India's National Register of Citizens, published in

3. Ayelet Shachar, Rainer Bauböck, Irene Bloemraad & Maarten Vink, *Introduction: Citizenship—Quo Vadis?*, in THE OXFORD HANDBOOK OF CITIZENSHIP 3, 8 (Ayelet Shachar et al. eds., 2017).

4. See e.g., DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 9 (1996) (arguing that the distinction between citizen and alien has eroded because rights are more and more predicated on residency); Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOB. LEGAL STUD. 447, 449–50 (2000) (arguing that efforts to conceive of citizenship beyond the nation-state are coherent and desirable). Certainly, I agree that thinking of citizenship as a changing or changed concept has merits, States nonetheless still control access to citizenship, as well as to its bundle of rights and duties.

5. JACOBSON, *supra* note 4.

6. *Id.* at 6.

7. For an excellent review of the shifts in formal legal citizenship, see Catherine Dauvergne, *Citizenship with a Vengeance*, 8(2) THEORETICAL INQ. L. (2007).

8. *Dred Scott v. Sandford*, 60 U.S. 393, 404–05 (1857).

9. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. ___, 140 S.Ct. 1891 (2020).

10. See Priya Pillai, *State Responsibility for Citizenship in India: Lessons for Myanmar, and the CERD Inter-State Communications Mechanism*, OPINIOJURIS (Dec. 12, 2019), <http://opiniojuris.org/2019/12/21/state-responsibility-for-citizenship-in-india-lessons-from-myanmar-and-the-cerd-inter-state-communications-mechanism/>.

August 2019, declared more than 1.9 million people, mainly from the state of Assam, on the verge of statelessness.¹¹

At the individual level, take the tales of two women from across the Atlantic as recent demonstrations of the pervasive, almost plenary, power of the State over inclusion and exclusion. In November 2014, Hoda Muthana from the United States, and in February 2015, Shamima Begum from the United Kingdom left their home countries. Muthana and Begum married Islamic State fighters and had children in Syria. When the Islamic State began to fall, both desired to return home. But both States denied their return because the women lacked citizenship.¹² According to the US Department of State, Muthana was not a US citizen, had no legal basis for return, did not hold a US passport, the right to a passport, or possess a visa to travel to the United States.¹³ Meanwhile, the United Kingdom intended to strip Begum of citizenship based on an amendment to its nationality law. The amendment allowed the UK Secretary of State to deprive individuals of citizenship if "conducive to the public good because the person, while having that citizenship status, has conducted him or herself in a manner which is seriously prejudicial to the vital interests of the United Kingdom."¹⁴

These stories are not unique. Our world, at least as far as citizenship is concerned, is largely statist. The State decides who a citizen is and who is stateless.¹⁵ International law embraces this truth: the 1954 Convention Relating to the Status of Stateless Persons (1954 Statelessness Convention) defines a "stateless person" as a "person who is not considered as a national by any State under the operation of its law."¹⁶ In embracing the power of the State to say who a stateless person is

11. See M. Mohsin Alam Bhat, *Twilight Citizenship*, https://privpapers.ssrn.com/sol3/papers.cfm?abstract_id=3603707&dgcid=ejournal_html_email_law:courts:ejournal_abstractlink (last visited Aug. 24, 2020).

12. See Jonathan Shaub, *Hoda Muthana and Shamima Begum: Citizenship and Expatriation in the US and UK*, *LAWFARE* (Feb. 25, 2019), <https://www.lawfareblog.com/hoda-muthana-and-shamima-begum-citizenship-and-expatriation-us-and-uk>. Although both Muthana and Begum's situations also concern issues of revocation of citizenship and denial of return to countries of citizenship or habitual residence, they also engage with what statelessness is. See also Steve Vladeck, *Unpacking (Some of) the Legal Issues Surrounding Hoda Marijuana*, *JUST SEC.* (Feb. 20, 2019), <https://www.just-security.org/62659/unpacking-some-of-issues-surrounding-hoda-muthana>.

13. U.S. DEP'T OF STATE, *Statement on Hoda Mutha*, <https://www.state.gov/statement-on-hoda-muthana/> (last visited Apr. 15, 2019).

14. Immigration Act, 2014, c.22, § 17(3) (Eng.). The UK Secretary of State must have reasonable grounds to believe that the person being stripped of citizenship will be able to become a national of another country or territory, or in other words, that they will not become stateless.

15. See Annemarieke Vermeer-Künzli, *Diplomatic Protection as a Source of Human Rights Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW* 250, 253 (Dinah Shelton ed., 2013).

16. Convention Relating to the Status of Stateless Persons, art. 1(1), Sept. 28, 1954, 360 U.N.T.S. 117 [hereinafter, "1954 Statelessness Convention"]. This Article will not engage in a discussion of the categories of people to whom the Convention does not apply as stated in article 1(2) of the Convention since they do not modify the general definition of statelessness.

or is not, the 1954 Statelessness Convention's definition betrays the very purpose of the 1954 Statelessness Convention, which is to assure that people have the widest possible exercise of fundamental rights and freedoms.¹⁷ That is the paradox. The 1954 Statelessness Convention wrongly assumed that stateless determinations are a straightforward, clinical process of applying citizenship law, and that a State can always rightly determine whether another State "considers" a person a citizen. While it recognizes the power of the State to grant or withhold citizenship, it does not take into account that if the State has discretion over citizenship matters, then statelessness can also be discretionary. It is not always black or white.

This Article is the first to critically theorize international law's definition of statelessness in design rhetoric to build the case for 'revisioning' the definition. In this way, we can develop a new vision of statelessness and revise international law. For the purposes of this Article, statelessness pertains to the definition in the 1954 Statelessness Convention. Using statelessness determination cases, I analyze international law's definition of statelessness and argue that international law's definition has discretionary features and facets. The definition does more than accord States with discretion. It allows States to constitute and ordain who is stateless, and therefore, decide who is entitled to the benefits of the 1954 Statelessness Convention, which establishes specific protections and rights to the stateless. It also entrenches and reifies State power over citizenship matters.

My central argument is that international law's definition of statelessness operates in a rhetoric that privileges the State, and because of this, should be revisioned. Without this revisioning, the statelessness regime, decisively converging with human rights principles, loses its emancipatory power.

Drawing insights from critical rhetoric as theory, I explore ideologies that animate and persist in the determinations of statelessness.¹⁸ Critical rhetoric "examines the dimensions of domination and freedom as these are exercised in a

Stateless persons differ from refugees. Although a person may simultaneously be stateless and a refugee, the 1951 Refugee Convention adequately addresses the situation of refugees. Stateless persons can qualify for refugee status if they are unable to return to their country of habitual residence owing to a well-founded fear of being persecuted for a reason listed in the Refugee Convention. Where a stateless refugee seeks rights from a State that is not a party to the Refugee Convention, however, their stateless status must still be determined. See FOSTER & LAMBERT, *infra* note 57, at 422.

17. See 1954 Statelessness Convention, *supra* note 16, at Preamble ("to assure stateless persons the widest possible exercise of these fundamental rights and freedoms").

18. Critical rhetoric is "[a] perspective on rhetoric that explores, in theoretical and practical terms, the implications of a theory that is divorced from the constraints of a Platonic conception." See Raymie E. McKerrow, *Critical Rhetoric: Theory and Praxis*, 56 COMM. MONOGRAPHS 91 (1989). Although related, critical rhetoric should not be confused with "critical legal rhetoric," which is legal analysis that critiques claims about the nature of the law. For a discussion of the basic distinction, see Lolita Buckner Inniss, 'Other Spaces' in *Legal Pedagogy*, 28 HARV. J. RACIAL & ETHNIC JUST. 67, 72 (2012). Critical legal rhetoric has developed its own basic assumptions that are focused on domestic law, particularly the domestic law of the United States. See generally MAROUF HASAIN, JR., *LEGAL MEMORIES AND AMNESIAS IN AMERICA'S RHETORICAL CULTURE* (2000). I relate it now to international law.

relativized world."¹⁹ It is an examination of power as both marginalizing (domination) and productive (freedom), and of how this happens in argumentation.²⁰ Here, rhetoric refers to the way that language operates, especially in argument.²¹ The Latin phrase "*finis autem conversatio*" (end of citizenship)²² captures the phenomenon, highlighting the tentative and rhetoricized nature of statelessness determinations. I also develop the connection of the definition to ideographs, ideologies, and categories to analyze statelessness determinations. Existing literature on categories, labels, and definitions in the social sciences, refugee studies, and migration studies are incorporated in an interdisciplinary analysis. Throughout this Article, I consider status determinations as institutional State practices and not just mere opinions and adjudications of statelessness judges or officers. I draw from the practice of States that have established domestic procedures to determine statelessness.²³

19. McKerrow, *supra* note 18, at 91.

20. Sara L. McKinnon, *Critical Theory*, in ENCYCLOPEDIA OF COMMUNICATION THEORY 237, 241 (Stephen Littlejohn & Karen Foss eds., 2009). As McKinnon explains: "A central thread in critical theory research is the examination of social conditions for the hidden productive structures of marginalization. This sort of examination looks at the constraints placed on people's subjectivity, agency, and access to resources in particular contexts... In both creating knowledge about people and allocating resources to those people, these structures privilege some while marginalizing others. It is this inequality that is at the heart of critical theory's analysis. The goal in critiquing such structures of domination, however, is to produce possibilities for transforming social relations." *Id.* at 238.

21. See Lolita Buckner Inniss, *A Critical Legal Rhetoric Approach to in Re African-American Slave Descendants Litigation*, 24 ST. JOHN'S J. LEGAL COMMENT 649, 655 (2010)

22. This can also be translated as *finis autem civitatis*. I thank Velentina Vadi for her help in the translation and for her thoughts. Note that my use of this term should not be confused with postnationalism, which "involves the extension of rights to noncitizen immigrants, which blurs the dichotomy between nationals and aliens." See Yasemin Soysal, *Postnational Citizenship: Reconfiguring the Familiar Terrain*, in THE BLACKWELL COMPANION TO POLITICAL SOCIOLOGY 333 (Kate Nash & Alan Scott eds., 2001).

23. For an overview of the statelessness determination models in Europe, see generally KATIA BIANCHINI, PROTECTING STATELESS PERSONS: THE IMPLEMENTATION OF THE CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS ACROSS EU STATES (2018). See also Gábor Gyulai, *The Determination of Statelessness and the Establishment of a Statelessness-Specific Protection Regime*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 122 (Alice Edwards & Laura van Waas eds., 2014). Gyulai provides a slightly more general account of statelessness determination models, including five procedures largely utilized in Europe. Most of the procedures are in Europe. Around twenty-five procedures exist as of this writing. *Id.* This Article also considers judicial decisions in addition to statelessness determination procedures.

Statelessness has been a forgotten human rights crisis,²⁴ an invisible theme in the history of international law,²⁵ and generally neglected in the field of human rights.²⁶ But an examination of the definition of statelessness is of utmost importance given its impact on the lives of people, societies, and States. Re-examining the definition of statelessness is particularly crucial not only for parties to the 1954 Statelessness Convention, which have direct obligations under the Convention,²⁷ but for all States because they are generally bound by the definition as a matter of customary international law.²⁸ States also have multifarious treaty obligations on citizenship or nationality, although statelessness is not defined in those other treaties.²⁹

As such, this Article attempts to make analytic and normative contributions. It offers a critical perspective on international law's statelessness definition. An analytic contribution helps to theorize the disparity and divergence in the results of stateless status determinations. There is a dearth in academic legal discussion

24. Lindsey Kingston, *"A Forgotten Human Rights Crisis": Statelessness and Issue (Non)Emergence*, 14 HUM. RTS. REV. 73, 80–82 (2013) (arguing that statelessness has "failed to successfully emerge onto the international agenda" because of two factors: issue heterogeneity that creates strategic obstacles, and a lack of widely recognized global solutions encompassing issue characteristics that relate to an issue's potential for change); see also Bill Frelick & Maureen Lynch, *Statelessness: A Forgotten Human Rights Crisis* (2015), <https://www.fmreview.org/sites/fmr/files/FMRdownloads/en/sudan/frelick-lynch.pdf> (last visited Apr. 15, 2019).

25. See Will Hanley, *Statelessness: An Invisible Theme in the History of International Law*, 25 EUR. J. INT'L L. 321, 322 (2014) (asserting that while scholars who study statelessness "seem to think that it is, or ought to be, part of international law," scholars of international law tend to view statelessness as a problem of nationality law); see also REFUGEES INT'L, *Statelessness: International Blind Spot Linked to Global Concerns* (2009), <https://reliefweb.int/report/bosnia-and-herzegovina/statelessness-international-blind-spot-linked-global-concerns> (last visited Apr. 15, 2019) (calling statelessness a "blind spot").

26. Michael Freeman, *Conclusion: Reflections on the Theory and Practice of Economic and Social Rights*, in THE STATE OF ECONOMIC AND SOCIAL HUMAN RIGHTS: A GLOBAL OVERVIEW 365, 381–82 (Lanse Minkler ed., 2013) (stating that the field of human rights has even more neglected socioeconomic rights of the stateless).

27. See Vienna Convention on the Law of Treaties [hereinafter, "VCLT"], art. 26, May 23, 1969, 1155 U.N.T.S. 331.

28. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, U.N. Doc. A/61/10, at 49 (2006).

29. See, e.g., Convention on the Rights of the Child [hereinafter, "CRC"], arts. 7–8, Nov. 20, 1989, 1577 U.N.T.S. 3; Convention on the Elimination of Discrimination against Women [hereinafter, "CEDAW"], art. 9(2), Dec. 18, 1979, 1249 U.N.T.S. 13; International Covenant on Civil and Political Rights [hereinafter, "ICCPR"], art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171; Convention on the Rights of Persons with Disabilities, art. 18, Mar. 30, 2007, 2515 U.N.T.S. 3; International Convention for the Protection of All Persons from Enforced Disappearances, art. 25(4), Dec. 20, 2006, 2716 U.N.T.S. 3; International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, art. 29, Dec. 18, 1990, 2220 U.N.T.S. 3; Convention on the Nationality of Married Women, arts. 1–3, Jan. 29, 1957, 309 U.N.T.S. 65. See also, for the various instruments, David Weissbrodt & Clay Collins, *The Human Rights of Stateless Persons*, 28 HUM. RTS. Q. 245, 246 (2006).

on the application of the definition of statelessness in international law.³⁰ In my research, I have yet to encounter a piece that directly questions and addresses the definition of statelessness in international law from a distinct critical rhetoric vantage point. This Article aims to fill those gaps in the academic literature. This Article also offers a normative contribution, building the case towards 'revisioning' the definition and encouraging States to revise their approach to statelessness. The 1954 Statelessness Convention allows any State that is a party to the Convention to request a 'revision' of the Convention through a notification addressed to the UN Secretary-General.³¹ I believe that international law's approach to statelessness should not be entirely thrown out, for its approach grants rights and aims to protect people without citizenship, but the definition must be so reformed as to fulfill the promise of emancipation.³²

This Article proposes a two-pronged framework that recalibrates the definition. The first prong moves the definition of statelessness from formal to substantive protection, thus allowing a piercing of the veil of citizenship and placing non-discrimination as the core tenet of statelessness determinations. The second prong reorients the State's responsibilities and duties in statelessness determinations, limiting the discretion of the State and assigning more duties to the international community as a whole. To be clear, I do not advocate for the abandonment of legal statelessness for de facto statelessness, but rather advocate for revisioning the definition of *legal* statelessness itself. That is, the definition that is codified in the 1954 Statelessness Convention. Doing so, I take into account the goal-oriented dimensions of the 1954 Statelessness Convention and propose assigning wider duties to the international community.³³ While this Article's analysis and prescriptions around the domination-emancipation discourse of statelessness may neither be definitive nor comprehensive, the aim is to spark a debate that will move the law forward.³⁴

30. Alice Edwards & Laura Van Waas, *Statelessness*, in THE OXFORD HANDBOOK OF REFUGEE AND FORCED MIGRATION STUDIES 290, 296 (Elena Fiddian-Qasmiyeh et al. eds., 2014). ("In contrast, there has been little discussion of the application of the definition of a stateless person that is provided by international law and to which rights are attached.")

31. 1954 Statelessness Convention, *supra* note 16, at art. 41.

32. For a critical view of citizenship as a flawed model, see Barry Hindess *Citizenship for All*, 8 CITIZENSHIP STUD. 305 (2004).

33. This approach is inspired by literature that aims to "bridge" international law and moral philosophy. See Steven Ratner, *Ethics and International Law: Integrating the Global Justice Project(s)*, 5 INT'L THEORY 1 (2013); Steven Ratner, *International Law and Political Philosophy: Uncovering New Linkages*, 14 PHIL. COMPASS (2018); see also Samantha Besson, *Moral Philosophy and International Law*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 385 (Anne Orford & Florian Hoffman eds., 2016).

34. Indeed, further studies in other disciplines can lend more light on whether the definition actually leads to meaningful positive change in the lives of the stateless.

I.

THE PRESCRIBED ORTHODOXY: THE INTERNATIONAL DEFINITION OF
STATELESSNESS

If a State is allowed to consider who its citizens are and are not, and if a State could determine who is entitled to rights under the Statelessness Convention, then the State is more than a determiner of status; it is the giver of status, rights, and even life. Given these realities, the first question should be: why and how should statelessness be revisioned to respond to our present reality of a statist world?

Before arguing why and how statelessness should be revisioned, this Section first discusses the international definition of statelessness. I present a very brief history of the quest to define statelessness, then examine international law's current definition of statelessness, and analyze the dominant approaches to interpreting the definition. Then, I describe the identification of statelessness and its nature in our predominantly statist world.

An Abbreviated History of Defining Statelessness

Prior to its development as a legal concept in 1954, statelessness was sporadically discussed in the humanities, and even less so in law.³⁵ Statelessness is an old phenomenon,³⁶ perhaps as old as the State and State discretion.³⁷ People

35. See Mira Siegelberg, *The Question of Questions: The Problem of Statelessness in International History, 1921-1961*, Doctoral Dissertation, Harvard University (2014) (arguing that the transformation of statelessness from an important intellectual problem in the period after World War I to an ambiguous moral problem associated with human rights after 1948 contributed to its marginalization as an object of humanitarian concern and as an important category for comprehending international political and legal order). Cf. literature in history and social sciences. See generally CENTERING THE MARGIN: AGENCY AND NARRATIVE IN SOUTHEAST ASIA (Alexander Horstmann & Reed L. Wadley eds., 2006); C. MAGBAILY FYLE, INTRODUCTION TO THE HISTORY OF AFRICAN CIVILIZATION: PRECOLONIAL AFRICA (1999); JOHN PARKER & RICHARD REID, THE OXFORD HANDBOOK OF MODERN AFRICAN HISTORY (2013); C. PATTERSON GIERSCHE, ASIAN BORDERLANDS: THE TRANSFORMATION OF QING CHINA'S YUNNAN FRONTIER (2006); Kataoka Tatsuki, *Becoming Stateless: Historical Experience and Its Reflection on the Concept of State among the Lahu in Yunnan and Mainland Southeast Asian Massif*, 2 SE. ASIAN STUD. 69 (2013).

36. See United Nations High Commissioner for Refugees [hereinafter "UNHCR"], *Current UNHCR Activities on Behalf of Stateless Persons*, ¶ 1, U.N. Doc. EC/1995/SCP/CRP.6 (Sept. 21, 1995); UNHCR, *Information and Accession Package: The 1954 Convention Relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness*, ¶ 8 (1996, revised in 1999). If ancient Rome were considered a State, then the earliest deprivations of citizenship in Roman law, including banishment (*aquae et ignis interdictio*) and deportation in its severe form (*deportation in insulam*), would be some of the nascent causes of statelessness. PAUL WEIS, NATIONALITY AND STATELESSNESS IN INTERNATIONAL LAW 117 (2d ed. 1979).

37. Despite the problems associated with statelessness, some give up on citizenship and voluntarily choose to become stateless. These individuals retain, in a limited sense, the discretion to be stateless if and only if they choose to be and if the State says they are. The Westphalian system ushered in dogmas and doxas of sovereignty: territorial sovereignty (*dominium*) and personal sovereignty (*imperium*), or supreme authority over all citizens of the State at home or abroad. We can trace discretion from sovereignty. See Eric Allen Engle, *The Transformation of the International Legal System: The Post-Westphalian Legal Order*, 23 QUINNIAC L. REV. 23, 24 n.5 (2004).

have been "displaced from formal belonging"³⁸ in the nation-State system since at least the nineteenth century.³⁹ However, statelessness had not been defined as an international law concept until 1954.⁴⁰

States created the concept of statelessness against the backdrop of their top-down bureaucratic perspective that only States determine who a citizen-national is.⁴¹ The current definition still embodies this perspective. The Universal Declaration of Human Rights (UDHR) of 1948 included the right to nationality, paving the way for the 1954 Statelessness Convention.⁴² After drafting the UDHR, Eleanor Roosevelt wrote that a treaty on statelessness "seem[ed] to be knocking at our doors for consideration almost immediately."⁴³ But States remained unwilling to wholly surrender their discretion in defining statelessness. Consequently, State privilege in international law influenced the evolution of the agreed-upon definition. The State was regarded as supreme not only in granting civil rights, but also that the grant of an individual's status was exclusive to the State.⁴⁴

After the Second World War, the international community drew attention to the loosely-defined "statelessness." States were still reeling from the harrowing loss of lives and from witnessing the suffering of "stateless persons" in Europe.⁴⁵ But statelessness was (and still is) an amorphous concept. Initially intertwined with the concept of refugee protection,⁴⁶ the broad concept of statelessness originally encompassed both States' original definition of refugees as groups of (de jure) stateless people and other "stateless persons" in general.⁴⁷

In December 1947, the Human Rights Commission (HRC) noted the lack of agreements protecting refugees from the Second World War and highlighted the

38. KRISTY A. BELTON, STATELESSNESS IN THE CARIBBEAN: THE PARADOX OF BELONGING IN A POSTNATIONAL WORLD 27 (2017).

39. *Id.*

40. See Amal de Chickera & Laura van Waas, *Unpacking Statelessness*, in UNDERSTANDING STATELESSNESS 53 (Tendayi Bloom et al. eds., 2017) (describing the historic evolution and contemporary understanding of statelessness).

41. See Aaron Hale & Fredline M'Cormack-Hale, *Statelessness, Nationality, and Citizenship in Sierra Leone*, 35 J. GLOB. S. STUD. 311 (2018).

42. Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 15, U.N. Doc. A/RES/3/217A (Dec. 10, 1948).

43. Mrs. Franklin D. Roosevelt, *The Promise of Human Rights*, 26 FOREIGN AFFS. 470, 477 (1948).

44. See IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 390 (5th ed. 1998); Alexander Orakhelashvili, *The Position of the Individual in International Law*, 31 CAL. W. INT'L L. J. 241 (2001); Dinah Shelton, *Proceedings of the Annual Meeting*, 100 AM. SOC. INT'L L. 249 (2006).

45. Brad Blitz, *The State and the Stateless: The Legacy of Hannah Arendt Reconsidered*, in UNDERSTANDING STATELESSNESS 70, 72 (Tendayi Bloom et al. eds., 2017). I put stateless persons in quotes because, at this time, States did not really explicitly know what they meant when they used this term.

46. For an excellent historical overview, see James Hathaway, *The Evolution of Refugee Status in International Law: 1920-1950*, 33 INT'L & COMP. L. Q. 348 (1984).

47. *Id.* See also ATLE GRAHL-MADSEN, I THE STATUS OF REFUGEES IN INTERNATIONAL LAW 77 (1966).

need to adapt existing treaties to postwar conditions and new developments in international law.⁴⁸ The HRC requested that the Economic and Social Council (ECOSOC) initiate action, and the ECOSOC requested the Secretary-General undertake a study on it. Improving the position of stateless persons "require[d] their integration in the framework of international law, which, by tradition, has dealt with cases of foreigners possessing nationality."⁴⁹ The UN Secretary-General undertook a study on the situation of "stateless persons" even though statelessness was still ill-defined.⁵⁰ The UN's 1949 study constituted a step towards creating an international regime for protecting the unprotected.⁵¹ The study recommended providing stateless persons with status that would ensure their enjoyment of "rights necessary to enable them to lead an existence worthy of human beings, and . . . [provide] adequate international protection."⁵²

Eventually, States came up with two different treaties for refugees and stateless persons.⁵³ Drafters of the 1954 Statelessness Convention believed that States could fix statelessness through the liberal State system, which was supposed to ensure universal rights and shared development.⁵⁴ Most importantly, for our purposes, drafters debated whether to include a statelessness definition in the first place.⁵⁵ When States initially drafted a protocol for stateless persons, they did not intend to establish the meaning of statelessness and their draft did not contain a definition.⁵⁶ The draft protocol reflected a State-preferred arrangement, leaving States to decide who does and does not qualify as stateless.⁵⁷ Even as States drafted a treaty on statelessness separate from the protocol, delegates could not

48. NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF STATELESS PERSONS: ITS HISTORY AND INTERPRETATION (1995), https://www.oas.org/dil/1954_Convention_relat-ing_to_the_Status_of_Stateless_Persons.pdf (last visited Apr. 15, 2019).

49. *Id.*

50. *Id.*

51. LAURA VAN WAAS, NATIONALITY MATTERS: STATELESSNESS UNDER INTERNATIONAL LAW 66 (2008). The study is proof of the shared history and concern of the international community. The study refers to refugees as stateless persons: de jure stateless if they had been deprived of nationality by their country of origin and de facto stateless if they did not enjoy the protection and assistance of national authorities.

52. United Nations, *A Study of Statelessness*, at 43, U.N. Doc. E/1112/E/1112/Add.1 (Aug. 1, 1949).

53. For background, see ROBINSON, *supra* note 48. See also Paul Weis, *The Convention Relating to the Status of Stateless Persons*, 10 INT'L & COMP. L. Q. 255 (1961).

54. Tendayi Bloom, Katherine Tonkiss & Phillip Cole, *Introduction: Providing a Framework for Understanding Statelessness*, in UNDERSTANDING STATELESSNESS 5 (Tendayi Bloom et al. eds., 2017). In this regard, one might say that statelessness is a challenge to the liberal order of States, and the liberal order's failure is part of the overall rise of the sentiment against (neo)liberalism.

55. See United Nations Ad Hoc Committee on Refugees and Stateless Persons, *Ad Hoc Committee on Statelessness and Related Problems, Comments of the Committee on the Draft Convention*, U.N. Doc. No. E/AC.32/L/32 (Feb. 10, 1950).

56. *Id.*

57. ROBINSON, *supra* note 48; see also MICHELLE FOSTER & HÉLÈNE LAMBERT, INTERNATIONAL REFUGEE LAW AND THE PROTECTION OF STATELESS PERSONS 40–46 (2019).

agree on a definition.⁵⁸ A drafting committee was designated to address the impasse.⁵⁹ States realized that the 1954 Statelessness Convention needed a definition to delimit its field of application.⁶⁰ Some States, including Israel, argued that without a definition, States would have unbridled discretion to include and exclude beneficiaries from the treaty's provisions.⁶¹

Another relevant question for our purposes was the substance of the definition. States struggled with how to define statelessness.⁶² The Secretary-General's memorandum on the draft protocol,⁶³ which referred to a definition of statelessness in a report by Manley Hudson, the Special Rapporteur of the International Law Commission (ILC), attracted much attention.⁶⁴ States integrated Hudson's definition into the 1954 Statelessness Convention. However, the Hudson definition was not declarative of the concept of statelessness per se, but more about statelessness in its "strict, legal sense."⁶⁵ Notably, the UN study on statelessness contained "definitions" of stateless persons, which were longer and more elaborate than Hudson's strict, formalistic, and legalistic definition. The UN study defined stateless persons as "persons who are not nationals of any State, either because at birth or subsequently they were not given any nationality, or because during their lifetime they lost their own nationality and did not acquire a new one."⁶⁶ This definition is more specific than that of Hudson, containing causes of statelessness and without qualifying "national" with "considered." Notwithstanding this difference, the framers of the 1954 Statelessness Convention chose Hudson's definition despite the reservations of States like Israel and Norway.⁶⁷

58. See generally Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. Doc. Nos. E/CONF.17/SR.1 to E/CONF.17/SR.15.

59. The President of the Conference (Denmark) and the representatives of Australia, Belgium, Brazil, Germany, France, Israel, and the UK formed the committee. See Final Act of the United Nations Conference on the Status of Stateless Persons, at 120, New York, Sept. 26, 1965, <https://www.refworld.org/pdfid/3ae6b3840.pdf> (last visited Apr. 15, 2019).

60. See debates in U.N. Doc. No. E/CONF.17/3, pages 5 onwards; see also U.N. Doc. No. E/CONF.17/21. States were concerned about the relationship between the definition of statelessness and the concept of a refugee. States resolved to draft a definition of statelessness that would exclude persons who are or could become subject to the refugee treaty.

61. ROBINSON, *supra* note 48.

62. *Id.*

63. *Id.*

64. *Id.*; see Report on Nationality, Including Statelessness by Manley O. Hudson, Special Rapporteur, at 17, U.N. Doc. A/CN.4/50 (Feb. 21, 1952). ("Stateless persons in the legal sense of the term are persons who are not considered as nationals by any State according to its law.")

65. Hudson, *supra* note 64.

66. United Nations, *A Study of Statelessness*, *supra* note 52, at 7. (The study also advances that: "Stateless persons *de facto* are persons who, having left the country of which they were nationals, no longer enjoy the protection and assistance of their national authorities, either because these authorities refuse to grant them assistance and protection, or because they themselves renounce the assistance and protection of the countries of which they are nationals.")

67. ROBINSON, *supra* note 48. Israel argued that the definition should be about the State's lack of proof of a person's citizenship. Meanwhile, Norway foresaw that the "negative aspect" would affect a person's ability to claim stateless status.

This abbreviated history reveals decisions that were path-determinative for the contemporary understanding of statelessness. The decisions taken, among others, conceptually defined refugees separately from stateless persons. States also took a very particular approach to defining statelessness that would later have implications on the interpretation and application of the definition, which is discussed in Part II.C of this Article.

International Law's Definition

The stateless individual has been compared to a *res nullius* (a thing that does not belong to anyone), a flotsam, a vessel on the open sea not sailing under the flag of a State, a *caput lupinum* (an outlaw), a bird that flies alone, and an international vagabond.⁶⁸ Under international law, however, a person is stateless when they are "not considered as a national by any State under the operation of its law."⁶⁹ All States are generally bound by this definition as a matter of customary international law.⁷⁰

States opted for the de jure definition of statelessness over what was perceived to be an unclear, ambiguous de facto one.⁷¹ According to Edwards and van Waas:

Despite the preceding work of the ILC to deal with the distinctions between de jure and de facto statelessness, and the passionate appeal by the Special Rapporteur Roberto Cordova to include both categories in any instrument, the Conference decided only to cover 'de jure' stateless persons. As discussed further herein, this definition requires establishing a negative condition, which can make it particularly complex to apply in practice. Nevertheless, the non-binding Final Act of the Conference called on States parties to accord to persons who have

68. Myers McDougal, Harold Lasswell & Lung-chu Chen, *Nationality and Human Rights: The Protection of the Individual in External Areas*, 83 YALE L. J. 900, 961 (1974).

69. 1954 Statelessness Convention, *supra* note 16, at art. 1(1).

70. International Law Commission, *Draft Articles on Diplomatic Protection with Commentaries*, U.N. Doc. A/61/10, at 49 (2006). Although this statement was made when there was comparatively less State action on statelessness, to the ILC's mind, the definition expressed a customary rule probably because of the action of States in ratifying and accepting the definition that did not allow reservations. To contextualize this, however, the ILC made this statement in the articles on diplomatic protection.

Customary law is established from a widespread, consistent State practice and *opinio juris*. *Opinio juris* is the manifestation of the normative legal force of a principle. See *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, 44 (Feb. 20) [hereinafter "North Sea"]. Before a treaty provision can create a customary norm, there are a number of conditions that must be established, including the normative character of the treaty provision; widespread and representative participation in State practice, especially the most affected States; and the extensiveness of the practice and virtual uniformity. *Id.* at ¶¶ 73–74.

71. Edwards & van Waas, *supra* note 30, at 295–96. For a brief discussion of the other categories of persons who are excluded from the application of the 1954 Convention, see Budislav Vukas, *International Instruments Dealing with the Status of Stateless Persons and of Refugees*, 8 REV. B.D.I. 143, 168–70 (1972).

renounced the protection of their nationality for valid reasons (de facto stateless persons) the benefits of the Convention.⁷²

At the heart of the 1954 Statelessness Convention is the definition in Article 1(1), which embraces an essentialist and deductive approach to defining the term "stateless person." Definitions are among the most basic concerns of international law.⁷³ In language, definitions can either be essentialist or polythetic as well as deductive or inductive.⁷⁴ Essentialist definitions identify the elements necessary for something to be designated as such.⁷⁵ By contrast, polythetic definitions do not require all things falling within a definition to have specific common elements.⁷⁶ In a famous illustration, philosopher Ludwig Wittgenstein explained that the word "game" does not point to what all games have in common, but allows us to identify things that bear "family resemblances."⁷⁷ Deductive definitions articulate a general concept with reference to certain criteria, which identify activities associated with that concept.⁷⁸ The definition of statelessness is essentialist because it has two constituent elements that tell us when someone is stateless: (1) "not considered as a national... under the operation of its law;" and (2) "by any State."⁷⁹ The two elements must be present. It is deductive in that we refer to the elements as criteria to know whether a person is stateless or not.

The State's vision of statelessness is the converse of citizenship, the latter being understood in the traditional sense as the possession of the formal status of membership of a political and legal entity.⁸⁰ If one is not formally a member of the entity, then they are stateless. Thus, international law has adopted a dichotomous vision of citizenship in relation to statelessness: either one is a citizen or not of any State.

States that ratified or acceded to the 1954 Statelessness Convention are parties to the treaty that accept this definition of statelessness. The treaty prohibits

72. Edwards & van Waas, *supra* note 30, at 291–92; Cordova argued that “de facto statelessness is much worse than de jure statelessness not only quantitatively but also qualitatively.”

73. See, e.g., Ben Golder & Williams George, *What is 'Terrorism'? Problems of Legal Definition*, 27 U.N.S.W.L.J. 270 (2004); T. Jeremy Gunn, *The Complexity of Religion and the Definition of 'Religion' in International Law*, 16 HARV. HUM. RTS. J. 189, 194 (2003); Steven R. Ratner, *Self Defense Against Terrorists: The Meaning of Armed Attack* (Public Law And Legal Theory Working Paper Series, Working Paper No. 270, (2012)).

74. Gunn, *supra* note 73, at 194.

75. *Id.*

76. *Id.*

77. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 15 (G. E. M. Anscombe trans., 3rd ed. 1968).

78. Golder & George, *supra* note 73, at 273, 286 (as Golden and George explain, deductive and inductive approaches may also be combined within a single definition).

79. UNHCR, *HANDBOOK ON PROTECTION OF STATELESS PERSONS* 11 (2014) [hereinafter "UNHCR, HANDBOOK"].

80. See Richard Bellamy, *Introduction: The Theories and Practices of Citizenship*, in *CITIZENSHIP: CRITICAL CONCEPTS IN POLITICAL SCIENCE* 1, 2 (Richard Bellamy & Madeleine Kennedy-Macfoy ed., 2014).

reservations to the definition, ensuring it has a normative character.⁸¹ While the 1954 Statelessness Convention has one of the poorest ratification and accession records among all human rights treaties,⁸² it is mostly subscribed to by Western liberal democracies.⁸³ Consequently, a worldwide campaign has encouraged new ratifications from countries in Latin America, Asia, Africa, and Oceania.⁸⁴ Since 2010, some twenty-seven States either ratified or acceded to the treaty, representing almost thirty percent of State parties to the treaty.⁸⁵ It seems, on this metric, that States have largely accepted or are increasingly accepting the binding force of the definition.

In addition, supranational entities like the Council of Europe now adopt the definition.⁸⁶ The UN hailed the definition as the treaty's "most significant contribution to international law."⁸⁷ The UN Secretary-General has released a guidance note on the UN and statelessness, explicitly declaring that the definition is universally accepted and has established an internationally-recognized status.⁸⁸ UN specialized agencies, such as the UN High Commissioner for Refugees (UNHCR), routinely turn to the treaty definition when talking about statelessness.⁸⁹ The Inter-Parliamentary Union (IPU), a global organization of national parliaments,

81. 1954 Statelessness Convention, *supra* note 16, art. 38(1).

82. As of this writing, the 1954 Statelessness Convention has 97 States parties. See United Nations Treaty Collection, *Chapter V Refugees and Stateless Persons*, https://treaties.un.org/pages/ViewDetailsII.aspx?src=TREATY&mtdsg_no=V-3&chapter=5&Temp=mtdsg2&clang=_en (last visited Aug. 24, 2020).

83. SRINI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 124 (2009).

84. Nour Dados & Raewyn Connel, *The Global South*, 11 KEY CONCEPTS IN SOC. RSCH. (2012), <https://journals.sagepub.com/doi/pdf/10.1177/1536504212436479>.

85. United Nations Treaty Collection, *Chapter V Refugees and Stateless Persons*, *supra* note 82.

86. Council of Europe Convention on Avoidance of Statelessness in Relation to State Succession, Jan. 5, 2009, CETS No. 200, Article 1(c) (incorporating a definition of statelessness that mirrors Article 1(1) of the 1954 Statelessness Convention).

87. UNHCR, *Introductory Note to the Text of the 1954 Convention Relating to the Status of Stateless Persons*, Sept. 28, 1954, 360 U.N.T.S. 3, https://www.unhcr.org/ibelong/wp-content/uploads/1954-Convention-relating-to-the-Status-of-Stateless-Persons_ENG.pdf (last visited Apr. 15, 2014).

88. UNITED NATIONS, *The United Nations and Statelessness: Guidance Note of the Secretary-General* 4 (2011), <https://www.un.org/ruleoflaw/files/FINAL%20Guidance%20Note%20of%20the%20Secretary-General%20on%20the%20United%20Nations%20and%20Statelessness.pdf> (last visited Apr. 15, 2019) [hereinafter "UNITED NATIONS, *Guidance Note*"] (listing the identification and protection of stateless persons and the prevention and reduction of statelessness as action points).

89. See UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)* (2006), <https://www.unhcr.org/excom/ex-conc/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html> (last visited Apr. 15, 2019); see also UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note* (2010), <https://www.unhcr.org/protection/statelessness/4b960ae99/unhcr-action-address-statelessness-strategy-note.html> (last visited Apr. 15, 2019).

accepts it as *the* definition of statelessness.⁹⁰ As we shall see later, authorities around the world increasingly recognize the definition—but with variations—whether in pronouncements as to the content of the law, or in judicial and administrative decisions and opinions on statelessness determinations.

Legal scholars likewise endorse the definition. Guy Goodwin-Gill, for instance, referred to the definition as a description of the stateless person in international law.⁹¹ Alice Edwards has taken the position that the definition is descriptive of the situation of *de jure* stateless persons.⁹² Laura van Waas submits that it is the official and internationally endorsed definition of statelessness.⁹³

Interpretations of the Definition of Statelessness

The literature on legal statelessness prescribes at least two standard interpretations of the statelessness definition. This Section highlights the two top-line approaches, according to competing schools of thought on the matter in legal literature. The idea that there are largely only two ways to interpret the definition is the orthodox view in international law. However, interpretation in international law is a rhetorical enterprise, which involves matters of choice and of values and can enable us to generate new insights.⁹⁴

The First Approach

The first approach regards the definition as purely objective: a person is stateless if no State considers them a national under its law.⁹⁵ The value is put on what the domestic laws of the relevant States provide. A person claiming stateless status must prove that no State recognizes them as a national.⁹⁶ According to this

90. See INTER-PARLIAMENTARY UNION, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS (2005).

91. See Guy Goodwin-Gill, *Stateless Persons and Protection Under the 1951 Convention (or Refugees, Beware of Academic Error!)* 4 (1992), http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:979 (last visited Apr. 16, 2019) (referring to the definition in response to James Hathaway's position on stateless status vis-à-vis refugees).

92. Alice Edwards, *Displacement, Statelessness, and Questions of Gender Equality and the Convention on the Elimination of All Forms of Discrimination Against Women*, Background Paper for a Joint UNHCR and United Nations Committee on the Elimination of Discrimination against Women Seminar, held at the United Nations in New York, Jul. 16–17, 2009, at 17 (Apr. 2009); see also Carol Batchelor, *Statelessness and the Problem of Resolving Nationality Status*, 10 INT'L J. REFUGEE L. 156, 171 (1998) (Article 1 contains a description of statelessness).

93. VAN WAAS, *supra* note 51, at 228 (Mark Manly's position seems to reflect van Waas's stand on the issue).

94. Ian Scobbie, *Rhetoric, Persuasion, and Interpretation in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 71, 75 (Andrea Bianchi, Daniel Peat & Matthew Windsor eds., 2015) (For instance: "should one argue that the text is clear in the light of the treaty's object and purpose; or should it be read in the light of the parties' subsequent practice; or that recourse should be made to the *travaux préparatoires* to clarify matters?").

95. ROBINSON, *supra* note 48.

96. *Id.*

view, the phrase "operation of its law" was inserted into Article 1(1) of the 1954 Statelessness Convention to cover people who lost their nationality automatically through the application of law and people who lost their nationality through the application of a rule (e.g., an executive act).⁹⁷ Whether a person is stateless depends on a point of law, "an arguably unremarkable approach since nationality is itself a *legal* connection between a person and a [S]tate."⁹⁸

Under this first approach, statelessness is a question of law. Whether a State includes or excludes someone through the blackletter law is controlling. This mandates a strict, textual reading of the relevant laws. The IPU gives the impression that it endorses this view because Article 1(1) is a "strictly legal definition"⁹⁹ binding on all States. To illustrate, if A's status is under determination, the determination officers of State Y would have to check the laws of all relevant States to know if A is not considered a national under the laws of those States. Relevant States are usually those States in which A has an important life connection (for example, birth and parentage, or where A lives or lived). Take for example that one such State is State X. If State X's *law* provides that all persons born in its territory are automatically citizens of State X, and A was born in the territory of State X, then A is not stateless because A is a citizen of X.

The Second Approach

The second approach, endorsed by UNHCR, is rooted in the renewed attention to statelessness. In 2010, UNHCR organized an expert meeting in Prato, Italy on the concept of statelessness.¹⁰⁰ The meeting's summary conclusions stressed the importance of interpreting the definition in line with the 1954 Statelessness Convention's object and purpose.¹⁰¹ At the meeting, scholars' views were taken into account on how the definition should be interpreted.¹⁰² UNHCR's position was that a more holistic interpretation is best, paying due regard to the ordinary meaning of the term "statelessness," but at the same time, examining the elements of the definition.¹⁰³

97. *Id.*

98. VAN WAAS, *supra* note 51, at 20.

99. INTER-PARLIAMENTARY UNION, NATIONALITY AND STATELESSNESS: A HANDBOOK FOR PARLIAMENTARIANS 10 (2005).

100. See UNHCR, *Expert Meeting, The Concept of Stateless Persons under International Law: Summary Conclusions*, (May 27–28, 2010), <http://www.unhcr.org/4cb2fe326.pdf> (last visited Apr. 15, 2019) [hereinafter "UNHCR, *Expert Meeting*"].

101. *Id.* at 2.

102. *Id.*

103. *Id.*

Under this second approach, statelessness is a mixed question of law and fact, putting greater value on the "operation of law" clause of the definition.¹⁰⁴ This approach takes into account the law as applied to a specific case and rejects a purely formal analysis. Law refers to legislation, decrees, regulations, orders, and case law.¹⁰⁵ The law is not just the constitution or citizenship statute of a State. According to UNHCR, the word "operation" in the definition of statelessness "requires a careful analysis of how a State applies its nationality laws in an individual's case in practice and any review/appeal decisions that may have had an impact on the individual's status."¹⁰⁶ This approach reflects the general principles of law set out in Articles 1 and 2 of the 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws.¹⁰⁷

To illustrate, if A's status is under determination by State Y, the determination officers of State Y would have to check the laws of relevant States to know if A is *not considered a national under the laws* of those States. If State X's law provides that all persons born in its territory are citizens, and A was born in the territory of State X, it cannot be readily concluded that A is not stateless by being a citizen of State X. It may well happen that despite the provision of the law of State X, A is *not considered* a citizen by State X. To be determined stateless, other evidence would have to show that State X does *not consider* A as its citizen under the *operationalization* of its law and that no other State in the world considers them a citizen. Stated otherwise, there must be some *negative evidence* to show and prove that A is stateless. UNHCR explains that a State may not follow the letter of the law in practice.¹⁰⁸ In fact, a state may ignore the law's substance.¹⁰⁹

There is, however, a problem with proving "nothing." What counts as negative evidence is not clear. UNHCR tells us that the evidence can be one of two kinds: evidence relating to the individual's personal circumstances or evidence concerning the laws and other circumstances in the States concerned.¹¹⁰ In its determination, the State does not look to its own laws, but primarily looks at the

104. UNHCR, HANDBOOK, *supra* note 80, at 12. See Betsy Fisher, *The Operation of Law in Statelessness Determinations under the 1954 Statelessness Convention*, 33 WIS. INT'L L. J. 254 (2015) (contending that "operation of law" is not just nationality law, but also other legal provisions including civil registration law and state practice, and that a totality approach is necessary).

105. See, e.g., European Convention on Nationality, art. 2(d), Nov. 6, 1997, E.T.S. No. 166.

106. UNHCR, HANDBOOK, *supra* note 79, at 12.

107. Accordingly, the Hague Convention provides:

Article 1. It is for each State to determine under its own law who are its nationals. This law shall be recognised by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognised with regard to nationality.

Article 2. Any question as to whether a person possesses the nationality of a particular State shall be determined in accordance with the law of the State.

Convention on Certain Questions Relating to the Conflict of Nationality, arts. 1–2, Apr. 13, 1930, 179 L.N.T.S. 89.

108. UNHCR, HANDBOOK, *supra* note 79, at 13.

109. *Id.*

110. *Id.* at 32.

laws of another. If the State wants to be exhaustive in its determination, it must look at the laws of all the States in the world.¹¹¹ Of course, the most direct piece of evidence is a letter or statement from all States declaring that A is not their citizen. But such a letter or statement is difficult to obtain. Moreover, not every piece of evidence is as clear and direct in evidencing statelessness. For example, a passport could be evidence of citizenship or a mere passport of convenience. A person may possess a travel document but not be a citizen. A person could have a voting document but not be actually allowed to vote. A birth certificate could explicitly state one's citizenship or merely state the citizenship of one's parents. Additionally, a State does not have the duty to cooperate with another State's determination of statelessness. The current definition of statelessness privileges State gaze, which is the State's vicarious view of another State's perception of an individual. As I discuss more specifically in Part II.B.2, this view is fraught with danger.

More Alike than Different: Some Preliminary Critiques of the Orthodoxy

How different are the two approaches from each other? I submit that they are more alike than different. First, unlike the first approach, the second approach professedly attempts to broaden the number of people considered legally stateless by emphasizing that people *not considered* citizens by any State under the *operation* of its law are stateless. The premise is that:

Applying this approach of examining an individual's position in practice may lead to a different conclusion than a purely formalistic analysis of the application of a country's nationality laws to an individual's case. A State may not in practice follow the letter of the law, even going so far as to ignore its substance. The reference to "law" in the definition of statelessness in Article 1(1) therefore covers situations where the written law is substantially modified when implemented in practice.¹¹²

But it does not necessarily follow that the application of the second approach broadens the number of people considered stateless. It cannot plausibly do so because of the explicit State-centered language of the definition and is thus still like the statist orientation of the first approach. The Hague Convention, which inspired

111. *Id.* at 32–33 (UNHCR provides a non-exhaustive list of the types of evidence that may be pertinent: testimony of the applicant, responses from another State's authorities, identity documents (ex. birth certificate, extract from the civil registrar, national identity card, voter registration), travel documents, documents regarding applications to acquire nationality or obtain proof of nationality, certificate of naturalization, certificate of renunciation of nationality, marriage certificate, military service record, school certificates, medical certificates/records, record of sworn oral testimony of neighbors and community members, etc.).

112. *Id.* at 13. (To quote the UNHCR, what matters is the State's position: "Where the competent authorities treat an individual as a non-national even though he or she would appear to meet the criteria for automatic acquisition of nationality under the operation of a country's laws, it is their position rather than the letter of the law that is determinative in concluding that a State does not consider such an individual as a national.").

the second approach, itself works from the premise of State discretion,¹¹³ as the Hague Convention primarily promotes deference to the State.¹¹⁴

Second, the first approach emphasizes the law, while the second approach emphasizes both the law and the facts attendant to the individual's circumstances. However, applying the first approach also compels the determiner to examine an individual's factual circumstances. In determining statelessness, an individual or group of individuals presents their case before a determination officer—either a judge or an administrative officer—who considers their personal circumstances. Whether in the first or second approach, a State cannot determine an individual's citizenship status without an analysis of the attendant facts and their personal circumstances. If State Y determines A's citizenship status, it would have to determine if A is born in State X to ascertain which relevant provisions of State X's law must be included in its analysis. State Y has to consider A's life events and personal and family histories, including their residence, work, education, and other intimate details of life, from the most banal to the monumental. Otherwise, an adjudicator would not know which provisions of law are relevant to their analysis. Both approaches thus involve mixed questions of law and fact.

Perhaps what the second approach ultimately does, or hopes to do, is urge the State to exercise due diligence in fulfilling its obligations under the 1954 Statelessness Convention by engaging the State to look more carefully at the individual's situation whose citizenship or stateless status is under determination. In the second approach, the State is encouraged to be more diligent and look into a myriad of evidence, mainly documentary and oral evidence or narratives, relating to the facts and circumstances of the individual and the laws of other States. However, there are still significant challenges to the execution of the statelessness regime under the two approaches. For example, in both approaches, it is challenging to ascertain the information relevant for determining non-citizenship or stateless status. Here, negative evidence is required, and it is highly dependent on the cooperation other States. At minimum and depending on the situation, without direct, relevant, and clear evidence from other States, a determining State may merely have perceptions of people's status.

113. See Peter Spiro, *Citizenship, Nationality, and Statelessness*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND MIGRATION 281, 283 (Vincent Chetail & Céline Bauloz eds., 2014).

114. McDougal et al., *supra* note 68, at 914–15; see also *Nottebohm Case* (Liechtenstein v. Guatemala), Second Phase, 1955 I.C.J. 1, 4 (Apr. 6) [hereinafter "*Nottebohm Case*"]; *Nationality Decrees Issued in Tunis and Morocco*, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 4 (Feb. 7) [hereinafter "*Nationality Decrees Case*"].

*It's A Statist World, After All: Constituting Statelessness Within and Without
Circles of Citizenship*

1. *Identification of Statelessness*

States create procedures used to identify stateless persons. During a "stateless status determination," the State formally identifies stateless persons falling either under the 1954 Statelessness Convention's definition or another definition chosen by the State. At the moment, most States do not have a consistent or formal procedure for identifying statelessness in their national jurisdictions.¹¹⁵ Even States that are parties to the 1954 Statelessness Convention lack such procedures.¹¹⁶ Only a few determination machineries exist.¹¹⁷ Other less recognized means of identification of statelessness include quantitative methods—such as censuses, surveys, and the Delphi method—and qualitative methods—such as focus groups, semi-structured interviews, participatory assessment, and life histories.¹¹⁸

Identification procedures are important for several reasons. First, identification procedures aid the State in complying with international obligations. Identifying people entitled to the protection of the 1954 Statelessness Convention is the paramount initial step in protecting stateless persons and eradicating statelessness.¹¹⁹ While the 1954 Statelessness Convention does not explicitly obligate the

115. Edwards & van Waas, *supra* note 30, at 296.

116. Gyulai, *supra* note 23, at 122–23; see *X v. The Mayor and City Council Members of the City of Utrecht*, 201302776/1/A3, The Netherlands: Council of State (Raad van State) (2014), http://www.refworld.org/cases,NTL_COS,539085a64.html (last visited Apr. 15, 2019) (explaining that because there is no procedure to determine whether a person without a nationality is stateless, such persons cannot claim the protection of the 1954 Statelessness Conventions or relevant Dutch legislation).

117. See generally Gyulai, *supra* note 23, at 122. Mechanisms for protection can be grouped into five categories: (1) statelessness-specific mechanisms based on clearly established procedural rules; (2) statelessness-specific mechanisms without clearly established procedural rules, but with a general "consensus" on procedural modalities; (3) statelessness-specific mechanisms without clearly established procedural rules in law and without general consensus; (4) non-statelessness-specific mechanisms where legal and/or practical obstacles to expulsion provide grounds for residence rights; and (5) no protections available. *Id.* As Gyulai explains, "a handful of countries already have specific identification and protection mechanisms in place (including France, Georgia, Hungary, Italy, Latvia, Mexico, Moldova, the Philippines, Spain, and the United Kingdom." *Id.* at 123; cf. *R (on the application of Sameda) v. Secretary of State for the Home Department* (statelessness; Pham [2015] U.K.S.C. 19 applied) I.J.R. [2015] U.K.U.T. 00658 (I.A.C.) [hereinafter "*Sameda Case*"] (referencing previous decisions that cited and deferred to UNHCR's guidance and position).

118. See UNHCR, *Guidance Document on Measuring Stateless Populations*, <https://www.refworld.org/pdfid/4f6887672.pdf> (last visited May 19, 2020).

119. See Michelle Foster et al., *Part One: The Protection of Stateless Persons in Australian Law - The Rationale for a Statelessness Determination Procedure*, 40 MELB. U. L. REV. 401, 445–46 (2016) (arguing that the introduction of a specific status determination procedure in Australia could meet the dual objectives of identifying stateless persons and conferring a status that accords rights and the potential for naturalization); Ayane Odagawa et al., Study Group on Statelessness in Japan,

State to establish a procedure to determine statelessness, the State cannot effectively implement the treaty's provisions without a mechanism for identifying its beneficiaries.¹²⁰ Only after the State identifies stateless persons can it confer an established status and accord basic rights under the 1954 Statelessness Convention. This process also creates potential naturalization in accordance with international law.¹²¹

Second, identification procedures open the door for the international community to enforce rights-related duties that apply to individuals who lack citizenship. The human dimension of statelessness affects lives and goes beyond basic State interests. Many studies portray the human impact of lacking citizenship.¹²² People without citizenship often lack formal identities, and consequently, are often not entitled to the protection (diplomatic or otherwise) that is extended to citizens. The stateless are unable to exercise and enjoy such basic rights as the right to an education, the right to vote, the right to work, and access to basic social services.¹²³

Third, identification procedures impact the rights to which a person is entitled. The protections and rights codified in the 1954 Statelessness Convention are not the same as the rights of citizens.¹²⁴ The 1954 Statelessness Convention does not have an omnibus bill of rights for stateless people. It only provides what international law considers to be the bare minimum rights for the stateless. Therefore, if a person is determined to be stateless, they are entitled only to the rights in the 1954 Statelessness Convention—assuming other customary and treaty State obligations do not apply. For instance, the 1954 Statelessness Convention does not guarantee the right to vote or the right to political participation for a stateless individual. In the same manner, these individuals are generally entitled to practice

Typology of Stateless Persons in Japan 150 (Dec. 2017) (arguing that it is essential to identify stateless persons in Japan to protect them); UNHCR, *Note on International Protection*, ¶ 33, U.N. Doc. No. EC/SC/69/CRP.8 (Jun. 4, 2018) (stating that statelessness determination "assists States in fulfilling their commitments" under the 1954 Statelessness Convention).

120. See Katja Swider & Maarten den Heijer, *Why Union Law Can and Should Protect Stateless Persons*, 19 EUR. J. MIGRATION & L. 101, 109 (2017) (analogizing to the 1951 Refugee Convention, which does not contain an explicit obligation to establish a refugee status determination procedure, but which States have recognized as creating an implied duty).

121. See Foster et al., *supra* note 119.

122. There have been several studies on the impact of statelessness, with some studies using different definitions. One of the earliest was UN-sponsored, which used the traditional definition from the 1940s. See Report on Nationality, Including Statelessness by Manley O. Hudson, Special Rapporteur, at 17, U.N. Doc. A/CN.4/50 (Feb. 21, 1952). See, e.g., Manly van Waas & Berry, *Statelessness*, p. 2; UNHCR, *I am Here, I Belong*.

123. Hudson, *supra* note 122, at 19–20.

124. Depending on the right concerned, the 1954 Statelessness Convention establishes minimum standards of treatment along the following scale: (1) "treatment which is to be afforded to stateless persons irrespective of the treatment afforded to citizens or other aliens;" (2) "the same treatment as nationals;" (3) "treatment as favorable as possible, and in any event, not less favorable than that accorded to aliens generally in the same circumstances; and" (4) "the same treatment accorded to aliens generally." UNHCR, *Guidelines on Statelessness No. 3: The Status of Stateless Persons at the National Level* 3–4 <https://www.refworld.org/docid/5005520f2.html> (last visited Nov. 26, 2019).

their professions in the State that protects them or admits them, but only to the same degree as other non-citizens. On the other hand, if these individuals are determined to be citizens of another country, they are, in theory, entitled to citizen rights of that country. Assuming they are not disqualified, citizens are entitled to vote and participate in public affairs.¹²⁵ They are also allowed to practice their professions if able, duly authorized, and capacitated to do so.¹²⁶ Citizen rights offer higher protection and more entitlements than the rights of the stateless. Either way, identification procedures guarantee at least some legal protection.

The Constitutive Nature of Statelessness Identification

It has been asserted that identification procedures only declare an existing status because determinations only formally recognize people who are already stateless.¹²⁷ My position is different: identifying statelessness constitutes the status of persons, and therefore affords them the rights allocated to that status by the 1954 Statelessness Convention. By its very nature, the definition in the 1954 Statelessness Convention is constitutive because the State determines whether or not an individual is a citizen within what I call "circles of citizenship." During the determination process, the State or group of States exclude or include a person in their polities. When the State ascertains whether a State or group of States *considers* a person a citizen, the State "gazes" and passes a vicarious *judgment* on that person's status through its own perception of another State or group of States' polities. The determining State can also look into its own polity to consider them a citizen or not. Unlike refugee status, where being persecuted is among the objective crux of determination,¹²⁸ States determine who belongs or does not belong inside those circles of citizenship or polities.

To illustrate, when State Y wants to determine A's citizenship status, it must determine whether State X (assuming X is the only State with a connection to A) considers A a citizen or not. In the course of the determination process, State Y passes judgment based on the laws, life events, and personal and family histories of A. State Y generates its own perception of State X's circle of citizenship and whether State X considers A to belong within it. Or, State Y could directly ask State X if it considers A a citizen or not. Assuming that State X replies in the negative (even if A believes they are a citizen of State X), A is deemed a stateless person.

125. ICCPR, art. 25(b), Dec. 19, 1966, 999 U.N.T.S. 171.

126. Stateless persons are also allowed to practice their professions, but only if they are "lawfully staying" in the territory of the State, among other conditions. *See* 1954 Statelessness Convention, *supra* note 16, art. 19.

127. UNHCR, HANDBOOK, *supra* note 79, at 10 ("An individual is a stateless person from the moment that the conditions in Article 1(1) of the 1954 Convention are met. Thus, any finding by a state or UNHCR that an individual satisfies the test in Article 1(1) is declaratory, rather than constitutive, in nature.")

128. *See* 1951 Convention Relating to the Status of Refugees, art. 1(1).

What I refer to as "circles of citizenship" resonates with what political and social theorists call "imagined communities."¹²⁹ Citizenship is membership to imagined communities that States create. One of the oldest civilizations, Rome, began as an "association" that was initially comprised of stateless peoples.¹³⁰ In Michael Ignatieff's contemporary classic, *The Myth of Citizenship*, citizenship is described as a "noble myth," a reminder that, from its conception, citizenship is an "exclusionary category" that justifies the coercive rule of the included over the excluded.¹³¹ The anthropological perspective accepts that States "legibilize" populations when they imagine polities. Legibility is related to statecraft—the management of State affairs; statecraft's authority lies in the "distinct power to define citizenship membership in the social whole."¹³² In his influential book, *Seeing Like a State*, anthropologist James Scott demonstrates the modern State's ability to "legibilize" populations and territories by simplifying and standardizing measurement and documentation according to its view.¹³³

If citizenship is a construct of the State, then so is statelessness. Noora A. Lori writes that because the world's outlier populations do not neatly align with State configurations, most States have populations that do not fit into their imagined communities—that is, the dominant national narratives of what the States look like.¹³⁴ Consequently, States have resorted to three options when responding to these populations: "incorporate, expel, or ignore."¹³⁵ When States ignore them, they become "invisible in the [S]tate's legal self-image."¹³⁶ The result is statelessness, as these populations are excluded from the States' circles of citizenship.

Statelessness determination is one process through which States create and re-create imagined communities. At the moment of determination, the State decides whether an individual is a member of the imagined communities of States, thereby changing or maintaining the configuration of the circles. A configuration is changed if a person is excluded or included. Circles can have thick or thin

129. See, e.g., BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* 6, 25 (1983).

130. JOY CONNOLLY, *THE STATE OF SPEECH: RHETORIC AND POLITICAL THOUGHT IN ANCIENT ROME* 87 (2007).

131. Michael Ignatieff, *The Myth of Citizenship*, in *CITIZENSHIP: CRITICAL CONCEPTS IN POLITICAL SCIENCE* 137, 140 (Richard Bellamy & Madeleine Kennedy-Macfoy eds., 2014).

132. See Janet Coleman, *Citizenship and the Language of Statecraft*, in *FINDING EUROPE: DISCOURSES ON MARGINS, COMMUNITIES, IMAGES* 223–53 (Anthony Molho, Diogo Ramado Curto & Niki Koniordos eds., 2007) (For an excellent exposition of how citizenship and its relationship to statecraft had been variously defined, spanning from the period of the Christian Roman imperial statecraft as experienced and described by St. Augustine to its much later realizations during the 17th and 18th centuries, and arguing that in some way, these conceptions continue to the present).

133. See generally JAMES SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* (1998).

134. Noora A. Lori, *Statelessness, 'In-Between' Statuses, and Precarious Citizenship*, in *THE OXFORD HANDBOOK OF CITIZENSHIP* 743, 748 (Ayelet Shachar et al. eds., 2017).

135. *Id.*

136. *Id.*

boundaries; they can be permeable or airtight; they can overlap concentrically or form a Venn diagram. They can also vary in the firmness of their qualifications and disqualifications, as well as in their prerogatives and discretions. By this, I mean that they can allow multiple citizenships, identities, and permutations. Circles can also be stand-alone, thereby preventing dual or multiple citizenships.

It has long been acknowledged that a law containing norms could be constitutive: "The law constitutes when it composes, constructs, or forms."¹³⁷ Constitutive norms "define an identity."¹³⁸ The law can also be the tool to constitute something and someone;¹³⁹ in this case, statelessness and stateless persons. The policy school of international law acknowledges lawmaking as a constitutive process:¹⁴⁰ in international relations, particularly in constructivism, States engage in constitutive practices.¹⁴¹ One such practice, I argue, is the State's determination of whether a person is a citizen, which effectively determines that person's status as stateless or otherwise.

II.

THE REALITY: STATELESSNESS AS RHETORIC

In this section, I propose arguments for revisioning the definition of statelessness. This section moves away from the top-line, dominant approaches to interpreting statelessness, and instead shifts to a searching, critical interpretation and application of the definition. Although the 1954 Statelessness Convention strives to secure for stateless people "the widest possible enjoyment of their human rights and regulating their status,"¹⁴² international law's definition in the treaty has been an avenue for the State to engage in rhetoric around citizenship and statelessness. I argue for a new statelessness definition that draws insights from critical rhetoric as a theory to analyze international law's definition of statelessness as applied in stateless status determination cases.

A. Critical Rhetoric as Theory

Critical rhetoric is used in this Article as an aid to theorize about the definition of statelessness as a concept. Critical rhetoric provides a set of

137. See, e.g., John Brigham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10(2) *YALE J. L. & HUM.* 421–22 (1998).

138. Ted Hopf, *The Promise of Constructivism in International Relations Theory*, 23(1) *INT'L SEC.* 171, 193 (1998).

139. *Id.*

140. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 11 (2007).

141. See Hopf, *supra* note 138, at 1983.

142. See UNHCR, *Expert Meeting*, *supra* note 100, at 2.

methodological principles that inform our subsequent analysis.¹⁴³ For our purposes, this article utilizes critical rhetoric to theorize about the concept of a "stateless person" as articulated in the definition in the 1954 Statelessness Convention. Through critical rhetoric, legal artifacts (i.e., decisions and rulings) can be critiqued to uncover meanings.¹⁴⁴ Subjectivities can be exposed.¹⁴⁵ Within the critical humanist paradigm of communication studies, critical rhetoric assumes that reality is socially constructed.¹⁴⁶ Since lack of citizenship is a social construction—determined by, for, and because of the State—this lens sheds light on the discourse surrounding statelessness. States determine statelessness for, among other reasons, the purposes of treaty compliance, and people are stateless because of their perceived non-admission into the States' circles of citizenship.

Critical rhetoric has been used in legal studies.¹⁴⁷ Considering power relations imprinted in the legal text, critical rhetoric is "capable of indicating and specifying the political dimensions of legal language and further capable of explaining its apparently non-communicative qualities . . ."¹⁴⁸ Jeremy Bentham, in his analysis of abstract and uncertain concepts,¹⁴⁹ was one of the earliest scholars to apply critical rhetoric in legal scholarship. Illustratively, Bentham posited that the word *order* is employed in rhetoric to cloak tyranny.¹⁵⁰ Whether in relation to a law that is transitory or permanent, order can be invoked to justify any good or bad action.¹⁵¹ Bentham showed, using critical rhetoric, that a measure enacted in the maintenance of order can lead to the persecution of individuals.¹⁵² In recent

143. See generally Raymie McKerrow, *Critical Rhetoric*, in *ENCYCLOPEDIA OF COMMUNICATION THEORY* 235 (Stephen Littlejohn & Karen Foss eds., 2009) (stating the non-exhaustive eight principles of critical rhetoric); see McKerrow, *supra* note 18, at 102–08 for the original articulation of the principles.

144. Marouf Hasian Jr., *Myth and Ideology in Legal Discourse: Moving from Critical Legal Studies Toward Rhetorical Consciousness*, 17 *LEGAL STUD. F.* 347, 349–50 (1994).

145. See Kent A. Ono & John M. Sloop, *The Critique of Vernacular Discourse*, 62 *COMM. MONOGRAPHS* 19, 25 (1995). Their allusion is poignant: "Just as rap, jazz, and black power may not always construct positive representations of culture, Japanese American discourse may not construct positive representations in every instance." *Id.*

146. See Judith Martin & Thomas Nakayama, *Thinking Dialectically About Culture and Communication*, 9 *COMMUN THEORY* 1, 6–9 (1999).

147. E.g., Peter Goodrich, *Rhetoric as Jurisprudence: An Introduction to the Politics of Legal Language*, 4 *OXFORD J. LEGAL STUD.* 88, 90 (1984).

148. *Id.* at 90. In this regard, it is "an alternative to the 'authoritarian monologue' of dominant legal discourse which depicts itself as clear, technical and formal, but whose language rests on unarticulated exclusions that reflect power." Rebecca Moosavian, *A just balance or just imbalance? The role of metaphor in misuse of private information*, 7 *J. MEDIA L.* 196, 208 (2015).

149. Goodrich, *supra* note 147, at 88–89.

150. JEREMY BENTHAM, *THE BOOK OF FALLACIES: FROM UNFINISHED PAPERS OF JEREMY BENTHAM, BY A FRIEND* 232 (1824).

151. *Id.* at 232–33.

152. *Id.*

decades, scholars of domestic law have suggested that critical rhetoric could supply important schools of thought with theoretical understanding.¹⁵³

To understand critical rhetoric and its developments, I must briefly explain the theory of ideographs.¹⁵⁴ Ideographs are concepts that possess "force and meaning because of how they constitute and trigger a particular ideology."¹⁵⁵ They are abstract, standing "for beliefs and commitments that constitute ideologies."¹⁵⁶ However, they often have competing and contradictory dimensions.¹⁵⁷ To illustrate, the right to life and the right to choose are presented as oppositional in the abortion debate; gun control and the right to bear arms are positioned as oppositional in the debate over guns in the United States. Guns can be used to both protect and destroy lives.

Since ideographs have the capacity to be used in contradictory ways,¹⁵⁸ critical rhetoric posits that the analysis should recognize discursive indeterminacy.¹⁵⁹ Based on Martin Koskenniemi's idea of radical indeterminacy, international law standards are porous, malleable, and can defend any State's course of action.¹⁶⁰ International law is not free from decisionism; it involves choices.¹⁶¹ States argue based on choices amidst indeterminacy. Much like ideographs (although he does not call them ideographs), Koskenniemi validates international law's creation of various binarisms—reality is "constituted as language and as such, of binary distinctions."¹⁶² In other words, the language of international law is indeterminate as it creates, sustains, and reinforces ideographs, while the ideographs themselves create and recreate international law.

Proceeding from this, I put forward that States are rhetors who create citizens and stateless persons and constitute status. They pull together the conceived meanings of statelessness, citizenship, or both from fragments of texts. In rhetoric

153. See, e.g., Warren Sandmann, *Critical Legal Studies and Critical Rhetoric: Toward a Reconceptualization of the Acting Human Agent*, 17 *LEGAL STUD. F.* 367, 367 (1994). Despite this call, there remains a dearth in legal literature of scholarship that explicitly takes critical rhetoric as informative of critical approaches to law.

154. STEPHEN LITTLEJOHN, KAREN FOSS & JOHN OETZEL, *THEORIES OF HUMAN COMMUNICATION* 451 (11th ed. 2017).

155. *Id.* at 451–52.

156. *Id.* at 425.

157. *Id.*; see Michael Calvin McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 *Q. J. SPEECH* 1 (1980). McGee observed that "many use the term [ideology] innocently, almost as a synonym for 'doctrine' or 'dogma' in political organizations; and others use the word in a hypostatized sense that obscures or flatly denies the fundamental connection between the concept and descriptions of mass consciousness. The concept seems to have gone the way of the dodo." *Id.* at 1–2.

158. LITTLEJOHN, FOSS & OETZEL, *supra* note 154, at 452.

159. See McKerrow, *supra* note 18, at 98 (adding that ideas and concepts could be reconstructed after discursive indeterminacy is recognized in a critical rhetoric analysis).

160. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 25, 591 (2006).

161. *Id.* at 596.

162. Martti Koskenniemi, *A Response*, 7(12) *GERMAN L. J.* 1103, 1104 (2006).

studies, Aristotle is credited for a normative view of rhetoric centered around the role of the State.¹⁶³ Rhetoric is "an expertise in discharging public speaking roles"¹⁶⁴ that is employed as people deliberate on State matters. In the words of Neil McCormick: "[w]herever there is a process of public argumentation, there is rhetoric."¹⁶⁵ The enterprise includes decisions on laws, policies, and court rulings.¹⁶⁶

It has long been recognized that argumentation about the organization and management of the State is a rhetorical process.¹⁶⁷ State management, insofar as it entails communicating with others through persuasion, is an exercise of rhetorical power at the most basic level.¹⁶⁸ Why certain management ideas are more widely accepted than others is likewise attributed to rhetoric.¹⁶⁹ The determination of status—who belongs and does not belong in polities—is thus a way in which the State organizes and manages itself. The features of this rhetorical enterprise are analyzed in the next subsections.

On the whole, critical rhetoric prescribes an analysis of power and knowledge to examine an ideograph.¹⁷⁰ The focus is on how power is both marginalizing and productive.¹⁷¹ What ideologies underlie discourses? What symbolisms, if any, accompany language? How do those symbolisms and ideologies influence the overall rhetoric? Applied to law, "rhetoric creates ideology and ideology creates, empowers and sustains law."¹⁷²

Statelessness as an Ideograph

The 1954 Statelessness Convention's object and purpose is to protect stateless persons who are not refugees.¹⁷³ Scholars interpret this directive as securing stateless persons with "the widest possible enjoyment of their human rights and regulating their status."¹⁷⁴ States are supposed to accord these persons the widest

163. JAMES DOW, *PASSIONS & PERSUASION IN ARISTOTLE'S RHETORIC* 226 (2015).

164. *Id.* at 65.

165. NEIL MACCORMICK, *RHETORIC AND THE RULE OF LAW: A THEORY OF LEGAL REASONING* 17 (2005) (arguing "[n]otwithstanding the restriction to what is rationally arguable, the very idea of law as arguable leads us at once to consider the rhetorical character of legal argumentation. Wherever there is a process of public argumentation, there is rhetoric.").

166. JAMES DOW, *PASSIONS & PERSUASION IN ARISTOTLE'S RHETORIC* 65 (2015).

167. CHRISTOPHER HOOD, *THE ART OF THE STATE: CULTURE, RHETORIC, AND PUBLIC MANAGEMENT* 177 (1998).

168. *Id.* at 192.

169. *Id.*

170. McKerrow, *supra* note 18, at 91.

171. *Id.*

172. Inniss, *supra* note 21, at 665.

173. See 1954 Statelessness Convention, *supra* note 16, preamble at 5 (stating that the UN has expressed concern for stateless persons and endeavored to assure them the "widest possible exercise" of rights, and that many stateless persons are not covered by the 1951 Refugee Convention).

174. See UNHCR, *Expert Meeting*, *supra* note 100, at 2.

possible rights. A few States, including the UK, even stress full compliance with international obligations under all applicable statelessness treaties (the other global treaty being the 1961 Convention on the Reduction of Statelessness).¹⁷⁵ Others proclaim compliance with all international law norms,¹⁷⁶ or with regional human rights treaties and statelessness treaties.¹⁷⁷ Some add humanitarian traditions.¹⁷⁸ The professed objectives underlying these proclamations appear commendable.

The reality, however, is that statelessness is used to provide rights to the excluded, but is simultaneously deployed in tyranny to subject people to the rule of the State without the status of citizenship. When the State constitutes one to be stateless, the State is declaring that they have official status as "stateless" and are entitled to rights under the 1954 Statelessness Convention, constituting their exclusion from politics but according them only very limited rights. A stateless person receives the protection of the State, albeit in a limited and abstruse sense. Furthermore, when the State constitutes one as stateless, the State could declare them a thrall subject to the State's rule with very limited rights to participate in society. According to Matthew J. Gibney, based on the principle of subjection, everyone "living under or subject to" the laws of a State should be members of the polity.¹⁷⁹ State rule "is legitimate only if the people consent to its rule, and decisions are only legitimate if those affected by them are consulted and involved in the decision-making process."¹⁸⁰ Therefore, when stateless people are mandated to follow the laws of the State but are accorded no voice in State affairs and

175. U.K. BORDER AGENCY, *Home Office Instruction*, 6 (2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/501509/Statelessness_AI_v2.0_EXT_.pdf (last visited May 2, 2019) [hereinafter "U.K. BORDER AGENCY, *Home Office Instruction*"].

176. Law of Georgia on the Legal Status of Aliens and Stateless Persons, art. 1, <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99405/118651/F-1390570618/GEO99405%20Eng.pdf> (last visited Apr. 15, 2019). Georgia also refers to rights and freedoms guaranteed under its Constitution.

177. See the Republic of Panama's *Ministerio de Relaciones Exteriores' Decreto Ejecutivo Numero 10 (de 16 de Enero 2019)*, Preamble. Panama refers to the norms of international law, the American Convention on Human Rights, and the statelessness conventions. Panama has explicitly declared that the purpose of determining statelessness is to ensure the widest possible enjoyment of human rights for stateless persons and to provide extraterritorial effect to the status of a stateless person. *Id.*, ch. 1, arts. 2–3. Interpretation should largely favor the person applying for stateless status. *Id.*, ch. 1, art. 4.

178. See the Republic of the Philippines' *Department Circular No. 58, series of 2012: Establishing the Refugee and Stateless Status Determination Procedure*, sec. 2 (asserting consistency with "the laws, international commitments and humanitarian traditions and concerns").

179. Matthew J. Gibney, *Statelessness and the Right to Citizenship*, 32 FORCED MIGRATION REV. 50, 51 (2009).

180. *Id.*

only limited rights in the State, the law assumes a tyrannical structure.¹⁸¹ People become "*subjects but not members* of the political community."¹⁸²

This dichotomy has been the confounding moral tragedy of the law. Under international law, the State can make stateless persons live with only minimum rights and without full participation in society,¹⁸³ subject nonetheless to naturalization if required under the law. This has been the situation ever since international law began allowing statelessness to be contingent on the interests and values of States.¹⁸⁴ Because ideographs, such as statelessness, are equivocal and ill-defined, they accommodate "the use of power [and] excuse[] behavior[s] and belief[s]."¹⁸⁵

1. *Vicissitudes of Statelessness*

The ideographic nature of the definition is most pronounced in the vicissitudes of statelessness. Orthodoxy dictates that there are two main ways of interpreting the definition of statelessness. However, despite the international definition of statelessness detailed in Part I.B, not all States have the same understanding of statelessness, even when they refer to the definition in the 1954 Statelessness Convention. Polysemy or "the existence of determinate but non-[singular denotational meanings]"¹⁸⁶ is a direct manifestation of the ideograph.

There are at least three general ways in which States display their polysemic attitudes toward statelessness. Firstly, some States drop the "operation of law" component of the definition, a direct disregard of its customary nature. In civil law jurisdictions, whose laws specifically provide a definition of statelessness, like Georgia and Panama, reference to "operation of law" is completely omitted from the definition.¹⁸⁷ Betsy L. Fisher demonstrated that Australian and New

181. Odessa Gonzalez Benson & Yoosun Park, *Resettled. Yet Stateless: Elderly Monoglot Refugees in the United States as a Limit Case to Citizenship*, 10 J. HUM. RTS. PRACT. 423, 430 (2018).

182. *Id.*

183. *See supra* note 124, and accompanying text.

184. State interests vary. For example, in the United States, Gerald Neuman's work elucidated that the State looks into ideological qualifications, English-language skills, and renunciation of foreign allegiance. Gerald L. Neuman, *Justifying U.S. Naturalization Policies*, 16 IMMIGR. & NAT'LITY L. REV. 83 (1994–1995).

185. *See* McGee, *supra* note 160, at 15. For a reading of citizenship as a "slippery concept," see THE HUMAN RIGHT TO CITIZENSHIP: A SLIPPERY CONCEPT (Rhoda E. Howard-Hassmann & Margaret Walton-Roberts eds., 2015). While this edited collection uses the term "slippery concept," I argue that citizenship can also be read as an ideograph.

186. Leah Ceccarelli, *Polysemy: Multiple Meanings in Rhetorical Criticism*, 84(4) Q. J. SPEECH 395, 399 (1998).

187. Law of Georgia on the Legal Status of Aliens and Stateless Persons, art. 2(b), <https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/99405/118651/F-1390570618/GEO99405%20Eng.pdf> (last visited May 6, 2019) (defining a stateless person as "a person who is not considered a citizen by any state under its legislation"). Panama has similarly defined statelessness without reference to operation of law: "A person who is not considered as a national by

Zealand tribunals have also disregarded how law operates in some of their cases.¹⁸⁸ Most States, in theory, deny or grant stateless status based exclusively on reading another State's citizenship law, rather than by analyzing how that law (and other related laws) operates with respect to a particular person. Adjudicators either fail to interpret the definition "properly," are confused with de facto and de jure statelessness, or are dissuaded by the complexities, time, and effort required to make a "proper" analysis of statelessness.¹⁸⁹ But the problem is that State practice can contradict or alter the reading of citizenship laws,¹⁹⁰ and States grant (or withdraw) citizenship at their discretion, even when they are not so authorized under their own laws.¹⁹¹

Secondly, other States add or subtract other elements to international law's definition of statelessness. In the United Kingdom, immigration rules add that one cannot be stateless if they are not in the United Kingdom.¹⁹² Canada's approach, another Commonwealth common-law jurisdiction, is to include a stateless person in its definition of "foreign national," as if to say that stateless persons are nationals of another State.¹⁹³

Finally, there could be more eclectic approaches to interpreting the definition that work around and within indeterminacy. Despite the customary nature of the definition, the US Department of State, for instance, refers to a stateless person as "someone who, under national laws, does not enjoy citizenship."¹⁹⁴ The emphasis is on the "enjoyment" of citizenship.¹⁹⁵ In the Czech Republic, a person who is not a Czech citizen is stateless.¹⁹⁶ Hence, although statelessness has a definition in international law, it operates in vagueness.¹⁹⁷

any State, according to its legislation, is considered a stateless person." The Republic of Panama's *Ministerio de Relaciones Exteriores' Decreto Ejecutivo Numero 10 (de 16 de Enero 2019)*, ch. 11, art. 5.

188. Fisher, *supra* note 104, at 271.

189. *Id.* at 274–78.

190. *Id.* at 278.

191. See UNHCR, HANDBOOK, *supra* note 79, ¶ 22.

192. Immigration Rules Part 14 <https://www.gov.uk/guidance/immigration-rules/immigration-rules-part-14-stateless-persons>.

193. See Immigration and Refugee Protection Act - S.C. 2001, c. 27 (Section 2) <https://laws.justice.gc.ca/eng/acts/i-2.5/>.

194. U.S. DEP'T OF STATE, *Statelessness*, <https://www.state.gov/other-policy-issues/statelessness/>.

195. Note, however, that US practice is not consistent. US adjudicators rule on a person's status as "somewhat ambiguous" despite a statement from the State concerned that a person is not its citizen. Fisher, *supra* note 104, at 270.

196. Helena Hofmannová, *Legal Status of Stateless Persons in the Czech Republic*, 3 L. Q. 55, 67 (2013).

197. Two State practices are most noteworthy. Hungary's definition looks into the applicant's "national law" without explaining how to determine what a person's national law is. This allows Hungarian agents to pick and choose which laws and instruments to apply. See Hungary's Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals, RRTN Section 2 (b),

Explaining the Ideograph: State Privilege and State Gaze

In a world that privileges State discretion, States have an opportunity to constructively engage in an ideational imposition of interests and identities in relation to the individual. In communication studies, concepts are the State's agents of social control. States are able to control societies through ideographs, or abstractions with highly contingent meanings open to interpretation and negotiation.¹⁹⁸ This is so with statelessness. Statelessness has no definite meaning but is given the impression of a clear meaning for political positions.

The definition allows what I call State gaze. State gaze is the State's vicarious view of the individual's situation. Through State gaze, the State gazes and passes a vicarious *judgment* on a person's status through its own perception of another State or group of States' polities. Under international law's definition, the presence or absence of statelessness is disappointingly contingent on whether the State *considers* one as a citizen or not. To decide whether a person should be a citizen in a constructivist activity, the State uses a value and interest system. This system entertains factors that in turn have normative and instrumental dimensions that construct "realities."¹⁹⁹ Part II.C describes some of these factors.

Belief takes center stage in State gaze because international law's definition of statelessness relates to whether a State "consider[s]" a person (the referent in discourse) as its national under the operation of its laws.²⁰⁰ The State's perceptions of other States' actions or inactions, and at limited times, the actions or inactions of the person claiming statelessness, become conclusive. The determining

<https://www.refworld.org/pdfid/4979cae12.pdf> (last visited May 6, 2019) ("[S]tateless person' shall mean a person who is not recognized as a citizen by any country under his/her national law") [hereinafter "Hungary's Act II of 2007"]. In Latvia, a person is stateless if "some other [S]tate" does not recognize them as a citizen. See Latvia's Law of 2004 on Stateless Persons, sec. 2(1), <https://www.refworld.org/docid/41387c6c4.html> (last visited May 6, 2019) ("A person may be recognised as a stateless person in the Republic of Latvia if some other state has not recognised the person as a citizen thereof in accordance with the laws of such state.")

198. See McGee, *supra* note 157, at 5. See also Inniss, *supra* note 21, at 665–68.

199. See John Gerard Ruggie, *What Makes the World Hang Together? Neo-utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 878–79 (1998). For an example of a work on the social constructivism of statelessness, see Jocelyn Kane, *The Social Construction of Statelessness in Canada: A Study of National Media 1930-2011* (2013) (Master's Thesis, Ryerson University).

200. It is not even clear from the international definition of statelessness which States have a stake in the status of a person: the State where they applied for stateless status, a collection of States, or any other third-party state. For an opinion on which States should have a stake in status determinations, see *Sentenza n. 4262/2015*, Italy: Italian Supreme Court (Corte Suprema di Cassazione) (Nov. 4, 2014), https://www.refworld.org/cases,ITA_CC,556da6cf4.html (last visited May 2, 2019). Italy's practice is to look into the country of origin of the person and any countries where they have "relevant links." *Id.* In the UK, Justice McLaughlin opined that "countries who are potential candidates for granting" a person citizenship are relevant to statelessness determinations. *Fedorovski, Re Judicial Review*, (2007) N.I.Q.B. 119, United Kingdom: High Court (Northern Ireland), ¶ 13 (Nov. 23), https://www.refworld.org/cases,GBR_HC_NI,492accba2.html (last visited May 2, 2019); but see ROBINSON, *supra* note 48 (seemingly advocating for a more exhaustive search into the different States of the world).

State can "read its substantive conception of world society as well as its view of the extent of sovereign freedom into legal concepts and categories."²⁰¹

The absence of a duty by the non-determining State to cooperate with a determining State's procedures compounds this reliance on belief. A variety of interpretations can be drawn from a State's silence or refusal to respond to a request verifying citizenship status.²⁰² The non-communication between States could take place while applicants for recognition of stateless status remain in detention. Applicants may be detained for months or even years, and many do not receive diplomatic assistance.²⁰³ In *Kim v. Russia*, the European Court of Human Rights found that an applicant had been "left to languish for months and years, locked up in his cell, without any authority taking an active interest in his fate and well-being."²⁰⁴ Equally important, because a determining State cannot compel cooperation or demand information from other States, the State may rule on a person's status based on an incomplete set of information or an erroneous interpretation and application of another State's law. States do not know, and are presumed not to know, the laws of other States.²⁰⁵ The State determining stateless status thus runs the risk of performing legally incorrect analysis.

In sum, the State engages in a construction of who is, and who is not, stateless based on a gaze. Thus, the definition presents a paradox because the State determines who is in fact stateless, based on law that States themselves create and implement. Not only does the term "statelessness" bear multiple meanings, but whatever its "autonomous and international meaning"²⁰⁶ is, it is relativized in relation to the State's concept of who is the 'other' based on its own interests and values.²⁰⁷

201. See Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 30 (1990) (speaking in the general context of international law).

202. To illustrate, in *B2 v. The Secretary of State for the Home Department*, UK Justice Jackson wrote that a non-determining State may choose not to respond to a request from a determining State to confirm whether an individual is its national. As UK Justice Jackson explained, the non-determining State may lack institutional capacity to carry out the necessary investigations or may simply be unwilling to respond. It should be noted that Justice Jackson in turn relied on UNHCR's analysis. See *B2 v. Secretary of State for the Home Department*, (2013) E.W.C.A. Civ. 616, ¶ 36 (May 24).

203. For information on the detention of applicants, see Amal de Chickera & Nina Murray, *Protecting Stateless Persons from Arbitrary Detention* (2017), https://www.statelessness.eu/sites/www.statelessness.eu/files/attachments/resources/ENS_LockeInLimbo_Detention_Agenda_online.pdf. (last visited May 2, 2019).

204. *Kim v. Russia*, Application no. 44260/13, Eur. Ct. H.R., p. 11, para. 54.

205. For problems in the proof and interpretation of foreign law, see generally Jacob Dolinger, *Application, Proof, and Interpretation of Foreign Law: A Comparative Study in Private International Law*, 12 ARIZ. J. INT'L & COMP. L. 225 (1995). For a much earlier overview, see Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L. J. 1018 (1941).

206. See UNHCR, Submission by the United Nations High Commissioner for Refugees in the case of *AS (Guinea) v. Secretary of State for the Home Department before the Court of Appeal (Civil Division)*, C5/2016/3473/A, ¶13 (Feb. 20, 2018) [hereinafter UNHCR Submission in *AS (Guinea)*] (asserting that the definition of statelessness has autonomous and international meaning).

207. See Ronald Lee, *Ideographic Criticism*, in RHETORICAL CRITICISM 285, 296 (Jim Kuypers ed., 2009). An ideograph is always understood in relation to the 'other.'

While the binary category (stateless or citizen) is generally maintained,²⁰⁸ States understand and use the legal concept of statelessness differently.

As a doctrinal matter, this leads to an implicit contestation of the definition of statelessness in international law. While the ILC declared that the definition of statelessness is a matter of customary international law,²⁰⁹ and seemed to suggest that its customary status derives from the fact that the definition in the 1954 Statelessness Convention is singular in international law and not subject to any reservation,²¹⁰ a careful review reveals that States do not uniformly and consistently use the definition of statelessness set forth in the 1954 Statelessness Convention. Given disparate State practices, it may be questioned whether States are in contempt of their obligation or if contrary practices have arisen as seeds for a new rule.²¹¹ These subsequent practices could also be evidence of the true meaning of the term. How States apply the definition in practice elucidates the agreement of the parties on its interpretation.²¹² This Article suggests that differences are not merely due to the States' desire to flagrantly violate the definition of statelessness or to renege on treaty obligations, but are also a function of States interpreting and applying the definition differently because of the ideographic character of statelessness.

Statelessness Identification as a Playing Field of Ideologies

Understanding statelessness as rhetoric reveals not only the important ideographic nature of the term, but also the ideologies behind the process of identifying statelessness. I have previously introduced the identification of statelessness, together with stateless status determination, in Part I.D.1. The law bears ideologies that are not easily revealed through a reading of its text and the text's avowed objectives and the related declarations of States. Since the time of Hans Morgenthau, one of the major twentieth-century figures in the study of international

208. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 16. *Cf.* In citizenship studies, scholars posit that citizenship could be "graduated" since the concomitant layers of rights associated with legal, social, racial, and economic constructs differentiate the groups of people. See Avyanthi Azis, *Urban Refugees in a Graduated Sovereignty: The Experiences of the Stateless Rohingya in the Klang Valley*, 18 CITIZENSHIP STUD. 839 (2014). Aihwa Ong, *Graduated Sovereignty in South-East Asia*, 17 THEORY, CULT. & SOC. 55 (2000). See also Marie McAuliffe, *Protection Elsewhere, Resilience Here: Introduction to the Special Issue on Statelessness, Irregularity, and Protection in Southeast Asia*, 15 J. IMMIGR. REFUGEE STUD. 221, 227–28 (2017). Studies also demonstrated that citizenship exists along a spectrum and does not just require a grant of a formal citizenship. See also ELIZABETH F. COHEN, SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS 15 (2009); Lindsey N. Kingston, *Statelessness as a Lack of Functioning Citizenship*, 19 TILBURG L. REV. 127 (2014).

209. International Law Commission, Draft Articles on Diplomatic Protection with commentaries, U.N. Doc. A/61/10, at 36 (2006).

210. UNHCR, HANDBOOK, *supra* note 79, at 9; see 1954 Statelessness Convention, *supra* note 16, at art. 38(1) (prohibiting reservations to Article 1).

211. See Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95(4) AM. J. INT'L L. 757, 790.

212. See VCLT, *supra* note 27, art. 31(3)(b).

relations, international law has been regarded as an ideological structure that States use to retain the status quo.²¹³ International law is a prime, though not the only, determinant of relative power positions between and among States.²¹⁴ While international law may herald a manifest ideology (or objective), it could itself also reflect a latent, hidden ideological underpinning.²¹⁵

I claim here that ideologies latent in the text of the 1954 Statelessness Convention's definition of statelessness influence rhetors in the identification of statelessness. The causal force of ideologies works to determine the direction of the discourse, thereby removing the rhetor as the sole party deciding on matters.²¹⁶ They are akin to headwinds, tailwinds, and sidewinds changing or pushing the direction of discourse. At least two ideologies do that: what I have termed *formalism*—form over substance of protection—and *discretionism*—that State discretion in nationality ascription necessarily leads to State discretion in statelessness determinations. I posit that these two ideologies affect stateless status determinations.

1. Formalism in Stateless Determinations

In many stateless status determinations, from the pretense of the State as the giver of rights, the existence of citizenship on its own is sufficient 'to protect' the otherwise unprotected. As a case in point, the UK Home Office asserts that the possession of nationality (or even the possibility of acquiring a nationality) already ensures "full participation in society and [functions as] a prerequisite for the enjoyment of the full range of human rights."²¹⁷ UNHCR's guidelines likewise reinforce this notion. Despite encouraging States to examine a person's position vis-à-vis the law in practice and to veer away from a purely formalistic analysis, UNHCR merely engages States to consider whether another State's law as applied regards the person in question as a citizen.²¹⁸ And, that is enough to satisfy international standards. The non-enjoyment or absence of any entitlements that flow from citizenship is immaterial or irrelevant. People's sufferings are rendered invisible.

Formalism has deep foundations, rooted in the formulation and initial conceptualization of the definition. Hannah Arendt, a stateless person and political theorist, wrote in her seminal work *The Origins of Totalitarianism* that the most basic of rights flowed through one's citizenship.²¹⁹ She drew the distinction

213. Scott, *supra* note 133, at 319.

214. *Id.* at 319. Scott, however, emphasized the realist paradigm's inability to adequately account for the dynamics between international law and the support of less powerful states. *Id.* at 324.

215. Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L. L. J. 81, 99–100 (1991).

216. See McKerrow, *supra* note 143, at 236.

217. U.K. BORDER AGENCY, *Home Office Instruction*, *supra* note 175, at 5.

218. UNHCR, HANDBOOK, *supra* note 79, at 13.

219. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 277 (1951).

between human rights that flowed from the dignity of the person and civil rights that are derived from belonging to a distinct political community willing to enforce rights.²²⁰ Stateless persons generally lose all rights.²²¹ For Arendt, who made the argument that there is a link between the State and rights, belonging to a community as a citizen constituted "the right to have rights."²²² Arendt explained, "[t]he question was not, as for Hamlet, to be or not to be, but to belong or not to belong."²²³ Aristotle's idea that humans are political animals and that political rights are the door to other rights proved central to Arendt's philosophy.²²⁴ US Chief Justice Earl Warren's famous dissent in *Perez v. Brownell* neatly captured Arendtian philosophy. Chief Justice Warren described the right to citizenship as "man's basic right for it is nothing less than the right to have rights."²²⁵ States are, in the words of Brad K. Blitz and Maureen Lynch, "the principal guarantor[s] of human rights."²²⁶ While Arendt's framework distinguished between human rights and the right to citizenship, both rights exist within States.²²⁷ States have rights and responsibilities under international law as primary actors.²²⁸ Oppenheim's famous statement in the first half of the twentieth century was that States were the only subjects of the law of nations.²²⁹

Arendt's thinking on the "right to have rights" is now, however, challenged.²³⁰ Arendt's notion of the "right to have rights" could be viewed as a moral claim or a performative right in the linguistic sense.²³¹ The former sense means that States bear the deontological duty to protect humans by providing the right to nationality and opening the door for full human rights protection.²³² The latter means that the 'right to have rights' could be interpreted as "a right brought into

220. *Id.*

221. *Id.* at 290–302.

222. *See generally* ARENDT, *supra* note 219.

223. *Id.* at 84.

224. Meghna Kajla, *Nation-State and its Production of Statelessness: A Study of Chin Refugees*, in *DETERRITORIALISED IDENTITY AND TRANSBORDER MOVEMENT IN SOUTH ASIA* 91, 101 (Nasir Uddin & Nasreen Chowdhury eds., 2019).

225. *Perez v. Brownell*, 356 U.S. 44, 64 (1958).

226. *See* Brad Blitz & Maureen Lynch, *Statelessness and the Deprivation of Nationality*, in *STATELESSNESS AND CITIZENSHIP: A COMPARATIVE STUDY ON THE BENEFITS OF NATIONALITY* 1, 4 (Brad K. Blitz & Maureen Lynch eds., 2011).

227. Kajla, *supra* note 224, at 101.

228. *See* MALCOLM N. SHAW, *INTERNATIONAL LAW* 197 (6th ed. 2008).

229. *See generally* HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950).

230. *See* SEYLA BENHABIB, *THE RIGHTS OF OTHERS: ALIENS, RESIDENTS, AND CITIZENS* (2004). Benhabib extended Arendt's idea to the "rights of others"—the right of an outsider of a State to political membership. She questioned the idea of the State as the sole authority in denying (and giving) rights to outsiders.

231. Stephanie DeGooyer, *The Right....*, in *THE RIGHT TO HAVE RIGHTS* 18, 21–24 (Stephanie DeGooyer et al. eds., 2018).

232. *Id.* (citing Seyla Benhabib, *Human Rights and the Critique of "Humanitarian Reason"* (2004), <https://www.resetdoc.org/story/human-rights-and-the-critique-of-humanitarian-reason/> (last visited May 2, 2019)).

being through the very statement of articulating it."²³³ As Judith Butler, a scholar on performativity, nonetheless admitted, there is no ground to the claim outside the claim.²³⁴ The implication is that people could not simply lay very strong entitlements to rights via citizenship.

Another critique is that Arendt rendered an overly simplistic consideration of the situation of statelessness.²³⁵ To be a stateless person is to be unprotected by any specific law of a State.²³⁶ Arendt's analysis assumed that human rights are empty and hollow, and that they are made concrete when connected with a political institution—the State.²³⁷ Arendtian philosophy was conceived at a time when human rights were cheap talk, and Arendt presented a sharp critique to the abstract Rights of Man discussed in the first half of the twentieth century.²³⁸

Formalism has emerged from Arendtian philosophy as applied by States. It is a fallacy that mere membership in a political community (formal nationality) *ipso facto* is full human rights protection. The substantive is reduced into the formal. States choose not to inquire into the substance of human rights protection, and perfunctorily consider a person fully protected once determined to have formal citizenship.²³⁹ The *ex ante* assumption is that if individuals have citizenship, they have and enjoy human rights. Human rights are fetishized and essentialized into citizenship rights.²⁴⁰ True, without citizenship, humans are in a Hobbesian state of nature. Those left outside the State are vulnerable to human rights violations.²⁴¹ It is a fallacy, however, to contend that human rights protection necessarily follows from mere political membership. Neither human rights nor citizenship practically guarantees the rights afforded by the other.

The very formalistic nature of the present definition of statelessness aids the rise of this ideological fallacy. The definition does not presently require States to inquire into the substantive nature or quality of one's citizenship. After struggling to define statelessness in the 1954 Statelessness Convention, States ultimately

233. *Id.* at 23. For a good introduction to J. L. Austin and Judith Butler's performativity, see Stephen Young, *Judith Butler: Performativity*, CRITICAL LEGAL THINKING (2016), <http://criticallegalthinking.com/2016/11/14/judith-butlers-performativity/> (last visited May 2, 2019).

234. DeGooyer, *supra* note 231.

235. Richard Bernstein, *Hannah Arendt on the Stateless*, 11(1) PARALLAX 46, 51 (2005).

236. *Id.*

237. *Id.* at 57.

238. Richard Bernstein, *Are Arendt's Reflections on Evil Still Relevant?*, 70 REV. POL. 64, 70 (2008).

239. *See, e.g. AS (Guinea) Appellant - and - Secretary of State for the Home Department Respondent - and - United Nations High Commissioner for Refugees Intervener*, (2018) E.W.C.A. Civ. 2234, United Kingdom: Court of Appeal (England and Wales) (Oct. 12, 2018) [hereinafter, "*AS (Guinea)*"].

240. *See generally* Amir Biparva & Sayed Qasem Zamani, *The Convergence of Human and Citizenship Rights in the Globalization Era*, 10 MOD. APPLIED SCI. 94 (2016).

241. *See* Blitz & Lynch, *supra* note 226; *see also* GIORGIO AGAMBEN, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (1998). Giorgio Agamben furthered Arendt's arguments in his conceptualization of bare life's inexistence before the law.

decided on an abstract definition that considers only formal links to nationality.²⁴² As UNHCR explained in its guidance to States, the word "national" in the 1954 Statelessness Convention only reflects "a formal link, of a political and legal character, between the individual and a particular State."²⁴³ Once the link is determined to exist, thin, brittle, and anxious as the link is, the determining State willingly chooses not to inquire and is prevented from inquiring into the nature of the protection that such link accords the individual.²⁴⁴ States rely on this formalistic definition in making statelessness determinations, instead of individually looking into whether the individual is able to exercise the rights associated with citizenship because they are a citizen of at least one State in the world.

AS (Guinea) exemplifies that States merely ascertain the existence (or absence) of a legal bond in statelessness determinations.²⁴⁵ The case maintains that determinations are about *de jure* statelessness.²⁴⁶ When the applicant argued in *AS (Guinea)* that the 1954 Statelessness Convention "must be interpreted in light of its human rights and humanitarian objectives,"²⁴⁷ Lord Kitchin distinguished the nature of the issue to an application for refugee status.²⁴⁸ Lord Kitchen reasoned that, unlike a refugee, stateless persons could gather evidence at no risk to themselves,²⁴⁹ implying that they could themselves also secure rights protection on their own if they wanted to. In this framework, the protection of the applicant's human rights becomes irrelevant and is not investigated.

Formalism also manifests in the so-called presumption against statelessness.²⁵⁰ Many States impliedly assume citizenship so that a person does not become an alien in their own country.²⁵¹ If citizenship is presumed, then there would be no need to inquire into whether the individual is able to exercise rights tied to citizenship to account for the presence of citizenship. States just assume the formal presence of citizenship based on the facts and no longer look for its manifestations. For example, relying on a presumption of citizenship, the Philippine Supreme Court upheld a political candidate's natural-born Filipino

242. Per this definition, nationality refers only to the formal link to a State and not the quality of citizenship protection. Cf. *Nottebohm Case*, *supra* note 114, at 23 (requiring a genuine link as a test in cases of citizenship determination).

243. UNHCR, HANDBOOK, *supra* note 79, at 21.

244. See, e.g. *AS (Guinea)*, *supra* note 239.

245. *Id.*, ¶¶ 45–46.

246. *Id.*

247. *Id.*

248. *Id.* ¶ 46.

249. *Id.*

250. See Brownlie, *supra* note 44.

251. See, e.g., Kenya Citizenship and Immigration Act (2011) Cap. 9 (Kenya); The Citizenship of Zambia Act No. 33, Cap. 16 (2016) § 5–6 (Zam.).

citizenship, enabling her to run for public office as a Senator.²⁵² The court enthused over a "disputable presumption that things have happened according to the ordinary course of nature and the ordinary habits of life."²⁵³ The Supreme Court was willing to assume citizenship based on the fact that things happen the way they do ordinarily, for example a baby with Filipino features who was abandoned in a province in the Philippines likely had Filipino parents, and therefore, birth-right citizenship.²⁵⁴ States view citizenship as the normal and statelessness as the abnormal.²⁵⁵

States do not afford complete rights to all people.²⁵⁶ In its intervention in *AS (Guinea)* before the UK Court of Appeal, the UNHCR admitted that the assumption of the binary of statelessness and citizenship in international law leaves individuals in limbo, deprived of substantive nation-State protection.²⁵⁷ For one, States may choose not to accord citizenship-related rights to persons possessing formal citizenship.²⁵⁸ In the Introduction of this Article, I demonstrated that States chose not to protect Hoda Muthana and Shamima Begum and treat them as citizens based on national security interests.²⁵⁹ States can deliberately provide citizens with access to only a subset of citizenship-related rights, or even grant certain citizens no political rights at all.²⁶⁰

Further, according to Laura van Waas and Sangita Jaghai, not everyone admitted as a citizen enjoys the full package of attached rights; citizens may still suffer from insecure citizenship status.²⁶¹ For example, citizenship by birth is typically more secure than acquired citizenship.²⁶² Withdrawal of citizenship occurs more frequently for naturalized citizens.²⁶³ In the United States, a recent

252. *Poe-Llamanzares v. COMELEC*, G.R. Nos. 221697 & 221698-700, Republic of the Philippines: Supreme Court, Mar. 8 2016, https://www.lawphil.net/judjuris/juri2016/mar2016/gr_221697_2016.html (last visited May 2, 2019). I am not arguing that this case was wrongly decided on a point of domestic law. I reference this case merely to illustrate the premise of States' assumptions of citizenship. Though such a presumption may enable citizenship rights to be honored and attenuates a person's burden of proof to prove citizenship, it works against an applicant trying to prove statelessness.

253. *Id.*

254. *Id.*

255. See Rudolf Graupner, *Statelessness as a Consequence of the Change of Sovereignty over Territory after the Last War*, in *THE PROBLEM OF STATELESSNESS* 27, 29 (World Jewish Congress ed., 1944).

256. See David Weissbrodt & Michael Divine, *Unequal Access to Human Rights: The Categories of Noncitizenship*, 19(8) *CITIZENSHIP STUD.* 870 (2015).

257. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 16.

258. For an illustration, see Leti Volpp, *Citizenship Undone*, 75 *FORDHAM L. REV.* 2579 (2007).

259. See *supra* note 12 and accompanying text.

260. ELIZABETH COHEN, *SEMI-CITIZENSHIP IN DEMOCRATIC POLITICS* 6 (2009).

261. See Laura van Waas & Sangita Jaghai, *All Citizens are Created Equal, but Some are More Equal Than Others*, 65 *NETH. INT'L L. REV.* 413 (2018).

262. *Id.*

263. *Id.*

study ascertained trends in the denaturalization of naturalized US citizens, denial and revocation of passports, and political attacks on citizenship by birth of children born in the United States to non-citizens.²⁶⁴ While it is not possible to conclusively state that passport denials and revocations have increased recently,²⁶⁵ in comparison with previous administrations, denaturalization rose in the first two years of the Trump administration.²⁶⁶ Nearly three times as many civil denaturalization cases (29.5 per year) were filed than the average of the eight previous administrations (12 per year). Criminal denaturalization cases have also increased in 2017 and 2018.²⁶⁷ It is believed that a significant portion of the denaturalizations "have or will result in statelessness,"²⁶⁸ and suggests a "selective targeting based on national origin, as a proxy for race, ethnicity, and religion, and contributes to the overall charge that the administration is seeking to exclude immigrants and citizens because of its nativist ideology."²⁶⁹ Efforts to redefine *jus soli* citizenship may also be considered as a practice that threatens the security of citizenship by birth.²⁷⁰ New analyses of citizenship laws in Europe, the Americas, and Asia also reveal discrimination and inequalities between and among different kinds of citizens.²⁷¹

The cases and examples provided above show that while it is possible for States to uphold a person's citizenship to avoid statelessness based on the letter of the law, such is not always the case and inequality still persists within States when dealing with issues of citizenship and statelessness. Significantly, the formalism of the law is used as a subterfuge.

The Ideology of Discretionism

In Part I.D.2, I discussed that through State privilege and gaze, the State could constitute polities—create and uncreate the status of people. The State has the primary privilege to grant and revoke citizenship. The definition of statelessness retains the partiality towards State gaze predominant in the early half of the

264. See generally LAURA BINGHAM & NATASHA ARNPRIESTER, UNMAKING AMERICANS: INSECURE CITIZENSHIP IN THE UNITED STATES (2019).

265. *Id.* at 12.

266. *Id.* at 10.

267. *Id.*

268. *Id.* at 11.

269. *Id.*

270. *Id.* at 13.

271. Olivier Vonk et al., "Benchmarking" Legal Protection against Statelessness, in SOLVING STATELESSNESS 163, 187 (Laura van Waas & Melanie Khanna eds., 2017). This study concluded many nationality laws in the Americas discriminate between categories of nationals. This type of discrimination is less pronounced, but is also present in Europe. The study looked at seventy-six countries. For a study of the laws in Asia, see Olivier Vonk, *Comparative Report: Citizenship in Asia* (2017), <http://cadmus.eui.eu/handle/1814/50047> (last visited May 2, 2019).

twentieth century. Even though the State sets out to objectively define statelessness, State gaze becomes central regardless of its supposed objectivity.²⁷²

I further claim in this subsection that discretionism is present in statelessness determinations. The absence of concrete parameters for determining statelessness breeds State discretion.²⁷³ The reader of a text has a natural tendency to emphasize what is present, but absence "may be more important, more potent, as a source of information than mere presence."²⁷⁴ In critical rhetoric, "[t]erms are not 'unconnected'; in the formation of a text, out of fragments of what is said, the resulting 'picture' needs to be checked against 'what is absent' as well as what is present."²⁷⁵

Discretionism operates at a practical level in statelessness determinations. In evidentiary terms, since the 1954 Statelessness Convention is silent on matters of proof and evaluation, it has left these matters for a determining State to decide.²⁷⁶ This is where, so to speak, the rubber hits the road. The conspicuous silence of international law on these matters opens up discretion.²⁷⁷ Proof and evaluation are matters crucial to the conduct of statelessness determinations. As discussed above, statelessness precariously requires proving and establishing a negative (that is, the absence of citizenship) and in many States—like the United States—citizenship is sometimes defined in constitutions and statutes "although most of the time it [is] not."²⁷⁸ Despite the crucial role of evidence, there is no clear international rule on whether an individual applicant for stateless status should bear the burden to prove the negative, and associated with that, what evidentiary standards are adequate to prove the negative.

One matter that had been particularly challenging for applicants in proving statelessness is documentation. The variety of documents that could prove citizenship (and the lack of it) is just enormous and reflective of the complexity of

272. By objectivity, I refer to the twin criteria of concreteness and normativity. Concreteness means that the law (in this case, the definition) is verifiable, or justifiable, independently of what anyone might think that the law *should be*. Normativity means that the definition is applicable even against a State or other legal subject which *opposed* its application to itself. See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 25, 513 (2006).

273. See S.S. *Lotus* (Fr. V. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at ¶ 87 (Sept. 7) [hereinafter *Lotus Case*].

274. McKerrow, *supra* note 143, at 236.

275. McKerrow, *supra* note 18, at 107.

276. See *infra* note 291.

277. See *Lotus Case*, *supra* note 273, ¶ 87 (ruling that the absence of principles in international law gives the State discretion on how to act).

278. MARTHA S. JONES, BIRTHRIGHT CITIZENS: A HISTORY OF RACE AND RIGHTS IN ANTEBELLUM AMERICA 10 (2018).

citizenship.²⁷⁹ More so, not all documents grant rights.²⁸⁰ In the *Semeda Case*, while Justice McCloskey held that the UK's definition of statelessness aligns with the international law definition,²⁸¹ he admitted that the question of statelessness frequently turns on other things, in particular possession of or access to documents "which denote[] that the individual is recognized by one of the [S]tates of the world as one of its nationals."²⁸² The problem is that although individuals are charged with the burden of proof of statelessness, many stateless persons are without identity documentation or the means to obtain it.²⁸³

Another case in point is *RRT Case No. 1218580*, where Australia's Refugee Review Tribunal leaned on the non-submission of documents to surmise that an applicant was not stateless.²⁸⁴ Instead of providing the required multiple documents to prove citizenship (not actually to prove the lack of citizenship), the applicant submitted an identity card.²⁸⁵ The tribunal stated "[e]ven if three separate documents were required, the Tribunal considers that the fact that the applicant has not submitted the registration certificate or the PDS or ration card does not necessarily mean that he was never issued with these documents."²⁸⁶ Such pronouncement is problematic because it impliedly assumed that the applicant was issued citizenship documents, yet just did not submit them to the tribunal. The inference drew the presence of citizenship from the non-submission of documents. But it could simply be that the applicant was not issued those documents in the first place.

Apart from evidentiary concerns, it becomes problematic when States are afforded wide latitude to include and exclude considerations they deem relevant in an analysis. State discretion results in an assessment that incorporates other

279. See, e.g., Laurie Parsons & Sabina Lawreniuk, *Seeing Like the Stateless: Documentation and the Mobilities of Liminal Citizenship in Cambodia*, 62 POL. GEOG. 1, 4 (demonstrating that, for example in Cambodia, four documents prove citizenship: birth certificate, ID card, voting card, family book, and a letter of immigration; entitlement to certain documents is predicated on the possession of others).

280. *Id.*

281. *Semeda Case*, *supra* note 117, ¶ 13.

282. *Id.* ¶ 16. While documents are important for identity determination, danger inheres where they become solely determinative in the State's exercise of discretion.

283. BRONWEN MANDY, IDENTIFICATION IN THE CONTEXT OF FORCED DISPLACEMENT 7 (2016). See generally Samantha Balaton-Chrimes, *Statelessness, Identity Cards and Citizenship as Status in the Case of the Nubians of Kenya*, 18 CITIZENSHIP STUD. 15 (2014); Council of Europe, *Legal status / Identity documents / Statelessness*, <https://www.coe.int/en/web/roma-and-travellers/legal-status/-/id-documents> (last visited May 2, 2019); see also Jay Milbrandt, *Stateless*, 20 CARDOZO J. INT'L & COMP. L. 75 (2011).

284. *RRT Case No. 1218580*, (2013) RRTA 279, Australia: Refugee Review Tribunal ¶ 35 (Apr. 2).

285. *Id.* at ¶ 32.

286. *Id.* at ¶ 35. Although this case focused primarily on refugee status, it nonetheless illustrates the role of documents in statelessness determination.

elements and factors that States broadly find relevant.²⁸⁷ State agents incorporate other elements and factors beyond the statelessness definition when weighing statelessness claims, including the applicant's residence and actions. For example, Hungarian law²⁸⁸ requires applicants to be residing in Hungary before their stateless status is determined, implicitly including legal residence as an indispensable condition of statelessness. States also look into an applicant's actions. In *Fedorovski, Re Judicial Review*, the UK's High Court (Northern Ireland) said that since statelessness is "not a condition that can be wished upon one's self," a person cannot claim to be stateless if they had refused to apply for citizenship in the State or States that they are most closely connected with.²⁸⁹ Similarly, in *Z.L. c. Procureur Général près de la Cour d'appel de Bruxelles*, a determination officer in Belgium denied stateless status to an applicant who had renounced his nationality.²⁹⁰ A State could also decide based on whether an applicant fits the "other," as a judgment of someone who is different from oneself.²⁹¹

Thus, States have resorted to differing ways in the exercise of their discretion to include or exclude the individual in polity. International law's definition of statelessness has linked the general discretion of States in granting and revoking citizenship to determining statelessness. While international law has shifted to a rights perspective on nationality matters and limited discretion on citizenship matters, the 1954 Statelessness Convention's definition anachronistically retains a remnant of a State-centric era that breeds discretionism.²⁹² States consider vital interests in the determination of statelessness, such as the prevention of

287. UNHCR Submission in *AS (Guinea)*, *supra* note 206, ¶ 23 (citing the U.K. case of *Hesham Ali (Iraq) v. Secretary of State for the Home Department*, (2016) U.K.S.C. 60 (Nov. 16)).

288. Hungary's Act II of 2007, *supra* note 197, sec. 76(1); see UNHCR, *Observations of the Office of the United Nations High Commissioner for Refugees in the Case of X v Office of Immigration and Nationality (17.K.32.297/2013) before the Constitutional Court of Hungary* (2014), <https://www.refworld.org/docid/547c69434.htm> (last visited May 2, 2019) (arguing that the law is incompatible with the 1954 Convention).

289. *Fedorovski, Re Judicial Review*, (2007) N.I.Q.B. 119, United Kingdom: High Court (Northern Ireland), ¶¶ 12–13 (Nov. 23); see also *R v. Secretary of State for The Home Department, ex p Valentina Bradshaw*, (1994) Imm.A.R.359 (asserting that upon the withdrawal of her residence).

290. See *Z.L. c. Procureur Général près de la Cour d'appel de Bruxelles*, 5–6, C.07.0385.F, Belgium: Cour de cassation (Jun. 6, 2008). The first chamber of the Belgian Court of Cassation overruled the denial of status, reasoning that the judgment added a condition to the 1954 Statelessness Convention that it does not contain.

291. See Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage, and the Nauru Case*, 34 HARV. INT'L. L. J. 445, 499 (1993) (citing EDWARD SAID, *ORIENTALISM* (1978)). Orientalism views the Other as "inferior, incapable, and disorganized and therefore a suitable object for conquest and control." *Id.* Studies show that political procedures even use quantities of time to confer and deny citizenship rights. See ELIZABETH COHEN, *THE POLITICAL VALUE OF TIME: CITIZENSHIP, DURATION, AND DEMOCRATIC JUSTICE* (2018).

292. Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 694–95 (2011).

terrorism,²⁹³ the maintenance of international security,²⁹⁴ and sovereignty that often leads to discrimination.²⁹⁵ States consider such interests in the determination of statelessness.

Statelessness in the Resulting Rhetoric of Naming and Categorizations

The ideographic character of statelessness and the underlying ideologies of statelessness identification have several consequences. Firstly, statelessness has become a naming device of international law; States exercise a naming function in statelessness determinations through the "stateless" label. In critical rhetoric, naming plays an interpretive role in assessing what is perceived to be true at the moment. Through naming, one fixes and asserts a relationship to that which is named.²⁹⁶

Labelling, in the words of Geof Wood, refers to "a relationship of power in that the labels of some are more easily imposed on people and situations than those of others . . . [and] is therefore an act of politics involving conflict as well as authority."²⁹⁷ Labels proliferate with the development of the international migration regime. Governments form, transform, and politicize labels.²⁹⁸ In the arguments around statelessness, competing policy discourses are evident in how States use available means of persuasion (mainly grounded in law and within the wide discretion that international law's definition allows) to declare or constitute stateless status. States appear more willing to use domestic law to make stateless status determinations in the absence of prescribed rules of international law. States also incorporate policy-determined factors for inclusion or exclusion, such as lawful stay, actions of the applicant, and other links to the determining State.

293. See Shiva Jayaraman, *International Terrorism and Statelessness: Revoking the Citizenship of ISIL Foreign Fighters* 17(1) CHI. J. INT'L L. 178 (2016).

294. For a discussion of statelessness in the context of international security in the Security Council, see Valeria Bello, *Is the Discussion of 'Statelessness' in the UN Security Council a Question of Human Security or International Security?* (2014), <https://gcm.unu.edu/publications/policy-reports/is-the-discussion-of-statelessness-in-the-un-security-council-a-question-of-human-security-or-international-security.html> (last visited May 6, 2019).

295. See van Waas & Jaghai, *supra* note 261, at 413 ("As nationality revocation gains new attention from states as a tool to counter terrorism . . . the reality that this measure often applies only to particular sub-groups of citizens demands closer scrutiny."). See also J. M. Spectar, *To Ban or Not to Ban an American Taliban - Revocation of Citizenship & (and) Statelessness in a Statecentric System*, 39 CAL. W. L. REV. 263 (2003); Volpp, *supra* note 258. International law does allow the exclusion of the benefits of the 1954 Statelessness Convention on certain grounds in Article 1(2). However, the current definition of statelessness lends to constructivist critiques. Some States are also anticipating new loss of territory due to the impending effects of climate change and its impact of statelessness. See Abhimanyu George Jain, *The 21st Century Atlantis: The International Law of Statehood and Climate Change-Induced Loss of Territory*, 50 STAN. J. INT'L L. 1 (2014).

296. McKerrow, *supra* note 143, at 236.

297. Geof Wood, *The Politics of Development Policy Labelling*, 16 DEV. & CHANGE 347 (1985).

298. See generally Roger Zetter, *More Labels, Fewer Refugees: Remaking the Refugee Label in an Era of Globalization*, 20(2) J. REFUGEE STUD. 172 (2007).

Secondly, statelessness has become a category, with the consequences associated with categorizing people. The term "stateless" is a category of people in State vocabulary. Categorization is important for knowledge formation and action.²⁹⁹ At the intersection of anthropology and migration studies, "the national order of things" refers to the view that nation-States are the "natural" organizing parts of the world.³⁰⁰ Categories structure things and people.³⁰¹ As language ordains people and things to belong to a category,³⁰² categories make it possible to create groups of phenomena for a branch of knowledge.³⁰³ Yet, analytical categories such as "stateless" are also policy-related labels designed to meet policy ends.³⁰⁴ Through categories, States attempt to regulate and control people. Categories are contingent constructs corresponding to State policies.³⁰⁵

More than an issue of semantics, categories have consequences—firstly entitling "some to protection, rights and resources whilst simultaneously disentitling others."³⁰⁶ For instance, we have seen in this Article how identification procedures impact the rights to which a person is entitled, whether as "stateless" or "citizen" of a State.³⁰⁷ A stateless person is entitled to a minimum set of rights under the 1954 Statelessness Convention. A citizen is theoretically entitled to the entire gamut of rights under their State's constitution and laws.

But, secondly, categories create epistemological blind spots: the plight of those people excluded from the category is made invisible to the State.³⁰⁸ The formalism of the definition and the ideology of discretionism offer an opportunity for States to look away when claims of human rights violations are presented during determinations. While these States appeal to reason or intellect in reaching a decision on statelessness, the human rights condition of the applicant, which is often argued before statelessness determinations, does not appear that relevant to status determinations.³⁰⁹ When the applicant's human rights condition is raised,

299. For a discussion of categories and categorization in the social sciences, see Richard Jenkins, *Categorization: Identity, Social Process and Epistemology*, 48 *CURRENT SOCIO.* 7 (2000).

300. See Liisa H. Malkki, *Refugees and Exile: From "Refugee Studies" to the National Order of Things*, 24 *ANNU. REV. ANTHROPOL.* 495, 516 (1995).

301. MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* 417 (1970).

302. *Id.* at xvi–xvii.

303. *Id.* at 389.

304. Claire Beaugrand, *Framing Nationality in the Migratory Context: The Elusive Category of Biduns in Kuwait*, 6 *MIDDLE E. L. & GOVERNANCE* 173, 176 (2014).

305. *Id.* at 176–77.

306. Heaven Crawley & Dimitris Skleparis, *Refugees, Migrants, Neither, Both: Categorical Fetishism and the Politics of Bounding in Europe's 'Migration Crisis'*, 44(1) *J. ETHNIC & MIGRATION STUD.* 48, 59 (2018).

307. See *supra* notes 124–26 and accompanying text.

308. See Tara Polzer, *Invisible Integration: How Bureaucratic, Academic and Social Categories Obscure Integrated Refugees*, 21(4) *J. REFUGEE STUD.* 476, 477 (2008).

309. See Part II.C.1

the rhetor counters with the formal definition of statelessness, returning to a reasoned analysis of the law and other policy concerns of the State.³¹⁰

This leads to a third point. The other danger of categorization is that it can take on "a blurry, circular shape" as humans do not form categories in clean boxes and on objective processes.³¹¹ Categories tend to follow or develop ahead of a particular policy concern.³¹² At the time of the 1954 Statelessness Convention, the category of "stateless person" followed from the international community's policy concern about protecting people who did not enjoy State human rights protection.³¹³ However, as I have argued, the resulting definition is deficient and lacks a protection-oriented focus. International law enables States to decide on statelessness on their own accord³¹⁴ and to incorporate countering ideologies. The rightless (a stateless person in the Arendtian sense)³¹⁵ has become a referent in the rhetorical discourse. In sum, the policy choices of States become evident through statelessness determinations, and operate alongside ideologies that animate the law and the decisions of State agents.

IV.

A CALL: REVISIONING STATELESSNESS IN INTERNATIONAL LAW

The international community should and could revision statelessness in international law. This revisioning should address the inherent limitations and embedded ideologies in the definition of statelessness. The goal of the 1954 Statelessness Convention is to protect the people who would otherwise be unprotected. For States to further that goal, international law's definition of statelessness needs to be revisioned. I offer a framework introducing some possibilities, though I note that this framework does not solve all problems related to statelessness and has tentative moving parts. However, my hope is that this will further the conversation about the inadequacy of the concept of statelessness in international law and begin the process of revisioning statelessness in our statist world, inviting the reader to debate and identify alternative ways of looking at statelessness.

Notably, my approach is to 'revision' the statelessness definition. It is not merely to revise the definition, neither a total re-envisioning that so violently

310. *Id.*

311. See Lucille Jewel, *Old-School Rhetoric and New-School Cognitive Science: The Enduring Power of Logocentric Categories*, 13 LEGAL COMM. & RHETORIC: JAWLD 39, 44 (2016).

312. See Oliver Bakewell, *Research Beyond the Categories: The Importance of Policy Irrelevant Research into Forced Migration*, 21 J. REFUGEE STUD. 432, 436 (2008).

313. See 1954 Statelessness Convention, *supra* note 16, at preamble; UNHCR, Expert Meeting, *supra* note 100, at 2.

314. Cf. Tamas Molnar, *Remembering the Forgotten: International Legal Regime Protecting the Stateless Persons - Stocktaking and New Tendencies*, 11 US-CHINA L. REV. 822, 847 (2014). While Molnar accepts that international law's definition is a categorization, he asserts that it is a "coherent, logically closed legal architecture."

315. This is also reminiscent of Giorgio Agamben's take on stateless persons as having bare life. For Agamben, a stateless person exists in a state of exception. See AGAMBEN, *supra* note 241, at 9.

departs from the statelessness regime's policy intent. Revisioning entails having a calibrated protection-oriented vision or outlook to statelessness. At the same time, it works within the bounds of the 1954 Statelessness Convention, importantly acknowledging that international law's approach should not be discarded, despite the vision, because international law still does accord rights and aims to protect people. Furthermore, such a mechanism already exists in treaty law, which States embarked on after a tumultuous world war. Despite the prohibition of any reservations to the definition, the 1954 Statelessness Convention contains a revision procedure in Article 41.³¹⁶ That procedure commences when a State party requests to 'revision' the treaty.³¹⁷ The General Assembly must then recommend what steps, if any, should be taken.³¹⁸ As the treaty prescribes nothing more, the General Assembly possesses discretion on how to best proceed.

In this regard, I submit that the General Assembly could initiate the proper steps in changing the terms of the 1954 Statelessness Convention. Other steps may include: amending a treaty on nationality or human rights; creating a more precise definition of statelessness in future treaties; and even initiating or advocating for a change in the practice of States and other treaty bodies dealing with the concept of statelessness. Those initiatory steps could be started at the level of the UN General Assembly or at the level of any of the organs and specialized bodies of the UN or through any treaty body.

The point is that changing the definition of statelessness is possible. While I admit that we are in a precarious moment in which the international community is besieged with strong sentiments that would likely resist international lawmaking efforts that seek to address the status of persons on the move across borders of States, implicating reasons that prove the elusiveness of high-level reform,³¹⁹ some factors below point to why the statelessness question could be an exception to this broader trend. These factors relate to the recent, but inadequate, attempts to change the statelessness definition and could draw in a more progressive consensus through a lawmaking process. I point to why some steps can be taken to at least begin or move towards revisioning statelessness.

In this section, I first revisit those existing attempts to change the definition of statelessness, arguing their inadequacy and showing that they reveal a growing consensus on the impetus and need to 'revision' the statelessness definition. States can build on these movements in the future. At the initiation of a party to the 1954 Statelessness Convention, as stated, the UN General Assembly could jumpstart the revisioning process as the 1954 Statelessness Convention itself allows. Some

316. 1954 Statelessness Convention, *supra* note 16, at arts. 38, 41. A state may initiate this through a request for the revision of the treaty through a notification addressed to the UN Secretary-General.

317. *Id.* at art. 41(1). The Secretary-General then informs all UN members and nonmembers (those invited to the conference that led to the treaty and those invited to sign or accede to the treaty). In practice, this notification should be to all States. *Id.*, at art. 42(f).

318. *Id.* at art. 41(2).

319. Thanks to David Michael Hughes for this point.

other steps were enumerated earlier. An alternative way is for individual States to directly contest the definition by adopting definitions in their respective domestic laws that have a protection-oriented focus.³²⁰

I then identify some elements of a protection-oriented approach that could inform an agenda for reforming the definition and creating better statelessness determinations either by States collectively, as parties to the 1954 Statelessness Convention, or as States in their individual capacities in a customary lawmaking effort. I present these as options legally available to States, and build a framework that avoids one final, finite definition of statelessness. A one-size-fits-all approach would further lead to dogmatism and finality that cannot address changed and changing protection issues. Within the critical rhetoric tradition, even if change occurs, that change is subject to reflection and critique for further improvement.³²¹ The solution suggested is not the only possible approach, but it responds to the widely-accepted deficits of the current definition.

A. *Inadequacy of Existing Attempts to Change the Statelessness Definition*

In recent years, States and the international community have expressed heightened interest in addressing the issue of statelessness. UN bodies, such as the General Assembly, the Economic and Social Council, the Human Rights Council, and even the Security Council, regard statelessness as an issue of international and human security, reflecting a change in the use of the concept. Before 2000, UN bodies discussed statelessness in only 87 published documents, but from 2001 to 2013, statelessness appeared in more than 2,950 documents.³²² In 2011, UN Secretary-General Ban Ki-moon urged the UN to address statelessness from multiple perspectives, outlining guiding principles and policy frameworks for action.³²³ Ban described identifying stateless persons as a prerequisite for any response strategy.³²⁴ In 2014, the UNHCR, which is the UN body with the "statutory function of providing international protection [to stateless persons] and of seeking preventive action,"³²⁵ launched the *#iBelong* Campaign with the

320. For instance, Mexico's laws provide for equal treatment of persons who have a nationality that is not effective. Mexico's *Ley de Migracion*, art. 3(IV), (last visited May 6, 2019).

321. LITTLEJOHN, FOSS & OETZEL, *supra* note 154, at 452–53.

322. *Id.*

323. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 6, 9; see also UNHCR, *Conclusion on Identification, Prevention and Reduction of Statelessness and Protection of Stateless Persons No. 106 (LVII)* (2006), <https://www.unhcr.org/excom/exconcl/453497302/conclusion-identification-prevention-reduction-statelessness-protection.html> (last visited Apr. 15, 2019); see also UNHCR, *UNHCR Action to Address Statelessness: A Strategy Note* (2010), <https://www.unhcr.org/protection/statelessness/4b960ae9/unhcr-action-address-statelessness-strategy-note.html> (last visited Apr. 15, 2019).

324. UNITED NATIONS, *Guidance Note*, *supra* note 88, at 6, 9.

325. G.A. Res. 50/152, ¶ 14, U.N. Doc. A/RES/50/152 (Feb. 9, 1996). UNHCR's mandates are usually traced to G.A. Res. 3274 (XXIV) (Dec. 10, 1974) and G.A. Res. 31/36 (Nov. 30, 1976). States assigned this role to UNHCR pursuant to Article 11 of the 1961 Convention on the Reduction of

ambitious goal of ending statelessness in ten years (by 2024).³²⁶ UNHCR's Global Action Plan called on States to take action to "better identify and protect stateless persons."³²⁷ In 2017, UNHCR described statelessness as a concern within the scope of the Sustainable Development Goals. For example, UNHCR linked statelessness to Sustainable Development Goal 16, which calls on States to promote "peaceful and inclusive societies for sustainable development."³²⁸ At the domestic level, States have begun to engage more with international law's statelessness definition apart from determining statelessness. In the United States, for example, the relationship between statelessness and issues such as national security and terrorism³²⁹ and the status of "dreamers"³³⁰ continues to be debated. The Trump administration has proposed restrictions on birthright citizenship—which could have implications on statelessness—as a solution to US immigration issues.³³¹

The recent, renewed attention on statelessness reveals the beginnings and continuation of debates towards a more normative and goal-oriented approach to the definition. States, UN bodies and specialized agencies, working with academics and experts, have largely driven these attempts to change the definition. These attempts at changing the concept of statelessness could be grouped into three movements.

The first concerns an approach to interpretation. As explained in Part I.C.2, scholars recommend a fuller interpretation of the existing definition, putting an emphasis on the "operation of the law" clause as a way of gauging the status of a potentially stateless person. Under this approach, the focus is not simply on the

Statelessness, Aug. 30, 1961, 989 U.N.T.S. 175. Secretary-General Ban Ki-Moon's note regarded statelessness as a collective responsibility of the UN system, with UNHCR having the lead mandate. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 14–15.

326. UNHCR, *Global Action Plan to End Statelessness 2014-2024 2* (2017) <https://www.unhcr.org/protection/statelessness/54621bf49/global-action-plan-end-statelessness-2014-2024.html> (last visited Apr. 15, 2019).

327. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 2, 4.

328. Sustainable Development Goals, G.A. Res. 70/1, Goal 16, U.N. Doc. A/RES/70/1 (Oct. 21, 2015); see UNHCR, *The Sustainable Development Goals and Addressing Statelessness: A Briefing Note 4* <https://www.refworld.org/pdfid/58b6e3364.pdf> (last visited Apr. 15, 2019); see also Katy Long et al., *Citizenship, Migration and the 2030 Agenda for Sustainable Development* 8–9 (2017), OVERSEAS DEV. INST., <https://www.odi.org/sites/odi.org.uk/files/resource-documents/11744.pdf> (last visited Apr. 15, 2019).

329. See Jayaraman, *supra* note 293.

330. See Jamilah Sabur, *Let 'Dreamers' Live in the US – Their Home*, SUN SENTINEL (2017), <http://www.sun-sentinel.com/opinion/commentary/fl-op-viewpoint-sabur-dreamers-20170905-story.html> (last visited Apr. 16, 2019).

331. See Julie Hirschfeld Davis, *President Wants to Use Executive Order to End Birthright Citizenship*, N.Y. TIMES (Oct. 30, 2018), <https://www.nytimes.com/2018/10/30/us/politics/trump-birthright-citizenship.html>. For an early examination of birthright citizenship in the US as it relates to statelessness, see Polly Price, *Stateless in the United States: Current Reality and a Future Prediction*, 46 VAND. J. TRANSNAT'L L. 443 (2013) (arguing that confusion over national identity would increase exponentially if birthright citizenship were amended to exclude the children of undocumented persons).

letter of the law.³³² Scholars argue that *de facto* statelessness is legally ambiguous, and so a more robust interpretation of the definition in the treaty would protect more people.³³³ But this approach remains inadequate because it still does not take away the ideographic character of the definition, as well as the ideologies entrenched in statelessness determinations, which is embedded in the definition, and merely urges States to be more diligent in determining stateless status.³³⁴ To reiterate, this interpretation-oriented approach accepts as a given, and thus promotes, the conflation of citizen rights with the whole braid of human rights.³³⁵ Importantly, following this approach, State adjudicators have expressed reservations about departing too much from the letter of the law in applying the strictly legal definition.³³⁶

The second protection-oriented movement is found in the varying but inter-related positions arguing for the broadening of the concept of statelessness to include *de facto* statelessness. Some scholars regard the incorporation of aspects of *de facto* statelessness as an opening to include individuals who might have a legal claim to the benefits of nationality, but do not enjoy the protection of nationality for a variety of reasons.³³⁷ Yet reforming the accepted international definition to include dimensions of *de facto* statelessness may still be inadequate due to the capacious and ambiguous underpinnings of *de facto* statelessness.³³⁸ A vague denotation will be replaced with a more opaque one. Moreover, States explicitly decided not to commit to binding obligations that relate to *de facto* statelessness

332. See UNHCR, *Expert Meeting*, *supra* note 100.

333. See Laura van Waas, *The UN Statelessness Conventions*, in NATIONALITY AND STATELESSNESS UNDER INTERNATIONAL LAW 64, 79–81 (Alice Edwards & Laura van Waas eds., 2014). See also Hugh Massey, *UNHCR and De Facto Statelessness*, LEGAL AND PROTECTION POLICY RESEARCH SERIES 61 (2010) (proposing a definition of 'de facto stateless persons' as follows: "*De facto* stateless persons are persons outside the country of their nationality who are unable or, for valid reasons, are unwilling to avail themselves of the protection of that country. Persons who have more than one nationality are *de facto* stateless only if they are outside *all* the countries of their nationality and are unable, or for valid reasons, are unwilling to avail themselves of the protection of *any* of those countries.").

334. See *supra* Part I.C.3.

335. *But see* de Chickera & van Waas, *supra* note 40, at 60 (noting that UNHCR's approach has "broadened [collective] understanding of statelessness and . . . shown that many people previously envisaged to be *de facto* stateless are actually stateless, or at risk of statelessness.").

336. See *Pham v. Secretary of State for the Home Department*, (2015) U.K.S.C. 19, United Kingdom: Supreme Court, ¶ 25 (Mar. 25). ("If this wording was intended to imply that there is something in the word 'operation' which justifies departure from the letter of the law, it is not to my mind an accurate reflection of the passage in the UNHCR text. That passage . . . is suggesting, not that the law of the country is irrelevant, but rather that, having regard to the purpose of the article, the term 'law' should be interpreted broadly as encompassing other forms of quasi-legal process, such as ministerial decrees and 'customary practice.'").

337. See Weissbrodt & Collins, *supra* note 29, at 251–53.

338. For a study on the different notions and contradictory meanings of *de facto* statelessness, see Massey, *supra* note 333.

when they drafted the 1954 Convention,³³⁹ and it is unlikely that they will commit to one concrete meaning of de facto statelessness in the near future. This is because the concept has not yet crystallized and is extremely fuzzy, more than legal statelessness. It may unrealistically demand too little or too much of States, and States did not want that uncertainty in the obligation when they drafted the 1954 Convention. More so now. This approach is not, therefore, politically viable and workable. It will be one step forward but two steps back.

The third movement relates to various efforts instituting new terms (but still related to de facto statelessness), such as "undetermined nationality," and "risk of statelessness,"³⁴⁰ as well as "ineffective nationality."³⁴¹ Exemplarily, the Inter-American Court of Human Rights in *Expelled Dominicans and Haitians* declared Dominican-born children of Haitian descent, whom the Dominican Republic refused to register as citizens, to be at "risk of statelessness."³⁴² The Court held that the Dominican Republic had an obligation to resolve their "risk of statelessness,"³⁴³ triggering an obligation to guarantee citizenship to the Dominican-born children.³⁴⁴ While a novel analytical approach extending protection under the law of statelessness to individuals who face a "risk of statelessness,"³⁴⁵ the Court failed to specify what "risk of statelessness" meant. Risk is a matter of degree and is relative to a baseline. I posit that the term still needs conceptual precision and does not solve the ontological challenge to statelessness. Otherwise, this ambiguous term, together with "ineffective nationality" and "undetermined nationality," could help maintain statelessness' ideographic status and foster continued interplays of ideologies in statelessness identification.

Although I concede that one cannot completely insulate determinations of statelessness from the vestiges of politics, a clearer conceptual framework of statelessness could reduce room for uncertainty and promote legitimacy. Rather than misreading the language of the definition to expand it and end up with formalistic results, or incorporating the explicitly excluded notion of de facto statelessness into a strictly legal definition, or substituting it with other imprecise

339. Convention on the Reduction of Statelessness, Dec. 13, 1975, 989 U.N.T.S. 175. In fact, States opposed the inclusion of de facto stateless persons in the definition in the 1954 Statelessness Convention. See Weis, *supra* note 53, at 261.

340. See generally UNHCR, *Global Trends: Forced Displacement in 2018* (Jun. 19, 2019), <https://www.unhcr.org/statistics/unhcrstats/5d08d7ee7/unhcr-global-trends-2018.html> (including persons of undetermined nationality and those at risk of statelessness in UNHCR's reports on statelessness).

341. See e.g., DAVID WEISSBRODT, *THE HUMAN RIGHTS OF NON-CITIZENS* 84 (2008) (arguing that the definition should be broadened since persons with 'no effective nationality' are, for all practical purposes, stateless, and should be labeled and treated as such).

342. *Expelled Dominicans and Haitians v. Dominican Republic*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 282, ¶ 298 (Aug. 28, 2014).

343. *Id.*

344. *Id.* ¶ 458.

345. David C. Baluarte, *The Risk of Statelessness: Reasserting a Rule for the Protection of the Right to Nationality*, 19 YALE HUM. RTS. & DEV. L.J. 47, 52 (2017).

terms, States should 'revision' statelessness in light of the 1954 Statelessness Convention's aim to protect the unprotected. As emphasized, it is provided for in the treaty, and there is a momentum to reconsider approaches to the definition.

The next subsection presents a tentative framework that works as a middle ground to the de facto and de jure debate by suggesting a change in the de jure definition of statelessness. I suggest this change not by incorporating vague and undefined concepts relating to de facto statelessness, but by looking at what I term are "badges of protection" in a substantive analysis and by assigning greater responsibilities to the international community (not one State only) in stateless status determinations and the identification of statelessness more broadly. Indeed, definitions are meaningless on their own. A good concept aligns well with its purpose.³⁴⁶ As previously argued, the ultimate goal of the statelessness regime is the protection of unprotected persons who are not refugees.

B. Components of a Proposed Protection-Oriented Framework Agenda

1. From Formalism to Functionalism

One of the greatest challenges to statelessness is conceptualizing what it truly means. I have contended here that the conceptualization of citizenship varies from one State to another, and so does statelessness. In developing a framework which 'revisions' the definition of statelessness, States ought to advance the goal of the statelessness regime. Any revision should be premised on the 1954 Statelessness Convention as a protective human rights instrument.³⁴⁷ Rights should be the baseline. Under basic social contract theory, the guarantor and protector of all rights is one's State.³⁴⁸ In the classic formulation of Henry Shue, with every basic right, three types of State duties correlate: duties to avoid depriving rights, duties to protect from deprivation, and duties to aid the deprived.³⁴⁹ Even if States are the duty-bearers to all living within their territories,³⁵⁰ and States are obligated to ensure the rights of all persons within their territories or all persons subject to their

346. A concept is good if the following aligns well: (a) the events or phenomena to be defined, (b) the properties or attributes that define them, and (c) the term covering both the event or phenomena and the properties or attributes. John Gerring, *What Makes a Concept Good? A Criterial Framework for Understanding Concept Formation in the Social Sciences*, 31(3) *POLITY* 357, 357–58 (1999).

347. For the human rights dimensions of statelessness, see, e.g., Michelle Foster & Hélène Lambert, *Statelessness as a Human Rights Issue: A Concept Whose Time Has Come*, 28(4) *INT'L J. REFUGEE L.* 564 (2016).

348. Human rights instruments also assert State responsibility. For instance, the Universal Declaration of Human Rights proclaims that States pledge themselves for the promotion of universal respect for and observance of human rights. Universal Declaration of Human Rights, G.A. Res. 217 A(III), Preamble, U.N. Doc. A/RES/3/217A (Dec. 10, 1948).

349. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY* 52 (1980).

350. See Andrea Cornwall & Celestine Nyamu-Musembi, *Putting the 'Rights-Based Approach' to Development into Perspective*, 25(8) *THIRD WORLD Q.* 1415, 1417.

control (including stateless people),³⁵¹ citizens can make stronger claims on their States and hold their States accountable for duties, but not the stateless. Citizens are those who can demand and receive rights protection from the State; the stateless cannot do so meaningfully. This means that a substantive comparison between people or groups of people in terms of human rights protection is inevitable in an analysis.

To note, the greatest deficit of the current definition—aside from discretionism—is its formalistic nature, not incorporating the rationale that the 1954 Statelessness Convention is a protective instrument. It only allows one to look at whether an individual belongs to the polity of a State or not through State gaze. The statelessness definition is currently structured to serve a gatekeeping function, making available a limited number of rights enumerated in the 1954 Statelessness Convention.³⁵² While this is not an obscure point, it had been obfuscated because the current definition centers statelessness claims on the presence or absence of mere formal political membership. Thereby, the materiality of the human condition is almost always ignored as, to a much larger extent, is also the treaty's rights protective role.

To address this, the first prong of my proposed framework suggests that the definition of statelessness should be *functional*, that is, it should highlight what statelessness does to people. While we could be at a loss as to what statelessness means, we are clear with what statelessness does: it deprives people of the right to nationality. States should look for the material condition as to the right to nationality—not the other way around—to deduce statelessness. States could develop a definition from the viewpoint of the right to nationality. When the right to nationality is enjoyed, then the person is not stateless. When the right to nationality is not enjoyed, then the person is stateless.

Pragmatically, during stateless status determinations, I propose that the starting point should still be the law and the perceived or reported status of the person. However, the perceived or reported status of the person should be pierced in appropriate cases to inquire into substantial nationality protection.

a. Focusing on the Right to Nationality

States should look at concrete manifestations of the right to nationality to determine whether its inverse—statelessness—exists or not. States could comparatively define and determine statelessness from the viewpoint of the right to nationality. The focus on the right to nationality has the advantage of addressing the abstract and ideographic elements of the statelessness definition as it is presently conceived in the 1954 Statelessness Convention.³⁵³ Previously, I unpacked how the definition reifies the stateless person due to its abstract elements. Here, the

351. Human Rights Committee, General Comment No. 31, p. 4.

352. See 1954 Statelessness Convention, *supra* note 16, at arts. 3–32.

353. See *id.*, at art. 1(1).

abstractness of the statelessness concept is turned on its head to enable States to resort to a meaningful examination of the right to nationality. It counters the rhetoric of the definition of statelessness as the convenient naming and labelling device of the State. While policy interests are part of decision making and cannot be done away with, focusing on the right to nationality takes unbridled discretion away from the State.

At first blush, this approach appears counterintuitive. Since nationality is indeed the opposite of statelessness, it does not seem logical to analyze a person's enjoyment of the right to nationality to determine whether that person is stateless. Why do we need to focus on the right to nationality, as lived experience, when the issue under consideration is a condition that is the opposite of nationality? Will that not take the focus away from statelessness?

I argue that it is not counterintuitive. Nationality and statelessness are jural opposites. These concepts operate on the same axis of State discretion, rights, and inclusion or exclusion from a political community. Both are related legal concepts that form opposite sides of the same coin. In legal theory, Wesley Hohfeld advanced the position that the presence of a jural concept implies the absence of its opposite.³⁵⁴ Simply put, when one of the factors under consideration applies to a person, that person cannot be constrained by a disability posed by the opposite concept. If a person has the right to nationality, therefore, statelessness cannot at the same time disable them.

Unlike the limited law on statelessness, international law has broadly developed to articulate what the right to nationality means.³⁵⁵ Recognizing the right to nationality—that every individual is entitled to have at least one citizenship—means that its corollary of statelessness is a human rights violation that increases vulnerability to even more human rights violations.³⁵⁶ Statelessness causes harm. Under political theory, scholars have argued that the condition of rightlessness within the Arendtian concept of statelessness should be recognized as causing harm,³⁵⁷ including an inability to claim other fundamental rights and alienation from a political community.³⁵⁸ The law has the potential to extricate people from

354. See generally Wesley Newcomb Hohfeld, *Some Fundamental Conceptions as Applied to Judicial Reasoning*, 23 YALE L.J. 16, at 32 (1913). For an application to the ICCPR, see Sarah Joseph, *A Rights Analysis of the Covenant on Civil and Political Rights*, 5 J. INT'L LEGAL STUD. 57 (1999).

355. See Mirna Adjami & Julia Harrington, *The Scope and Content of Article 15 of the Universal Declaration of Human Rights*, 27(3) REFUGEE SURV. Q. 93, at 93–100 (chronicling the substance of the right to nationality indicated in international instruments).

356. *Id.* at 94.

357. Jo Shaw, *Citizenship and Constitutional Law: An Introduction* 6 (Edinburgh School of Law Research Paper No. 2017/21), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3075862 (last visited May 6, 2019).

358. For an exploration of the distinctive harms of statelessness, see James Draper, *Climate Change and Statelessness: Informing a Response to Statelessness due to Sea Level Rise in Dialogue with Hannah Arendt* (2016) (Master's Thesis, Utrecht University).

conditions of harm and from intrusions on individual liberties.³⁵⁹ International law's concept of an obligation to protect is part of a broader trend that seeks to suppress human rights abuses by reference to associated international responsibility.³⁶⁰

International law also provides the right to nationality with a dynamic meaning that can inform an analysis of the more ambiguous, intractable concept of statelessness. Since the adoption of the UDHR in 1948, States have elaborated on the concept of the right to nationality. Previously, the question of nationality was completely within the *domaine réservé* of States.³⁶¹ However, in the *Nottebohm Case*, which the ICJ decided in 1955 (about a year after the Statelessness Convention), the court viewed nationality as a juridical expression of a social fact that connects the individual to a State, and that such a link should be genuine and effective.³⁶² *Nottebohm* transferred the genuine connection principle belonging to the discourse of dual nationality to the field of diplomatic protection, and thereafter, to the field of rights protection.³⁶³

Nationality, as I have argued elsewhere, is therefore no longer regarded as entirely within the *domaine réservé* of States.³⁶⁴ Various instruments after the 1954 Statelessness Convention incorporated the right to nationality in adopted treaty texts to strengthen State obligations.³⁶⁵ For example, Article 24(3) of the International Covenant on Civil and Political Rights (ICCPR) states that every child has the right to acquire a nationality.³⁶⁶ From childhood, all of us thus have the right to nationality. The Human Rights Committee declares that the enjoyment of the rights in the ICCPR is "not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness."³⁶⁷ This

359. See, e.g., THOMAS HOBBS, *LEVIATHAN* 153 (Richard Tuck ed.) (1991); JOHN LOCKE, *SECOND TREATISE ON CIVIL GOVERNMENT* §§ 7–13, at 123–30 (3rd ed., 1988); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 25 (1974).

360. See Monica Hakimi, *State Bystander Responsibility*, 21 EUR. J. INT'L L. 341, 341 (2010).

361. See *Nationality Decrees Case*, *supra* note 114, ¶ 38.

362. See *Nottebohm Case*, *supra* note 114, at 23.

363. Albrecht Randelzhofer, *Nationality*, in *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 502 (1997). Cf. International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, U.N. Doc. A/61/10, at 33 (2006).

364. Francis Tom Temprosa, *Statelessness in Philippine Law: Expanding Horizons of the International Stateless Person Protection Regime*, 58 ATENEO L. J. 29 (2013).

365. See, e.g., Article 24 of the ICCPR; Article 18 of the Convention of the Rights of Persons with Disabilities; Article 25 of the International Convention for the Protection of All Persons from Enforced Disappearance; Article 29 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; Articles 7 and 8 of the Convention on the Rights of the Child; and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

366. International Covenant on Civil and Political Rights art. 24(3), Dec. 19, 1966, 999 U.N.T.S. 171.

367. U.N. Human Rights Committee, General Comment No. 31 Article 10, 2187th Session of the Human Rights Committee, CCPR/C/21/Rev.1/Add. 1326 (Mar. 29, 2004).

is itself an incorporation of the right to nationality, including civil and political rights, for stateless people.

Focusing on the right to nationality has the additional advantage of adapting to the changing norms of international law. While nationality is a concept that was created to organize the world under the old conditions of the feudal period, the concept remains dynamic and can acquire other meanings.³⁶⁸ It has indeed already acquired a different meaning in the last century. By themselves, *Nottebohm* and the ICCPR are demonstrations of the norm-adapting quality of the right to nationality. They point to a normative change in the way that nationality is viewed, that is, it is not just the formal link between a State and the individual. It is a genuine link protecting the individual. Initiatives of international actors have reconceptualized "citizenship status, shifting from an identity to a rights frame."³⁶⁹ We expect the concept of nationality to change and adapt in the future. A more differentiated and flexible approach should hence be preferred because it could accommodate change.

b. Piercing the Veil of Citizenship Status

Pragmatically, as suggested, determining stateless status should necessarily begin with an analysis of the laws and state practices of the States to which a person has links. Applying their laws and practices to the factual circumstances of particular persons should then follow. My proposed functional approach does not stop there, however, but adds that determinations of stateless status should consider what I term "badges of protection."

I posit here that determinations should take into account "badges of protection" or badges of the manifestations of the right to nationality. At our moment in international law's history, the right to nationality relates to and incorporates protection for the exercise of core civil and political rights.³⁷⁰ Where absent, these badges should compel determinations to pierce the veil of declarations of status—citizenship or statelessness—to exceptionally examine a person's real status. A determining State, entity, or body should resort to piercing when another State disregards its own citizenship law. Additionally, piercing should be resorted to when a State declares one to be its citizen or stateless with fraud, malfeasance, or to otherwise evade an obligation. It is a middle ground between the very strict text-only examination of statelessness and the very loose revalidation of de facto statelessness.

In international law, courts and tribunals have pierced the corporate veil to disregard the professed nationality of a corporation. In *Barcelona Traction*,

368. McDougal et al., *supra* note 68, at 998.

369. Spiro, *supra* note 292, at 694–95. Spiro argued that the existence of a conceptual shift from "nationality" to "citizenship" is a shift away from the formal, traditional and sovereignty perspective on nationality.

370. In the coming years, the right to nationality may have a different articulation. The badges would have to adjust.

Belgium sued Spain on behalf of the Belgian shareholders of Barcelona Traction—a Canadian company.³⁷¹ The court found that there was no reason to pierce the corporate veil, but declared that "fraud or malfeasance, to protect third persons such as a creditor or purchaser, or to prevent the evasion of legal requirements or of obligations" are grounds for piercing the veil.³⁷² In an exceptional circumstance allowing the piercing of the veil, the European Court of Human Rights, in *Agrotexim v. Greece*, where the shareholders complained that the expropriation by a municipality violated their rights, held that it is justified "where it is clearly established that it is impossible for the company to apply to the Convention institutions through the organs set up under its articles of incorporation."³⁷³ In international investment law, the tribunal in *Saluka Investments v. Czech Republic* held that the corporate veil should be pierced in the presence of fraud.³⁷⁴

To give an example, when State Y wants to determine A's citizenship status, it has to determine whether State X (assuming X is the only State with a connection to A) considers A a citizen or not upon the operation of its laws. In the course of the determination process, State Y examines the laws and state practice of State X on citizenship as applied to the life events and personal and family histories of A. State Y generates its own perception of State X's circle of citizenship and whether State X considers A as belonging inside or outside of it. Or, State Y could directly ask State X if it considers A a citizen or not. If State X replies in the positive (even if A believes they are not a citizen of State X), A should not be immediately constituted as not a stateless person. If there is a showing that State X does not allow A to vote in disregard of his right to political participation as a citizen of State X in violation of the ICCPR, then a badge of protection is absent. In such a case, the absence of a badge of protection should allow State Y to pierce the veil of the declaration of status of A. State Y could rule that A is stateless and provide them protection upon closer examination of their material condition.

When analyzing "badges of protection," it is imperative that the analysis incorporates concepts in international law that are inherent in nationality rights protection.³⁷⁵ These concepts include the principle of non-discrimination, and where applicable, State obligations to prevent and reduce statelessness.³⁷⁶ In explaining the right to nationality, the Human Rights Committee declared that it is a protection "from being afforded less protection by society" because of citizenship

371. *Barcelona Traction*, Judgment, 1970 ICJ Rep. 3, ¶ 42 (Feb. 5).

372. *Id.* ¶ 56.

373. *Agrotexim and Others v. Greece*, 330 Eur. Ct. H.R. 3 (ser. A) ¶ 66 (1995).

374. *Saluka Investments BV (The Netherlands) v. The Czech Republic*, UNCITRAL, Partial Award (Mar. 17, 2006), <http://www.pca-cpa.org/ENGLISH/RPC/>.

375. See Caia Vlieks et al., *Solving Statelessness: Interpreting the Right to Nationality*, 35 NETH. Q. HUM. RTS. 158, 165 (2017).

376. Brad Blitz, *Statelessness, Protection and Equality* 22 (2009), REFUGEE STUD. CTR., <https://www.rsc.ox.ac.uk/files/files-1/pb3-statelessness-protection-equality-2009.pdf>.

status.³⁷⁷ In *Yean and Bosico v. Dominican Republic*, the Inter-American Court of Human Rights stressed the limits on States' application of nationality-related rules and regulations.³⁷⁸ The *Yean and Bosico* court struck down the Dominican Republic's discriminatory application of nationality and birth registration laws and regulations.³⁷⁹ More recently, the International Court of Justice in *Ukraine v. Russian Federation* allowed the discrimination charge against Russia to proceed to trial, ruling that there would be a violation of the International Convention on the Elimination of All Forms of Racial Discrimination if sufficient evidence exists that Russian citizenship laws were adopted or executed with the purpose or effect of racial discrimination against Crimean Tatars and ethnic Ukrainians in Crimea.³⁸⁰

Hence, the determinations should be individuated, and the principle of non-discrimination necessitates that only persons who are similarly situated be compared with each other. It levels off from the premise that human rights protection relates to "a certain conception of the person and its relationship with others."³⁸¹ Piercing should also acknowledge aspects of indirect discrimination that occur when a practice, rule, requirement, or condition is facially neutral, but unduly impacts groups disproportionately.³⁸²

The most distinct benefit of piercing lies in its ability to remove the anachronistic vision of bare citizenship as human rights protection. Piercing lifts the false veil of protection that a status purports to grant an individual for a closer look at the human condition. Since both inequality and discrimination are the common threads tying all forms of rightlessness in the context of nationality and statelessness,³⁸³ piercing could also reveal interpositionality and intersectionality. Due to complex and layered vulnerabilities, different groups of people are

377. U.N. Human Rights Committee, General Comment No. 17: Article 24 (Rights of the Child), ¶ 8, 35th Session of the Human Rights Committee, U.N. Doc. HRI/GEN/Rev.9 (vol. I) (Apr. 7, 1989).

378. *Yean and Bosico v. Dominican Republic*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R., No. 12.189, ¶¶ 191–192 (Sept. 8, 2005); see also Baluarte, *supra* note 345, at 51–52.

379. *Yean & Bosico*, *supra* note 378.

380. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*) (Prelim. Obj.), Judgment, 2019 I.C.J. 166 Nov. 8, 2019.

381. See Jacques Lenoble, *The Implicit Ideology of Human Rights and Its Legal Expression*, 8 LIVERP. L. REV. 153, 166 (1986).

382. For an analysis of indirect discrimination in statelessness, see James A. Goldston, *Holes in the Rights Framework: Racial Discrimination, Citizenship, and the Rights of Noncitizens*, 20 ETHICS INT. AFF. 321, 328 (2006).

383. For an analysis of the elements of discrimination and inequality in statelessness literature, see generally Blitz, *supra* note 376.

especially prone to statelessness, such as women,³⁸⁴ children,³⁸⁵ indigenous peoples and racial minorities,³⁸⁶ and persons reported of engaging in terrorism.³⁸⁷

c. Other Related Considerations

In view of functionalism, the following should also be considered. First, refugees should be demarcated from the definition of statelessness because the purpose of the statelessness regime is the protection of the unprotected who are not refugees.³⁸⁸ Second, when looking into foreign law and practice, statelessness should always be approached from the perspectives of international comparative law and private international law. Otherwise, the analysis will be fragmented because statelessness relates to an examination of various domestic laws. States do not know, and are presumed not to know, the laws of every State in the world and how those laws are operationalized.³⁸⁹ While public international law is highly relevant to statelessness, States ultimately regulate citizenship through domestic laws and regulations.³⁹⁰ State legal policies can be liberating or discriminating. Approaching the question of statelessness from these lenses also takes care of the problems of law determination and operationalization.

The international community can build on the existing obligation in Article 33 of the 1954 Statelessness Convention to inform the Secretary-General about laws and regulations adopted to fulfill treaty obligations.³⁹¹ This obligation stems from each State party's right to be informed about the application of the 1954 Statelessness Convention.³⁹² Constructing a database of nationality legislation is

384. For a good overview, see Karen Knop & Christine Chinkin, *Remembering Chrystal MacMillan: Women's Equality and Nationality in International Law*, 22 MICH. J. INT'L L. 523, 531 (2001) (arguing that women's inequality in nationality law can be seen within the prism of three generations of issues of inequality). See also Francis Tom Temprosa, *Falling Between the Cracks: Statelessness, Nationality and Migration*, 2 QUILTED SIGHTINGS: A WOMEN AND GENDER STUDIES READER 11 (2012).

385. See Jacqueline Bhabha, *Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights*, 31 HUM. RTS. Q. 410 (2009); Jo Boyden & Jason Hart, *The Statelessness of the World's Children*, 21 CHILD. & SOC. 237 (2007).

386. For an interesting position on minority culture and secular criticism, see Aamir R. Mufti, *Auerbach in Istanbul: Edward Said, Secular Criticism, and the Question of Minority Culture*, 25 CRITICAL INQUIRY 95 (1998).

387. See other parts of this article for the discussion on the nexus with terrorism.

388. See WEIS, *supra* note 36, at 44, 164 (outlining the categories of unprotected persons).

389. See note 410–11 and accompanying text.

390. See Gerard-René de Groot, *Towards a Toolbox for Nationality Legislation Text of the Val-edictory Lecture as Professor of Comparative Law and Private International Law at Maastricht University* 9–10 (Oct. 14, 2016), [https://cris.maastrichtuniversity.nl/portal/en/publications/towards-a-toolbox-for-nationality-legislation\(6ed2896f-097e-4d08-b922-aff47b71a41a\).html](https://cris.maastrichtuniversity.nl/portal/en/publications/towards-a-toolbox-for-nationality-legislation(6ed2896f-097e-4d08-b922-aff47b71a41a).html).

391. 1954 Statelessness Convention, *supra* note 16, at art. 33.

392. ROBINSON, *supra* note 48.

a laudable initial step,³⁹³ but it is an incomplete one. As I shall argue later, an institutional approach would complement this effort.

Third, other areas of international law can also shed light on the issue of nationality protection. Although the 1954 Statelessness Convention is a human rights instrument, issues of statelessness extend far beyond human rights law and affect other aspects of a person's life and other branches of law. Within international investment law, for example, a framework of diplomatic protection serves as the source of traditional obligations toward foreign nationals; claims for violations of these standards may only be made at the interstate level by the State of nationality.³⁹⁴ Stateless persons are thus entitled to no protection under this framework.³⁹⁵

However, in pursuit of the progressive development of international law, the ILC adopted a provision in the Articles on Diplomatic Protection allowing States to exercise diplomatic protection in respect of stateless persons who are lawful and habitual residents of a claimant State.³⁹⁶ That person must be a resident of the claimant State at the date of the injury and when the claim is officially presented.³⁹⁷ The ILC asserted that international law reflects a concern for stateless persons in treaty law.³⁹⁸ We should anticipate and incorporate normative changes, such as this change in international investment law, in any analysis.

Fourth, since any determination of stateless status affects the life and liberty of people, the assessments should be fair and equitable. States must observe the imperatives of procedural justice, due process, and other substantive and procedural guarantees in international law and applicable domestic law. Questions of proof and evidence should be answered through these lenses. Administrative and/or judicial review processes must further be in place. States also need to think about the imperatives of global administrative law as it intersects with statelessness. Otherwise, the legitimacy of the procedures and the resulting status determinations could be called into question.

393. See Vonk et al., *supra* note 271 (for comparative law efforts); see also U.S. OFF. OF PERS. MGMT., *Citizenship Laws of the World*, <https://www.multiplecitizenship.com/worldsummary.html> (last visited May 3, 2019).

394. Alex Mills, *Rethinking Jurisdiction in International Law*, 84 BRIT. Y.B. INT'L L. 187, 216 (2014).

395. *Id.*

396. John Dugard, *Articles on Diplomatic Protection* (2006), http://legal.un.org/avl/pdf/ha/adp/adp_e.pdf.

397. International Law Commission, *Draft Articles on Diplomatic Protection with commentaries*, art. 8, at 36, U.N. Doc. A/61/10 (2006).

398. *Id.* at 35–36.

From State Discretionism to Greater Responsibilities for the International Community

The 1954 Statelessness Convention was designed as a concrete expression of the international community's responsibility to protect the unprotected. Yet a lacuna in the present framework persists: the lack of an international institutional approach to follow through on this commitment at the level of the international community. Conceptually, the UN General Assembly assigned UNHCR with the global mandate of identifying stateless persons while providing "relevant technical and advisory services pertaining to the preparation and implementation of nationality legislation."³⁹⁹ Article 34 of the 1954 Statelessness Convention also allows issues surrounding the definition of statelessness to be brought before the ICJ under certain circumstances.⁴⁰⁰ The UN wants a system-wide approach to statelessness.⁴⁰¹ But, by and large, States engage in a horizontally dispersed practice of interpretation and application of the definition of statelessness, while UNHCR plays only a supportive role. A State has not yet brought another State to the ICJ on an explicit question of statelessness. This current arrangement is no longer tenable.

a. International Institutional Statelessness Identification and Determination

Assigning greater vertically-oriented responsibilities to a treaty body that has the power to review determinations of statelessness offers a way forward. Under the revision process, States could form and organize a treaty-body for the 1954 Statelessness Convention, composed of an odd number of experts on rights and citizenship law. This would shift the axis from the State to the international community. It would also complement the horizontal enforcement of the 1954 Statelessness Convention and better guide the interpretation of a functional definition of statelessness. UN treaty bodies have a record of success in human rights protection.⁴⁰² Most core human rights treaties have expert and independent treaty bodies with developed methods of considering reports. The treaty bodies have the ability to issue general comments or recommendations to improve compliance with international human rights obligations, coordinate with other similar bodies, and work with States, human rights institutions, and non-governmental

399. G.A. Res. 50/152, ¶ 14, U.N. Doc. A/RES/50/152 (Feb. 9, 1996). This is actually weird because the present definition seems to only allow determination to be done by States. To recall, part of the definition reads that a person is stateless when not considered a national "by a State".

400. 1954 Statelessness Convention, *supra* note 16, art. 34 (allowing disputes on interpretation or application to be brought before the International Court of Justice at the request of a party to dispute).

401. See generally United Nations, Guidance Note, *supra* note 88.

402. James Crawford, *The UN Human Rights Treaty System: A System in Crisis, in THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 1, 3 (Philip Alston & James Crawford eds., 2000).

organizations.⁴⁰³ More importantly, a supervisory mechanism such as a treaty body could pin down factors that States manipulate through policy interventions.⁴⁰⁴

Crucially, a treaty body for the 1954 Statelessness Convention could hear subaltern voices on statelessness concerns. The treaty body could serve a bridging function between an individual and States in the determination process, providing a forum where stateless persons—often on the fringes of society—could express concerns and raise issues relating to determinations and the exercise of the right to nationality. The treaty body for the 1954 Statelessness Convention could also authorize non-governmental organizations to provide routine information and incoming shadow reports for consideration.⁴⁰⁵

Early scholarship on statelessness underscored the importance of institutions to statelessness issues, but those scholars remain largely unheeded. Returning to these and similar prescriptions, a treaty body could be established and organized for statelessness. For example, Myres S. McDougal, Harold D. Lasswell, and Lung-chu Chen all advocated for "some centralization, or organized internationalization of the protection function on the global level,"⁴⁰⁶ specifically advocating for a more organized institution to be positioned within the UN framework.⁴⁰⁷ Although the treaty body would operate independently, the UN General Assembly should provide the treaty body with adequate resources, manpower, and enforcement powers. The UN Secretary-General has also expressed the need for international cooperation and for treaty bodies to ensure the full implementation of the 1954 Statelessness Convention.⁴⁰⁸ It is high time to follow through on such prescriptions.

A dedicated treaty body that works with other treaty bodies is desirable. Since the 1980s, while different treaty bodies have made pronouncements on the condition of statelessness,⁴⁰⁹ they have not really considered the concerns that are

403. *Id.*

404. Philip Alston, *Between 'Them' and 'Us': Putting Treaty Body Reform into Perspective*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 501, 523 (Philip Alston & James Crawford eds., 2000).

405. See Felice D. Gaer, *Implementing International Human Rights Norms: UN Human Rights Treaty Bodies and NGOs*, 2(3) *J. HUM. RTS.* 339, 350 (2003).

406. McDougal et al., *supra* note 68, at 996–97.

407. *Id.*

408. See UNITED NATIONS, *Guidance Note*, *supra* note 88, at 4.

409. See UNHRC, *General Comment No. 27: Freedom of Movement*, U.N. Doc. CCPR/C/21/Rev.1/Add.9 (1999), p. 5, para. 20; UNHRC, *General Comment No. 15: The Position of Aliens Under the Covenant*, U.N. Doc. HRI/GEN/1/Rev.1, at 18 (1986), p. 1, para. 1; United Nations Committee on the Elimination of Discrimination Against Women, *General Recommendation No. 21: Equality in Marriage and Family Relations* (1994), Comment No. 6, <https://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>; United Nations Committee on the Elimination of Racial Discrimination, *General Recommendation No. 30: Discrimination Against Non-Citizens*, U.N. Doc. HRI/GEN/1/Rev.7/Add.1 (2004), para. 16; United Nations Committee on the Rights

unique to or within the specific ambit of the 1954 Statelessness Convention, such as the definition of statelessness. Creating a treaty body for the 1954 Statelessness Convention does not undercut their work. The plurality of treaty bodies ensures different approaches to human rights and may highlight neglected concerns.⁴¹⁰ However, in a discourse that is intimately tied with the interests of States, I do admit that it will require a lot of political will on the part of States for such a treaty body to gain support.

Several cornerstone principles should apply to the workings of the proposed treaty body. Among others:

First, due to the complex nature of the world's citizenship laws and their varied applications, the treaty body should be organized with panels grouped according to regions or specializations aligning with different legal traditions. Since statelessness results from negative conflicts between national laws, or when no law trumps other laws to grant citizenship to an individual,⁴¹¹ the treaty body should be composed of highly specialized comparative law experts. This will solve the fragmentation of approaches in discharging stateless status determination obligations and remove the unrealistic burden on States to know the nationality legislation of all other States. As the literature on citizenship shows, citizenship regimes do not work in isolation, and constellations arise through different types of transnational and supranational venues.⁴¹² The treaty body should create and continuously update a compendium of citizenship laws and regulations based on the different legal traditions of the world to guide the panels in their work.

Second, the treaty body should understand trends, policies, and movements in citizenship rights around the world. Because statelessness is an area of law that implicates State discretion, the treaty body should be able to untangle power and political dynamics. By analyzing trends, policies, and movements in citizenship rights in the international arena, the body could understand the dynamism of citizenship and statelessness. This is vital in accomplishing its objectives. As such, the body should have broad powers to compel States to submit laws, as well as reports describing the application of those laws. The treaty body must also develop a sense of duty from the States to do this, as explained in the next subsection.

Third, the UN and represented States should be able to hold the treaty body and its members accountable through a system of checks and balances. Under the 1954 Statelessness Convention, the ICJ is empowered to take on cases dealing with the interpretation or application of the provisions of the treaty.⁴¹³ It is

of the Child, *General Comment No. 11: Indigenous children and their rights under the Convention*, U.N. Doc. CRC/C/GC/11 (2009), para. 41; United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights*, U.N. Doc. E/C.12/GC/20 (2009), paras. 5, 26 & 30.

410. See Alston, *supra* note 404.

411. See Spiro, *supra* note 292, at 694.

412. See Shaw, *supra* note 357, at 15.

413. 1954 Statelessness Convention, *supra* note 16, art. 34.

possible to arrange that once the definition in the treaty is revised, questions arising out of the treaty body's interpretation or application of the new definition could be submitted to the ICJ for judicial review. Aside from installing a watchdog to the treaty body, this arrangement would ensure the continued development of the jurisprudence on statelessness and citizenship rights. Different regional human rights courts may also become oversight judicial bodies.

One may argue that the creation of the treaty body takes away the primacy of citizenship issues from the States. However, this view reflects an antiquated vision of citizenship issues as exclusively within the province of States. Rather than seeing the international body as encroaching on the prerogative of States in dealing with citizenship issues, it should be regarded as a monitoring and enforcement body that encourages States to comply with international law obligations. In addition, this body should not take away the State's right to promulgate laws and regulations on aspects of citizenship, although it could accumulate evidence of emerging State practices.

b. State Duties of Inquiry and Cooperation

As the international community bears greater responsibility towards stateless persons, States should also take on additional ethical duties, drawn from public law, which will help promote better status determinations. I identify two of such duties that must fall unto States. First, the treaty body should develop a duty of inquiry on the part of determining States. It is not enough for States to determine statelessness; they must conduct these determinations out of a sense of legal obligation. Encouraging States to do so will hasten the emergence of status determinations as part of customary law, and as an obligation, States will be bound to perform determinations in good faith. States that identify stateless persons under the functional definition of statelessness will be better positioned to protect them.

Several individual State level decisions have started moving into this direction. For example, in the *Semeda Case*, the UK Court conceived of a duty of inquiry as part and parcel of stateless status determinations.⁴¹⁴ In that case, the determination officer failed to make sufficient inquiries into the applicant's status.⁴¹⁵ The court, therefore, invalidated the Secretary of State's initial status determination.⁴¹⁶ In determinations, the UK Court warned that status adjudicators must ascertain whether the initial determining officer asked the right questions and took reasonable steps to acquaint themselves with the information needed to make proper determinations.⁴¹⁷ Whether the steps taken were reasonable depends on the factual circumstances of the case, so it is an obligation of conduct and not

414. See *Semeda Case*, *supra* note 117, ¶ 17.

415. See *id.* at ¶ 22.

416. See *id.* at ¶ 26.

417. See *id.* at ¶ 17 (citing *Secretary of State for Education and Science v. Metropolitan Borough Council of Tameside*, (1976) U.K.H.L. 6, (1977) A.C. 1014, United Kingdom: House of Lords (Oct. 21, 1976)).

an obligation of result that is rigid. It does not fetter the reasonable discretion of decision makers.⁴¹⁸ Likewise, because it is an obligation of conduct on the part of the State, the burden of ascertaining status is shifted to the State, which has more resources at its disposal than a potential stateless person. Moreover, it serves as a safeguard against arbitrary and capricious decision-making. Reasonable steps necessarily include a reason-based interpretation of law as applied to the facts of the case. In the event that a treaty body for the 1954 Statelessness Convention is not created, the duty is especially useful in raising the quality and credibility, as well as the legitimacy, of the results of domestic determinations.

Second, States must also bear the duty of cooperating with one another and with the proposed treaty body on statelessness determinations. Without this duty, States will continue to talk past each other and avoid dealing with the ontological issue. The definition of statelessness will either remain a siloed-off, strange cipher that no State understands, or it will become an empty vessel that privileges State discretion. Determinations will continue to be a monologue, rather than a dialogue between and among concerned States for the protection of the individual. A duty to cooperate will help yield sound determinations and promote candor between and among States in citizenship matters. Eventually, if the treaty-body on statelessness is created, States could come before the treaty body in dialogue with one another. They may also be persuaded to comply with existing commitments on statelessness matters because a duty to cooperate with the treaty body exists. The treaty body will not be as effective if States bear no duty to cooperate with it. States will not heed its general comments and views and respond to its call for reports, meetings, and conferences. In the end, inasmuch as the regulation of nationality is no longer within the exclusive *domaine réservé* of States, a duty of cooperation will also further the development of norms of international law on citizenship-related issues.

CONCLUSION

The Article's proposed framework revises the definition of statelessness, not in line with how this term was originally conceived by the framers of the 1954 Statelessness Convention, but in accordance with the purpose of the 1954 Statelessness Convention. This Article further suggests additional possibilities for reforming the definition of statelessness and the way that stateless status determinations are conducted.

Up to this point, statelessness has assumed a rhetoric-like discourse in international law. The existing definition, a product of the first half of the twentieth century, has become an ideograph that accommodates State-privileging ideologies. States have so far used this definition as a naming and labelling device of

418. *Id.* at ¶ 18 (citing *British Oxygen Co Ltd. v. Minister of Technology*, (1970) U.K.H.L., (1971) A.C. 610, United Kingdom: House of Lords (Jul. 15, 1970)).

international law in the midst of competing policy concerns during statelessness determinations. Aside from these concerns, the definition has stressed formalism and entrenched the absence of rights protection in the discourse of status determinations. Instead of only protecting the unprotected, as originally envisioned, the definition of statelessness can and has been used in other, often competing, ways. It may be argued that the description of rhetoric does not fit statelessness because international law is indeterminate in general and it is only a matter of interpretation and application. However, I respond to this by stressing that not all concepts in international law assume a rhetoric-like discourse. The definition is an ideograph contributing to a discourse around the ideologies of formalism and discretionism. As I have emphasized, the paradox of statelessness is that States decide on statelessness, based on laws that States themselves create and choose to implement.

Statelessness, therefore, should be revised. While arguing that the current definition of statelessness should not be entirely discarded but reformed, I have laid down a two-pronged framework. First, this framework makes the definition of statelessness more functional and substantive, allowing the piercing of State declarations of status. Second, it limits State discretionism through the creation of a treaty body on statelessness, the ethical development of the State duty to properly inquire on statelessness, and the State duty to cooperate with each other and the proposed treaty body on statelessness matters. I admit that this proposed framework will not completely insulate determinations of statelessness from the vestiges of the politics between and among States. But any reform agenda—for that matter—will not fully insulate law from politics. It is just impossible—politics is a fact of life. However, a clearer conceptual framework of statelessness will reduce room for uncertainty and promote the legitimacy and credibility of the process of identifying statelessness.

Inevitably, the revisioning process is a multi-actor effort. It will be a long and arduous process, although some components of the framework could be carried out more easily ahead of others and may even be done outside of a formal revisioning process. But if the formal revisioning process is engaged, at least one State party to the 1954 Statelessness Convention is required to start it by revisioning to the current treaty. Once a State suggests to revision the concept of statelessness, the UN General Assembly is needed to carry it into motion. The UNHCR and other UN bodies and specialized UN agencies have a role to play in supporting and providing technical support to the process. Stateless persons are a boundless source of information for States and other actors as the process unfolds. NGOs could triangulate information and provide pressure points for advocacy. But while no State initiates the process, these other actors could promote and advocate for the revisioning process. In the meantime, States could also change domestic laws to customarily form a more functional and protection-oriented definition of statelessness.

Blood and Treasure: How Should Courts Address the Legacy of Colonialism When Resolving Ownership Disputes Over Historic Shipwrecks?

Katie Sinclair*

As long as people have been sailing the seas, there have been shipwrecks—and adventurers on the search for sunken treasure. For centuries, the law regarding the salvage and ownership of shipwrecks has been governed by jus gentium: international common law based on norms and tradition. With the international recognition of the value of cultural property following the devastation of World War II and the passage of the UN Convention on the Law of the Sea (UNCLOS) in 1982, the paradigm regarding ownership of sunken historical artifacts has shifted. However, the more modern regime surrounding ownership of sunken artifacts has fallen short. By attempting to adhere to modern legal concepts regarding sovereign ownership of war vessels, cases over ancient shipwrecks often ignore the impact of colonialism. Nations that once saw their treasure plundered under brutal Spanish colonial rule now see those artifacts from sunken wrecks returned to Spain, even though the artifacts are discovered by private companies thousands of miles away from Spanish waters. This Note seeks to examine the current treatment of ownership disputes over sunken treasure found in the Americas and offers a new legal regime regarding historic wrecks—one that encourages the salvage of sunken artifacts while addressing the legacy of colonialism by returning artifacts to their countries of origin.

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INTRODUCTION

"Not all treasure's silver and gold, mate." So spoke the one and only Captain Jack Sparrow.¹ As attitudes toward archaeology and cultural property evolve, the value of artifacts depends less on the presence of gold, silver, or precious jewels and more on their historical and cultural provenance. In a post-colonial world,

1. *Pirates of the Caribbean: The Curse of the Black Pearl* (Disney, 2003).

changing attitudes regarding cultural patrimony and respect for indigenous cultures have led to a new perspective on "ownership" of cultural property.² While this debate has been carried out in museum halls across Europe, encompassing heated debates about the Elgin marbles³ and the Benin bronzes,⁴ it has yet to make its way to the sea floor.

Shipwrecks and the hunt for sunken treasure have captured the public imagination for centuries. As long as there have been ships, there have been shipwrecks. The first salvage operations began with the Ancient Greeks, with salvors' rights outlined in Rhodian law dating from the first millennium B.C.⁵ There are approximately three million shipwrecks scattered across the ocean floors,⁶ and new technology has enabled treasure hunters to discover and recover shipwrecks and artifacts that were previously believed lost to the depths.⁷

Of the many muddled areas of international law relating to resolving competing ownership claims for marine resources, it may be hard to see why shipwrecks deserve much discussion. However, shipwrecks not only have the unique ability to capture the public's imagination, but can also be a microcosm that embodies many of the competing interests and tensions in international ocean law. In examining the legal regimes surrounding shipwrecks, one encounters conflicts between private actors and states as well as disputes between formerly colonized nations and their colonizers.

Part I briefly discusses the history of Spanish conquest and shipwrecks in the Americas and the economics of modern-day treasure hunters. Part II examines the differing legal regimes that govern ownership of shipwrecks, including UNCLOS, the UNESCO Convention on Underwater Cultural Heritage, and the Abandoned Shipwrecks Act (ASA). Part III discusses recent shipwreck cases where ownership of wrecks and artifacts was disputed between the discovering company, the ship's original country of origin, and the country of origin for the artifacts. These cases highlight the difficulties and gaps in current law in equitably deciding ownership of shipwrecks and their cargos. Part IV proposes a new

2. See Jordana Hughes, Note, *Trend Toward Liberal Enforcement of Repatriation Claims in Cultural Property Disputes*, 33 GEO. WASH. INT'L L. REV. 131, 132–33 (2000).

3. See Christine K. Knox, Note, *They've Lost Their Marbles: 2002 Universal Museums' Declaration, the Elgin Marbles, and the Future of the Repatriation Movement*, 29 SUFFOLK TRANSNAT'L L. REV. 315, 326–30 (2006).

4. See Salome Kiwara-Wilson, *Restituting Colonial Plunder: The Case for the Benin Bronzes and Ivories*, 23 DEPAUL J. ART, TECH. & INTELL. PROP. L. 375, 396–402 (2013).

5. W. Paul Gormley, *The Development of the Rhodian-Roman Maritime Law to 1681, with Special Emphasis on the Problem of Collision*, 3 INTER-AM. L. REV. 317, 320–23 (1961). Gormley writes that salvage procedures date as far back as the Phoenicians, Ancient Egyptians, and are referenced in the Code of Hammurabi. *Id.*

6. John Capolitano, *Secrets of the Deep*, THE NEW YORKER (Apr. 7, 2008), <https://www.newyorker.com/magazine/2008/04/07/secrets-of-the-deep>.

7. David J. Bederman, *Historic Salvage and the Law of the Sea*, 30 U. MIAMI INTER-AM. L. REV. 99, 102 (1998).

regime for determining ownership of artifacts, which emphasizes the need to standardize and equitably reform the current process for determining ownership of historic shipwrecks.

I.

THE TREASURE HUNTERS: FROM CONQUISTADORS TO MODERN-DAY SALVORS

Before descending into the depths of our discussion of sunken treasure, a brief examination of the history of European colonialism and trade in the Americas is necessary to understand the issues at play in determining ownership claims of sunken vessels and their cargo. Because most shipwreck discoveries have been made by private treasure hunters,⁸ a brief discussion of the economics of private salvage companies is also warranted.

A. *Spanish Colonial Presence in the Americas*

Because most of the shipwreck cases in this paper involve Spanish ships carrying treasure originating from South and Central America, this part will focus primarily on addressing the history of Spanish colonizers in the Americas.⁹

The Spanish conquest of the Americas swiftly followed Christopher Columbus's landing on Hispaniola in 1492. By the mid-1500s, the Spanish crown claimed a territory ranging from the southwestern United States to as far south as Chile.¹⁰ Spanish colonization of the Americas began in the Caribbean as early as 1493, on Christopher Columbus's second voyage.¹¹ Spanish colonizers spread from the Caribbean to North America, arriving in Florida in 1513.¹² In 1519, Hernán Cortés landed in Mexico, and subjugated the Aztec civilization by 1521.¹³ In the 1530s, Francisco Pizarro journeyed south through the Isthmus of Panama to Peru, subjugating the Incan empire by 1538.¹⁴ Pizarro, in his conquest of Peru, demanded that the Inca fill a room with gold and silver treasures gathered throughout the Incan empire as ransom for the captured emperor Atahualpa.¹⁵

8. *Infra* note 225.

9. This is not meant to suggest, however, that the English, French, Portuguese and Dutch did not also have an extensive presence in the Americas from the sixteenth to the eighteenth centuries. *See generally European Colonization of the Americas*, NEW WORLD ENCYCLOPEDIA (Feb. 24, 2015), http://www.newworldencyclopedia.org/entry/European_Colonization_of_the_Americas.

10. *Spanish Empire*, NEW WORLD ENCYCLOPEDIA (Jan. 15, 2016), https://www.newworldencyclopedia.org/entry/Spanish_Empire.

11. H. Michael Tarver & Emily Slape, *Columbus, Christopher*, in 1 THE SPANISH EMPIRE: A HISTORICAL ENCYCLOPEDIA 142–43 (H. Michael Tarver & Emily Slape eds., 2016) [hereinafter THE SPANISH EMPIRE].

12. Cheryl H. White et al., *Creation of an Empire*, in 1 THE SPANISH EMPIRE 85–86.

13. *Id.* at 89.

14. *Id.* at 90.

15. Mark Cartwright, *Pizarro & the Fall of the Inca Empire*, ANCIENT HIST. ENCYCLOPEDIA (Jul. 1, 2016), <https://www.ancient.eu/article/915/pizarro—the-fall-of-the-inca-empire/>.

The task took eight months and scholars estimate the treasure to be valued at over \$50 million.¹⁶ Nonetheless, Pizarro summarily executed Atahualpa, and his men melted down the gold and silver treasures so they could better fit in ships' holds.¹⁷

Spanish settlers retained cultural and economic ties with Spain, and Spanish ships transported silver and gold mined from modern-day Peru, Chile, Bolivia, and Mexico back to Spain.¹⁸ Between 1566 and 1790, the Spanish Treasure Fleet made twice-yearly voyages between Spain and ports in Panama, Mexico, and Colombia.¹⁹ The Spanish left the Americas with vast quantities of gold and silver, upsetting Spain's economy by creating rampant inflation.²⁰ Seventy percent of total global gold production in the 1600s came from Spanish holdings in the New World.²¹ However, it is estimated that ten to fifteen percent of the gold and silver that left New Spain's ports never reached Europe—instead, large quantities of gold and silver ended up on the seafloor.²²

The extraction of gold and silver in the Americas came at tremendous human cost. The mines in Potosí, located in the Viceroyalty of Peru (modern-day Bolivia), were some of the most productive silver mines in the colonial Americas.²³ Potosí mines generated 45,000 tons of silver between 1556 and 1783.²⁴ The mines utilized a forced-labor system, relying on indigenous Peruvians and later African slaves.²⁵ Approximately eight million native Peruvians and Africans died in these mines.²⁶

Looking at the history of Spanish colonization of the Americas shows a legacy of exploitation and bloodshed. It also shows how difficult it can be to resolve ownership disputes: how does one identify the exact location where the gold and silver came from when precious metals from across Central and South America were collected at a few ports? Which modern day country can make a claim when the Spanish exploitation of mineral resources was continent-wide? This debate becomes even more complicated when such artifacts are found in

16. *Id.*

17. *Id.*

18. Darcy R. Fryer, *Trade within the Spanish Empire*, in 1 *THE SPANISH EMPIRE* 45–46.

19. H. Michael Tarver & Emily Slape, *West Indies Fleet*, in 1 *THE SPANISH EMPIRE* 116–17.

20. H. Michael Tarver & Emily Slape, *Precious Metals*, in 2 *THE SPANISH EMPIRE* 162–64.

21. *Id.* at 164.

22. *See id.*

23. Amber Crossman Cheng, Comment, *All in the Same Boat? Indigenous Property Rights in Underwater Cultural Heritage*, 32 *HOUS. J. INT'L L.* 695, 702–03 (2010).

24. H. Michael Tarver & Emily Slape, *Peru, Viceroyalty of*, in 2 *THE SPANISH EMPIRE* 189, 191.

25. *Id.* at 192–93.

26. *Id.*

shipwrecks, since the specific identity of wrecks and the exact provenance of artifacts is subject to dispute.²⁷

B. Economics of Private Salvage Companies

Hundreds of years after the conquistador era, humankind's obsession with treasure remains. Ever since people have been sailing the seas, there have been shipwrecks and salvage operations.²⁸ From the days of free diving and diving bells to the modern-day use of technologically-advanced sonar, enterprising salvors have utilized a variety of techniques to raise sunken treasure from the depths.²⁹ New technologies have allowed for the discovery of long-lost shipwrecks. One of the most famous salvage expeditions was the discovery of the *Titanic* in 1985.³⁰ The *Titanic* operation heralded a new era of salvage operations, where new technology allowed salvors to both locate and raise artifacts from previously unreachable ships. The *Titanic* was located in 13,000 feet of water using advanced sonar techniques and the use of remote operated vehicles (ROVs).³¹ Similar technology was used to discover the *Bismarck*, a sunken German World War II battleship, in 1989 at a depth of 15,000 feet in the North Atlantic.³²

The cost of locating and salvaging a wreck can vary tremendously. Wrecks located in shallow waters can be found by visual inspection, and human divers can access and retrieve artifacts.³³ Other expeditions searching for deep-water wrecks can cost tens of millions of dollars. Private salvage companies spend the majority of their time and money locating wrecks. Locating a wreck can take years and can involve combing through old archives to examine letters and ships' manifests.³⁴ The passage of time and existence of conflicting accounts can add to the difficulty in locating wrecks; shipwrecks in deep-water are often not intact,

27. See *infra* Part IV.B for a further discussion of the difficulties of identifying centuries-old wrecks.

28. See Gormley, *supra* note 5,

29. See generally Roderick Mather, *Technology and the Search for Shipwrecks*, 30 J. OF MAR. L. & COM. 175 (1999).

30. Brooke Wight, Comment, *Keepers, Weepers, or No Finders at All: The Effect of International Trends on the Exercise of U.S. Jurisdiction and Substantive Law in the Salvage of Historic Wrecks*, 33 TUL. MAR. L.J. 285, 291 (2008).

31. *Id.* at 291–92; WOODS HOLE OCEANOGRAPHIC INST., *Ships & Technology Used During the Titanic Expeditions*, <https://www.whoi.edu/know-your-ocean/ocean-topics/underwater-archaeology/rms-titanic/ships-technology-used-during-the-titanic-expeditions/>.

32. Reuters, *Nazi Bismarck Is Found in "Good Shape,"* N.Y. TIMES (Jun. 14, 1989), <https://www.nytimes.com/1989/06/14/world/nazi-ship-bismarck-is-found-in-good-shape.html>.

33. Mather, *supra* note 29, at 176–77.

34. Odyssey Marine's hunt for the *Sussex*, a sunken British warship, involved looking through documents relating to the British exchequer and reading personal letters between members of Louis XIV's court. See Capolitano, *supra* note 6.

with debris fields that can span large distances.³⁵ Modern-day salvage companies focused on finding historic wrecks borrow techniques from off-shore mineral and oil exploration by utilizing sonar and ROVs.³⁶ Once a potential wreck is identified, salvors will traverse up to hundreds of square miles of open ocean looking for the telltale signs of a ship.³⁷ Once a wreck is located, salvors will attempt to raise artifacts and treasure.³⁸ Locating and raising artifacts from wrecks can be an environmentally destructive process, particularly in shallow waters. Salvors will direct powerful blasts of water at the seafloor, with the goal of removing sand and revealing sunken wrecks.³⁹ This increases the turbidity of the water and can harm fragile ecosystems, such as coral reefs.⁴⁰

Because salvage operations require large amounts of upfront capital, salvage companies often rely on outside investors to fund their expeditions.⁴¹ Hedge funds, private equity firms, and individual investors have all funded private salvage companies focusing on historic wrecks.⁴² Deep-sea expeditions can cost up to \$30 million,⁴³ with costs running up to \$35,000 per day.⁴⁴ The need to pay back investors can lead to artifacts from shipwrecks being sold in auction houses, online, and even on home-shopping channels.⁴⁵ Odyssey Marine, the only publicly-traded salvage company, claims that artifacts sold to private buyers are "mass produced" items of minimal historical significance, such as coins.⁴⁶ While it can be argued that salvage companies are one of the few entities willing to invest extensive resources in discovering historic shipwrecks, it should not be overlooked that they are private businesses whose primary purpose is to produce a profit. The sheer cost of mounting an expedition, coupled with the chance to

35. Allison Leigh Richmond, *Scrutinizing the Shipwreck Salvage Standard: Should a Salvor Be Rewarded for Locating Historic Treasure?*, 23 N.Y. INT'L L. REV. 109, 141–42 (2010).

36. See Robert Trigaux, *Down but not out: Tampa's Odyssey Marine preps to swap treasure hunting for bigger ocean game*, TAMPA BAY TIMES (Aug. 14, 2016) <https://www.tampabay.com/news/business/down-but-not-out-tampas-odyssey-marine-preps-to-swap-treasure-hunting-for/2289065>.

37. Capolitano, *supra* note 6.

38. See Michael B. Kelley, *Divers Go To Incredible Lengths To Recover A 16th Century Shipwreck*, BUS. INSIDER (Jun. 20, 2012), <https://www.businessinsider.com/the-process-of-salvaging-a-16th-century-shipwreck-2012-6> (describing divers using an "underwater vacuum cleaner" to salvage a 16th century Spanish wreck).

39. James Paull IV, *Salvaging Sunken Shipwrecks: Whose Treasure is it? A Look at the Competing Interests for Florida's Underwater Riches*, 9 J. LAND USE & ENVTL. L. 347, 360 (1994).

40. *Id.*

41. *Id.* at 371.

42. Eoghan Macguire, *Why scouring sea for sunken treasures is big business*, CNN (Mar. 14, 2012), <https://www.cnn.com/2012/03/13/business/sunken-treasure-business/index.html>.

43. *Id.*

44. Zoe Kleinman, *Deep sea salvage: Finding long lost treasures of the deep*, BBC NEWS (Nov. 28, 2014), <https://www.bbc.com/news/business-30231421>.

45. See Capolitano, *supra* note 6.

46. *Id.*; Kleinman, *supra* note 44.

claim tens of millions of dollars' worth of gold and silver, raises the stakes around shipwreck ownership disputes.

II. FINDERS KEEPERS? LEGAL PRINCIPLES FOR DETERMINING OWNERSHIP OF HISTORIC SHIPWRECKS

The question of who owns a shipwreck and its artifacts depends on many things: where the wreck is physically located, what country owned the ship originally, which parties are making claim to it, and in what jurisdiction finders are making their claims. To better understand the current gaps in the law surrounding cultural artifacts recovered from shipwrecks, a brief survey of current legal regimes is needed. Part A briefly discusses the background principles of the law of salvage and law of finds, which were the controlling legal theories for determining ownership until the advent of codified international law in the twentieth century, and remain relevant in adjudicating claims over shipwrecks. Part B discusses the governing international law relating to the ownership of shipwrecks. Finally, Part C discusses how U.S. courts address shipwreck ownership cases.

A. *Law of Salvage and Law of Finds*

Although the law of salvage and law of finds have historically been the customary way to address shipwreck disputes, and these have been augmented in modern times by international law and US statutory law governing historic wrecks. However, the principles embodied in the law of salvage and law of finds that encourage the use of abandoned property and compensating salvors are still important concerns for deciding ownership claims. While the laws of salvage and finds are found in the common law dating back to the Middle Ages,⁴⁷ this section will primarily focus on its application in US federal court, where all the cases discussed in this paper have been filed.

The traditional law regarding ownership of wrecks contains two separate bodies of law: the law of salvage and the law of finds.⁴⁸ Both the law of salvage and the law of finds stem from the same principle of encouraging putting property back into use, but they have several distinct differences. The law of salvage does not convey ownership rights to the salvor, but rather allows him to raise and recover cargo from a sunken vessel for a "very liberal salvage award."⁴⁹ In

47. John Lang, Note, *Disaster, Deceit, and Treasure: Why the UNCLOS Resolution on Possession of Salvaged Wrecks Is Doing More Harm Than Good*, 11 DREXEL L. REV. 383, 392–93 (2018).

48. See *R.M.S Titanic, Inc. v. The Wrecked and Abandoned Vessel*, 323 F. Supp. 2d. 724, 736 (E.D. Va. 2004) ("The common law of finds and the maritime law of salvage, however, cannot be simultaneously applied to a shipwreck and property recovered from a shipwreck."), *rev'd on other grounds*.

49. *Columbus-Am. Discovery Grp. v. Atl. Mut. Ins. Co.*, 974 F.2d. 450, 459 (4th Cir. 1992).

salvage cases, the original owner of the ship retains legal title to the ship and its cargo.⁵⁰ To establish a claim for a salvage award, salvors must show that (1) the salvors' efforts were voluntary, (2) the salvor succeeded in salvaging some property and (3) the property was in marine peril.⁵¹ If the salvor successfully makes a claim for salvage, he is rewarded with a percentage of the proceeds from the sale of the property.⁵² In determining an award, courts look at the difficulty of salvage operation, the skill of the salvor, the amount of danger the property was in, and the value of the saved property.⁵³

Historically, shipwrecks were not considered to be subject to the law of finds, which applied only to "maritime property which had never been owned by anybody, such as ambergris, whales and fish."⁵⁴ However, a modern trend beginning in the 20th century was to apply the law of finds to shipwrecks.⁵⁵ The law of finds "expressed the ancient and honorable principle of 'finders, keepers.'"⁵⁶ In short, if property is considered "abandoned," the first person to claim it is entitled to claim ownership. To establish finders' rights, finders must show that (1) the property was abandoned and (2) they have "control" over it.⁵⁷

These two laws of finds and salvage present competing values and objectives. The law of finds encourages finders "to act acquisitively [and] secretly, and to hide their recoveries, to avoid claims of prior owners or other would-be finders that could entirely deprive them of the property."⁵⁸ In contrast, "[t]he primary concern of salvage law is the preservation of property on oceans and waterways" which better fits "the needs of marine activity."⁵⁹ Unlike traditional concepts of abandonment, which allows finders to lay claims on property, under the law of salvage, owners of cargo "lost" at the bottom of the sea are still the rightful owners. One of the goals of marine salvage is to "promote

50. *Id.*

51. Terence P. McQuown, *An Archaeological Argument for the Inapplicability of Admiralty Law in the Disposition of Historic Shipwrecks*, 26 WM. MITCHELL L. REV 289, 296 (2000). The first two elements of a salvage claim are more or less self-explanatory. The question of whether property is in "marine peril" is a more interesting one—courts have looked at different criteria to determine if property is in "marine peril." *See id.* at 297. However, an in-depth discussion of the elements of "marine peril" is beyond the scope of this paper. Although courts have disagreed whether hundreds-of-years-old wrecks are in fact in "peril," *see id.* at 308–12, determining if a wreck is in peril or not has not been a major factor in the cases discussed in this paper, and will be left for another day.

52. *Id.* at 298.

53. *Id.*

54. *Columbus-Am.*, 974 F.2d at 459–60.

55. *See id.* at 476–77 (Widener, J., dissenting) (noting that the application of the law of salvage to historic wrecks was a recent development).

56. *Id.* at 459.

57. McQuown, *supra* note 51, at 300.

58. *Columbus-Am.*, 974 F.2d at 460 (quoting *Hener v. United States*, 525 F. Supp. 350, 356 (S.D.N.Y. 1981)).

59. *Id.* (quoting *Hener*, 525 F. Supp. at 357–58).

commerce by encouraging people to save property from destruction at sea and discourage embezzlement of salvaged property.⁶⁰

Shipwrecks present two interesting twists to the law of finds regarding how the law treats abandonment and embedded objects. While at first glance, a ship moldering away at the bottom of the ocean for four hundred years might appear to be abandoned, the legal definition of abandonment is more complicated. Abandonment requires a "clear and unmistakable affirmative act to indicate a purpose to repudiate ownership."⁶¹ Historically, "[a]dmiralty courts have adhered to the traditional and realistic premise that property previously owned but lost at sea has been taken involuntarily out of the owner's possession and control by the forces of nature at work in oceans and waterways."⁶² Because owners of ships lost at sea did not "voluntarily" repudiate their ownership, shipwrecks were not considered abandoned, but still the property of the original owner. The passage of time alone is also not enough to render property abandoned.⁶³ However, "[i]n the treasure salvage cases, often involving wrecks hundreds of years old, the inference of abandonment may arise from lapse of time and nonuse of the property."⁶⁴ Additionally, common law has historically held that property "embedded" in the land is not subject to the law of finds but belongs to the owner of the land.⁶⁵ This raises another issue with determining abandonment, as shipwrecks could be "embedded" in the sea floor which, depending on location, can be considered common property of humankind.⁶⁶

The question of abandonment of shipwrecks made its way all the way to the Supreme Court in 1998 in the case of *California v. Deep Sea Research, Inc.*⁶⁷ In *Deep Sea Research*, a private salvage company filed an *in rem* action (an action to determine rights over property) to claim salvors' rights over the *Brother Jonathan*, a steamship carrying gold bullion that sank four and a half miles off the coast of California in 1865. Deep Sea Research claimed it was a salvor of the ship, since the insurance company that had paid the ships' owners now had title to the gold.⁶⁸ California intervened, claiming the *Brother Jonathan* was abandoned and embedded in the seafloor and, under the Abandoned Shipwrecks Act,⁶⁹ belonged

60. McQuown, *supra* note 51, at 295.

61. *Id.* at 461 (quoting *The Port Hunter*, 6 F. Supp. 1009, 1011 (D. Mass. 1934)). See also Eduardo M. Penalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 196 (2010) (abandonment requires the intentional and voluntary relinquishment of "right, title, and interest").

62. *Columbus-Am.*, 974 F.2d at 460 (quoting *Hener*, 525 F. Supp. at 357–58).

63. *Id.* at 461.

64. *Id.* (quoting ADMIRALTY AND MARITIME LAW, § 15–7, 514).

65. McQuown, *supra* note 51, at 301.

66. See UNCLOS art. 5 (discussing ownership of the deep seabed).

67. *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998).

68. John Paul Jones, *The United States Supreme Court and Treasure Salvage: Issues Remaining After Brother Jonathan*, 30 J. MAR. L. & COM. 205, 207 (1999).

69. See *infra* Part II.C for a discussion of the Abandoned Shipwrecks Act.

to California.⁷⁰ California argued that the Eleventh Amendment, which extends the doctrine of sovereign immunity to states,⁷¹ precluded Deep Sea Research from contesting California's claim to the ship.⁷² Both the district court and appellate court ruled in favor of Deep Sea Research, holding that for the Eleventh Amendment to apply, California must have "colorable title" by demonstrating the *Brother Jonathan* was in fact abandoned.⁷³ California appealed to the United States Supreme Court.⁷⁴ Although the question of whether the *Brother Jonathan* was abandoned was an issue in the case, the Supreme Court dashed the hopes of maritime lawyers seeking guidance on abandonment of historic shipwrecks and issued a narrow ruling focusing on the application of the Eleventh Amendment.⁷⁵ The Supreme Court held that the Eleventh Amendment did not preclude admiralty *in rem* actions against states if the state did not in fact have "possession" over the shipwreck.⁷⁶ Regarding abandonment, the Supreme Court unhelpfully stated that the meaning of "abandoned . . . conforms with its meaning under admiralty law."⁷⁷

Subsequent cases have held that "warships" or ships that belonged to a sovereign cannot be subject to *in rem* actions on two main grounds. First, courts have held that sovereign nations must expressly abandon title to their ships, precluding actions asserting finders' claims of ownership.⁷⁸ Second, courts have held that foreign nations are immune from suit in US courts, as codified by the Foreign Sovereign Immunities Act (FSIA).⁷⁹ The United States' policy is that, categorically, any sunken warship is immune from salvage claims.⁸⁰ International law decrees that neither the law of salvage nor the law of finds applies to wrecks of vessels owned by sovereign states.⁸¹ Another issue with applying the law of finds to shipwrecks is the concept of "control." How does one establish "control" over a vessel that can be thousands of feet under water? In the case of shipwrecks,

70. Jones, *supra* note 68, at 208.

71. U.S. CONST. amend. XI.

72. Jones, *supra* note 68, at 208.

73. *Id.* at 209–11.

74. *Id.* at 211.

75. *Id.* at 205–06.

76. *Id.* at 211.

77. California v. Deep Sea Rsch, Inc., 534 U.S. 491, 508 (1998). Ships may be abandoned under admiralty with an express renunciation of title. See Lawrence J. Lipka, *Abandoned Property at Sea: Who Owns the Salvage "Finds"?*, 12 WM. & MARY L. REV. 97, 102 (1970).

78. See, e.g., Sea Hunt Inc. v. The Unidentified Shipwrecked Vessel or Vessels, 221 F.3d 634 (4th Cir. 2000).

79. See, e.g., Odyssey Marine Expl. Inc. v. The Unidentified, Shipwrecked Vessel, 675 F. Supp. 2d. 1126 (M. D. Fla. 2009). The FSIA and its application to shipwreck cases will be discussed more in depth in Part III.A.2.

80. Richmond, *supra* note 35, at 162–63.

81. *Id.* at 146.

courts have applied a theory of "constructive possession" where finders can deposit part of a wreck with the court.⁸²

Looking at the law of salvage and the law of finds shows the difficulty of applying admiralty law to historic shipwrecks, particularly in regard to determining if and when a shipwreck has been "abandoned."

B. International Law

International law throws a further wrench into determining ownership of shipwrecks. Instead of looking solely at the original ownership of a wreck and applying the law of salvage and finds, international law also considers the physical location of the wreck and its status as historic or cultural property. While international law does recognize the cultural and historical value of shipwrecks, the fact that the United States is not a signatory to many international treaties means its application in US courts has been limited. However, international law's principle of honoring the cultural and historical value of artifacts provides helpful guidance when looking at the competing interests at stake in the salvage of historic shipwrecks.

1. UNCLOS Articles 303 and 149

The 1982 UN Convention on the Law of the Sea (UNCLOS) is "the most complex and far-reaching treaty ever concluded."⁸³ Coming into effect in 1994, UNCLOS consists of 320 articles and governs a range of issues, including the continental shelf, the creation of exclusive economic zones (EEZ), fishery rights, and scientific research operations.⁸⁴ UNCLOS codifies the existence of a 200-mile EEZ, where coastal nations have control over the harvesting of marine resources, and a twelve-mile territorial sea.⁸⁵ Although the United States never ratified UNCLOS, it accepts several of its tenets, including the existence of a 200-mile EEZ and the idea of the high seas belonging to "all nations" as customary international law.⁸⁶

Two specific articles of UNCLOS are relevant to determining the ownership of shipwrecks. Article 303 states that "States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose."⁸⁷ Article 303 also states that shipwrecks found in the contiguous zone

82. See *infra* note 162 and accompanying text for a discussion of constructive possession in the context of a shipwreck case.

83. ALISON REISER ET AL., *OCEAN AND COASTAL LAW: CASES AND MATERIALS* 29 (4th ed. 2007).

84. *Id.*

85. *Id.*

86. See *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965 (4th Cir. 1999) ("The mutual access to the high seas is firmly etched in the *jus gentium*.").

87. United Nations Convention on the Law of the Sea, art. 303 [hereinafter UNCLOS].

of a coastal state may not be removed without that state's permission.⁸⁸ The contiguous zone extends twenty-four nautical miles offshore.⁸⁹ Article 149 also addresses "objects of an archaeological and historical nature" found on the high seas.⁹⁰ Article 149 requires that such artifacts "be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."

While both Articles 303 and 149 express the goals of preserving historical artifacts on the high seas, neither fully displaces traditional admiralty law.⁹¹ Additionally, neither Article explicitly establishes a mechanism for determining ownership of historical artifacts, although Article 149 seems to give preference to the country where the artifacts originated.⁹²

2. *UNESCO Convention on the Protection of Underwater Cultural Heritage*

The UNESCO Convention on the Protection of Underwater Cultural Heritage provides further guidance on how international law should address historic shipwrecks. Proposed in 2001, one of the goals of the Convention on Underwater Cultural Heritage was "to prevent the exploitation of historic shipwrecks for profit."⁹³ The Convention prohibits applying the law of salvage and finds unless doing so is required for the preservation of cultural heritage.⁹⁴ While the Convention on Underwater Cultural Heritage espouses lofty goals, only thirty-one countries (not including the United States) are signatories to it.⁹⁵ More countries may be hesitant to sign because of a fear that the Convention could potentially limit sovereign nations' activities in their own territorial seas, since the Convention requires States who have underwater cultural property in their jurisdiction to affirmatively search for and protect it.⁹⁶ The Convention on Underwater Cultural Heritage also does not specifically lay out what constitutes "cultural heritage," instead defining it broadly as "[a]ll traces of human existence having a cultural, historical, or archeological character which have been partially

88. *Id.*

89. *See id.* art. 33.

90. *Id.* art. 149.

91. Lang, *supra* note 47, at 400.

92. *See* UNCLOS art. 149. Article 149 states "All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole, particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin."

93. Cheng, *supra* note 23, at 711.

94. *Id.* at 712–13.

95. *Id.* at 713.

96. *See id.*; Cathryn Henn, *The Trouble with Treasure: Historic Shipwrecks discovered in International Waters*, 19 U. MIAMI INT'L & COMP. L. REV. 141, 176–77 (2012).

or totally under water, periodically or continuously, for at least 100 years."⁹⁷ Interestingly, this could apply to almost *any* human-made object once it reaches the requisite age, including "splinters from surfboards, broken coke bottles and lobster traps."⁹⁸

While the Convention on Underwater Cultural Heritage's goal to protect historic wrecks is laudable, its overly-broad definition as to what constitutes underwater cultural heritage and proscriptive treatment of states who have underwater cultural property in their waters means that is not likely to be a widely accepted solution. States may not be willing or able to devote time and resources to discovering and salvaging historic artifacts as is required by the Convention, particularly since there is no limit as to what can be considered "cultural property."

3. *Other Treatments of Cultural Property Under International Law*

While there is minimal international law regarding shipwreck ownership specifically, applying international law regarding the ownership and disposition of cultural property to shipwrecks generally can provide further guidance. The idea of needing protections for cultural property first arose in the aftermath of World War II, where the devastation of historic sites across Europe and systematic looting by Nazis led to the realization that new laws were needed to preserve humankind's common cultural heritage.⁹⁹ Scholars estimate that up to twenty percent of art in the Western world was expropriated during World War II.¹⁰⁰ The 1954 Hague Convention recognized the need for special protection of cultural property during armed conflicts.¹⁰¹ The Hague Convention defined cultural property as "movable or immovable property of great importance to the cultural heritage of every people."¹⁰² In 1970, UNESCO refined the definition of cultural property to "property which, on religious or secular grounds, is specifically designated by each State as being of importance."¹⁰³

While the 1954 Hague Convention applied only to cultural property threatened during wartime, in 1970 the UN Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership

97. Henn, *supra* note 96, at 175 (quoting the Convention on Underwater Cultural Heritage).

98. *Id.* at 176.

99. M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finders and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223, 234 (1998).

100. Lauren Fielder Redman, *The Foreign Sovereign Immunities Act: Using a 'Shield' Statute as a Sword for Obtaining Federal Jurisdiction in Art and Antiquities Cases*, 13 ART ANTIQUITY & L. 75, 76 (2008).

101. Harris, *supra* note 99, at 234.

102. The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, Art. (1)(a), May 14, 1954, 249 U.N.T.S. 240.

103. *Id.* (quoting Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, art. 1, Nov. 14, 1970, 1972 U.N.T.S. 232.).

of Cultural Property focused on the need of protecting cultural property from illegal trading on private markets.¹⁰⁴ Additionally, the 1970 Convention explicitly recognized that property transferred from colonized people to a colonizing state is illicitly transferred and should be returned to its country of origin.¹⁰⁵

There are two competing theories regarding the proper place of cultural property. One, cultural nationalism, argues that cultural property belongs to its country of origin or the descendants of the people who created it.¹⁰⁶ A competing view, cultural internationalism, argues that cultural property belongs to humankind as a whole.¹⁰⁷ Such a view often justifies the placement of historic artifacts from around the world in Western museums, arguing that such institutions have the resources to preserve them and guarantee access to the greatest number of people.¹⁰⁸

Repatriation, or the return of illicitly traded goods to their country of origin, is the primary means to address stolen cultural property. Perhaps the most famous cases of repatriation involve the returning of artwork stolen by Nazis during the Holocaust to their rightful owners. The international community became interested in repatriating Nazi-looted art in the 1990s due to the recognition of the fiftieth anniversary of the Holocaust.¹⁰⁹ One famous case involved the return of a Gustav Klimt portrait of *Adele Bloch-Bauer I* to the descendants of its former owner.¹¹⁰ Italy has also been aggressive in its pursuit of its antiquities: Italy has been engaged in a fifty-year battle for the return of an ancient Greek statue that was once lost at sea in antiquity, but that now stands on display at the Getty museum in Los Angeles.¹¹¹ Egypt is pressing claims against the British Museum for the return of the Rosetta Stone and even the Sphinx's beard.¹¹² While there does seem to be a modern trend toward recognizing the cultural property rights of nations and people whose art was stolen from them, repatriation is a cumbersome, lengthy process.¹¹³ The most famous cases have also been primarily against

104. Hughes, *supra* note 2, at 136.

105. Cheng *supra* note 23, at 715–16.

106. Kiwara-Wilson, *supra* note 4, at 397.

107. David Curfman, Note, *Thar Be Treasure Here: Rights to Ancient Shipwrecks in International Water – A New Policy Regime*, 86 WASH U. L. REV. 181, 198 (2008).

108. Josh Shuart, *Is All Pharaoh in Love and War - The British Museum's Title to the Rosetta Stone and the Sphinx's Beard*, 52 U. KAN. L. REV. 667, 673–74 (2004).

109. Thérèse O'Donnell, *The Restitution of Holocaust Looted Art and Transitional Justice: The Perfect Storm or the Raft of the Medusa?*, 22 EUR. J. INT'L L. 49, 51 (2011).

110. *Id.* at 64–65.

111. Derek Fincham, *Transnational Forfeiture of the Getty Bronze*, 32 CARDOZO ARTS & ENT. L.J. 471, 471–72 (2014).

112. See generally Shuart, *supra* note 108.

113. See O'Donnell, *supra* note 109, at 64–65 (noting that the battle over *Adele Bloch-Bauer I* took over six years and was ultimately resolved through private arbitration outside of the court system).

flagship museums, which often fight tooth and nail to preserve their famous collections.

Current international law suggests that the countries of origin of looted and stolen artifacts should have preference, but disputes over ownership are often litigated in courts situated in the countries where the artifact is currently located. Such courts apply their own laws and see international law as merely advisory, if they even take note of it all.¹¹⁴

C. United States Case Law – Treasure Salvors, Inc. and the Abandoned Shipwrecks Act

Although only a few of the shipwrecks discussed in depth in this paper are located within the territorial sea or EEZ of the United States,¹¹⁵ providing an overview of the current statutory regimes operating in the United States provides insights into how US law values and manages historic wrecks. Similarly, with an estimated 50,000 wrecks off coastal US waters,¹¹⁶ including an estimated 4,000 sunken ships off the coast of Florida,¹¹⁷ it is only a matter of time before another historic wreck carrying artifacts from former Spanish colonies is uncovered in US waters. Such a dispute would likely be litigated in US courts.

Prior to 1987, claims to shipwrecks were adjudicated in US courts using traditional admiralty law. Litigation over historic wrecks also sometimes invoked the Antiquities Act, passed in 1906, and the Archaeological Resources Protection Act, passed in 1979.¹¹⁸ The United States passed the Abandoned Shipwrecks Act (ASA) in 1987, which abrogated the traditional law of finds and salvage as applied to shipwrecks within state waters.¹¹⁹ The ASA applies to wrecks "(1) embedded in submerged lands of a State; (2) embedded in coralline formations protected by a State on submerged lands of a State; or (3) on submerged lands of a State and is included in or determined eligible for inclusion in the National Register."¹²⁰ The purpose of the Act was to allow states to take title of and manage historic shipwrecks with the goal of "allowing access to historians and sport divers."¹²¹

114. See *infra* Part III.A.3 for discussion of a US district court's treatment of Peru's claims to treasure found on a Spanish galleon.

115. The *Mercedes* sank approximately thirty miles off the coast of Portugal; the *San José* is approximately sixteen miles off the coast of Colombia.

116. Kevin Berean, Comment, *Sea Hunt, Inc. v. The Unidentified Shipwrecked Vessel or Vessels: How the Fourth Circuit Rocked the Boat*, 67 BROOK. L. REV. 1249, 1258 (2002); see also Paul Hallwood & Thomas J. Miceli, *Murky Waters: The Law and Economics of Salvaging Historic Shipwrecks*, 35 THE J. OF LEGAL STUD. 285, 285 (2006).

117. Paull, *supra* note 39, at 364; see generally MICHAEL BARNETTE, FLORIDA'S SHIPWRECKS 31–49 (2008).

118. See Ole Varmer, *The Case against the Salvage of Cultural Heritage*, 30 J. MAR. L. & COM. 279, 281–82 (1999).

119. Curfman, *supra* note 107, at 195.

120. 43 U.S.C. § 2105(a).

121. Curfman, *supra* note 107, at 195.

Prior to the passage of the ASA, there were disputes between state and federal district courts over the ownership of shipwrecks in US coastal waters, with states claiming title to shipwrecks found within three miles of their coasts and federal district courts claiming they had sole jurisdiction over admiralty claims.¹²² The landmark 1978 case *Treasure Salvors, Inc. v. The Unidentified Wrecked and Abandoned Sailing Vessel*¹²³ encapsulated many of the tensions between state, federal, and international law and was a major factor in the passage of the ASA.¹²⁴

In *Treasure Salvors*, a private US company claimed to have discovered the wreck of *Nuestra Señora de Atocha*, a Spanish galleon which sank off the coast of Florida in 1622.¹²⁵ Treasure Salvors located the wreck in 1971 "after an arduous search" and raised "gold, silver, artifacts, and armament valued at \$6 million."¹²⁶ Treasure Salvors filed an *in rem* action in district court asserting their claim to the treasure.¹²⁷ The United States filed a counterclaim, arguing it had title under the Antiquities and Abandoned Property Act.¹²⁸ The district court granted summary judgment to Treasure Salvors, and the government appealed.¹²⁹ The Fifth Circuit affirmed the district court's decision, finding that the United States had no claim to the wreck under any laws existing at the time.¹³⁰ Interestingly, the Fifth Circuit did not go so far as to state that Treasure Salvors had "exclusive title to, and the right to immediate and sole possession of, the vessel and cargo as to other claims if any there be, who are not parties or privies to this litigation."¹³¹ However, the Fifth Circuit did state that "[t]he Atocha is indisputedly an abandoned vessel."¹³²

The tale of the *Atocha* did not end there. After the Fifth Circuit's decision, Florida filed a separate suit claiming that it had title.¹³³ The case made its way all the way up to the Supreme Court, which held that the Eleventh Amendment¹³⁴

122. Berean, *supra* note 116, at 1258–59 (citing H.R. REP. NO. 100-514 pt. I at 2). 28 U.S.C. § 1333 gives federal courts exclusive jurisdiction over admiralty cases.

123. 569 F.2d 330 (5th Cir. 1978).

124. See Timothy T. Stevens, *The Abandoned Shipwreck Act of 1987: Finding the Proper Ballast for the States*, 37 VILL. L. REV. 573, 587–88 (1992).

125. *Treasure Salvors*, 569 F.2d at 333.

126. *Id.*

127. *Treasure Salvors Inc. v. Abandoned Sailing Vessel Believed to Be a Nuestra Senora de Atocha*, 408 F. Supp. 907 (S.D. Fla. 1976).

128. *Id.* at 908–09.

129. *Treasure Salvors*, 569 F.2d at 333.

130. *Id.* at 335.

131. *Id.* at 336.

132. *Id.*

133. Stevens, *supra* note 123, at 586–88.

134. See *supra* notes 67–76 and accompanying text for a discussion of the Eleventh Amendment's application to shipwreck cases.

did not preclude *in rem* actions.¹³⁵ The case of the *Atocha* was the "catalyst" that prompted Congress to pass the ASA in 1987. After the passage of the ASA in 1987, which gave states title to "abandoned" and "embedded" wrecks found in state waters, it is likely that *Treasure Salvors* would have gone a different way, with Florida succeeding on its claim. While the ASA applied to abandoned shipwrecks, its statutory language and subsequent court cases did little to clarify the meaning of the term "abandoned." In *Deep Sea Research*, discussed above, the Supreme Court intentionally refused to provide guidelines for determining if a historic shipwreck was abandoned.¹³⁶ It was not until 2000 in *Sea Hunt Inc. v. Unidentified Shipwrecked Vessel or Vessels*¹³⁷ that a US court revisited the question of whether sunken Spanish ships in US waters were abandoned.¹³⁸

Sea Hunt was the first time Spain successfully established a claim to a sunken Spanish vessel in US waters.¹³⁹ *Sea Hunt*, a private salvage company, claimed to have found the remains of two Spanish naval vessels, *La Galga* and *Juno*, which sank off the coast of Virginia in 1750 and 1802, respectively.¹⁴⁰ *Sea Hunt* filed suit in Virginia, alleging that Virginia was the rightful owner of the abandoned vessels under the ASA.¹⁴¹ The district court held that Spain had expressly abandoned its claim to *La Galga* after a 1763 treaty ending the Seven Years War between France, Spain, and England, but that Spain had not abandoned its claim to the *Juno*.¹⁴²

The Fourth Circuit reversed the district court's holding regarding *La Galga*, analyzing the text of the 1763 treaty to show that it did not apply to "movable property located in coastal waters."¹⁴³ The court noted that the United States was justified in supporting Spain's claim, as the United States has a strong interest in ensuring its "sunken vessels and lost crews are treated as sovereign ships and honored graves, and are not subject to exploration, or exploitation, by private parties seeking treasures of the sea."¹⁴⁴ The court also noted that "[f]ar from abandoning these shipwrecks, Spain has vigorously asserted its ownership rights in this proceeding."¹⁴⁵ However, the court failed to address the fact that it was not until *after* *Sea Hunt* had spent millions of dollars locating and salvaging the ships

135. *Treasure Salvors*, 569 F.2d at 336.

136. *Supra* notes 75–77 and accompanying text.

137. 221 F.3d 634 (4th Cir. 2000).

138. *See* Berean, *supra* note 116, at 1261–62.

139. *Id.* at 1262.

140. *Sea Hunt*, 221 F.3d at 638.

141. *Id.* at 640. *Sea Hunt* had negotiated permits with the Virginia Marine Resources Commission to conduct salvage operations on historic wrecks off the Virginia coast. *Id.* at 639.

142. *Id.* at 640.

143. *Id.* at 644–46.

144. *Id.* at 647.

145. *Id.*

that Spain began to "vigorously assert its ownership rights."¹⁴⁶ *Sea Hunt* shows that Spain will still aggressively pursue title to ships lost hundreds of years ago and thousands of miles away from its shores. While the ASA attempted to provide some clarity over rights to abandoned shipwrecks, its failure to define the term abandoned has left the issue open to courts to decide. Additionally, because many historic wrecks in US waters originate from foreign nations, courts may also be hesitant to declare such wrecks abandoned, particularly if abandonment requires express repudiation of title, as seen in *Sea Hunt*.

III.

A TALE OF TWO SHIPWRECKS: *NUESTRA SEÑORA DE LAS MERCEDES* AND THE *SAN JOSÉ*

Two recent cases involving Spanish wrecks highlight the difficulties in determining ownership of shipwrecks and their artifacts, and the failures of existing legal regimes to address historical injustices committed by colonial powers in the Americas. In *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*, a US district court granted Spain's motion to dismiss an *in rem* action brought by a US company regarding a wreck purported to be the *Nuestra Señora de las Mercedes* discovered in international waters.¹⁴⁷ In *Odyssey Marine II*, the Eleventh Circuit affirmed the district court decision, holding that the *Mercedes* was immune from arrest under the Foreign Sovereign Immunities Act (FSIA).¹⁴⁸ The Eleventh Circuit also dismissed the claims advanced by Peru, which argued that many of the artifacts originated in Peru and were plundered by Spanish conquistadors. In contrast to *Odyssey Marine*, where a former colonial power retained rights to a sunken vessel containing Peruvian artifacts, in the case of the *San José*, Colombia, a formerly colonized country, is mounting an expedition to recover and salvage a sunken Spanish galleon containing artifacts that originated in South America.

A. *Odyssey Marine Exploration Inc. v. Unidentified, Shipwrecked Vessel*

Odyssey Marine is a more recent example of US courts awarding Spain title to long-lost sunken ships. Although the case raised provocative questions regarding Peru's rights to cargo it claimed were the spoils of colonialism, both the district court and Eleventh Circuit held that such questions were best left unanswered.

146. *See id.*

147. *Odyssey Marine Expl. Inc. v. The Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M. D. Fla. 2009), *aff'd*, 657 F.3d 1159 (11th Cir. 2013) [hereinafter *Odyssey Marine I*].

148. *Odyssey Marine II*, 657 F.3d at 1175.

1. *Odyssey Marine's Discovery of the Nuestra Senora de las Mercedes*

British forces sank the Spanish frigate *Nuestra Senora de las Mercedes* off Cape St. Mary, Portugal on October 5, 1804.¹⁴⁹ For the next 200 years, the ship laid undisturbed at a depth of 1,100 meters.¹⁵⁰ In 2006, Odyssey Marine mounted an expedition to search for sunken vessels in the historically heavily-trafficked sea lane off the coast of the Iberian Peninsula.¹⁵¹ In March 2007, Odyssey Marine discovered the remains of the *Mercedes* and recovered gold and silver coins from the wreck.¹⁵² Odyssey Marine transferred the gold and silver artifacts from the wreck to a secure location in Florida, and filed an *in rem* action in the district court, seeking a warrant of arrest against the ship.¹⁵³ Odyssey Marine claimed that it owned the wreck and its cargo, or alternatively deserved "a liberal salvage award."¹⁵⁴ Spain filed its own claim and motion to dismiss, asserting that the *Mercedes* was a Spanish naval vessel that Spain had never abandoned and was immune from arrest under the FSIA.¹⁵⁵ Peru also filed a claim, asserting ownership over the *Mercedes's* cargo by alleging that the gold and silver originated in Peru.¹⁵⁶

2. *Dismissal of Odyssey Marine's in rem Action and Appeal to the Eleventh Circuit*

The district court granted Spain's motion to dismiss, holding "[t]he ineffable truth of this case is that the Mercedes is a naval vessel of Spain and that the wreck of this naval vessel, the vessel's cargo, and any human remains are the natural and legal patrimony of Spain."¹⁵⁷ The district court's order incorporated and adopted a report and recommendation from the magistrate judge. The magistrate judge's order was skeptical of Odyssey Marine's invocation of the law of finds, noting "Odyssey essentially seeks a judicial declaration that would give it exclusive title against the world to artifacts located on a plot of Atlantic seabed over 4,000 miles from this district."¹⁵⁸ Odyssey Marine claimed that there was "no definitive archaeological evidence" that the ship was in fact the *Mercedes*, and thus Spain could not claim ownership.¹⁵⁹ The district court rejected Odyssey Marine's

149. *Odyssey Marine I*, 675 F. Supp. 2d at 1132–33.

150. *Id.* at 1130.

151. *Odyssey Marine II*, 657 F.3d at 1166.

152. *Id.*; Jennifer Tsai, *Curse of the Black Swan: How the Law of Salvage Perpetuates Indeterminate Ownership of Shipwrecks*, 42 INT'L LAW. 211, 211 (2008).

153. *Odyssey Marine I*, 675 F. Supp. at 1131.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 1129.

158. *Id.* at 1131 n. 4.

159. *Id.* at 1132.

argument, noting that there was "overwhelming circumstantial evidence pointing to the *Mercedes*—the location, coins, cannons, and artifacts."¹⁶⁰

The report next analyzed whether the court had jurisdiction over the case. The magistrate judge observed a disconnect between a district court in Florida and a sunken Spanish vessel: "To the casual observer, it might seem odd that a federal court in this district would be tasked with adjudicating salvage claims to the remnants of a centuries-old shipwreck discovered off the European continent in international waters."¹⁶¹ The report then found that because Odyssey Marine had deposited an artifact of the ship with the clerk of the court, the court had "possession," allowing for the *in rem* action.¹⁶² While the court allowed Odyssey Marine to file its *in rem* claim, the court highlighted the need to "be sensitive to the principle of international comity when dealing with a dispute involving the exercise of extraterritorial jurisdiction, as the application of international law evokes a sense not only of discretion and courtesy but also of obligation among sovereign states."¹⁶³

The next question the report addressed was whether the vessel, as property of Spain, was immune from suit under the FSIA, which states that a foreign State's property present in the United States is presumptively immune from suit unless an exception applies.¹⁶⁴ The FSIA, which passed in 1976, codifies the doctrine of sovereign immunity, which, as the name suggests, immunizes foreign States from suit in US courts.¹⁶⁵ Unlike more traditional applications of sovereign immunity, the FSIA has exceptions allowing citizens to bring suits against foreign nations under certain circumstances.¹⁶⁶ These exceptions include suits with relation to property involved in "commercial activity" in the United States.¹⁶⁷ In *Odyssey Marine I*, the court held that "[u]nquestionably, the *Mercedes* is the property of Spain,"¹⁶⁸ and that Odyssey Marine failed to even attempt to prove that a FSIA exception applied.¹⁶⁹ The report also dismissed Peru's claims to the artifacts,

160. *Id.* at 1134.

161. *Id.* at 1136.

162. *Id.* at 1137. The Court cited *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 496 (1998), noting that "the Supreme Court implicitly approved a salvor's presentation of a recovered artifact as the fictional equivalent of a wreck discovered in [domestic] waters." *Id.* This "constructive possession concept" also applies to "historic wreck[s] in international waters." *Id.* at 1137 (citing *R.M.S. Titanic*, 171 F.3d at 967–68).

163. *Id.* (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 cmt. a (1987)).

164. 28 U.S.C. § 1609.

165. Redman, *supra* note 100, at 80–01.

166. *Id.* at 81.

167. 28 U.S.C. § 1610.

168. *Odyssey Marine I*, 675 F. Supp. at 1140. The Court supported its reasoning with the following facts: the ship "was constructed in 1788 by Navy Engineers in the shipyard of the Spanish Navy in Havana, Cuba; commanded by officers and crewed by sailors of the Royal Spanish Navy throughout its service; and designated as a Spanish frigate of war. It remains on the Royal Navy's official registry of ships." *Id.* (internal citations omitted).

169. *Id.* at 1130–40.

noting the lack of applicable law¹⁷⁰ and the court's hesitance to get involved in international disputes: "no court has ventured into waters far beyond its jurisdictional boundaries to resolve a dispute between two sovereigns over the remnants of one of the sovereign's sunken warships."¹⁷¹

Both Odyssey Marine and Peru appealed. Odyssey Marine claimed that the court erred in determining that no FSIA exceptions applied, arguing that the *Mercedes* was exempt from Spain's claims of sovereign immunity because only ships engaged in non-commercial activity were eligible for sovereign immunity under international law.¹⁷² The Eleventh Circuit was wary of the argument that granting immunity to non-commercial vessels under international law showed there was an intent to create an exception to the FSIA for *foreign* commercial activity, even though foreign commercial activity was not a listed exception.¹⁷³ However, the Eleventh Circuit held that the line of reasoning was irrelevant because the "*Mercedes* was not engaged in commercial activity."¹⁷⁴ Odyssey Marine ignored another possible FSIA exception, one that has often been used in art expropriation cases.¹⁷⁵ Section 1605(a)(3) states "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case [] in which rights in property taken in violation of international law are in issue." Odyssey Marine could potentially have argued that the colonial exploitation of Peru violated international law, and thus Spain was not immune from suit.¹⁷⁶ Neither Peru nor Odyssey Marine attempted to argue that § 1605(a)(3) applied, even though Peru's claims stemmed from the fact that the artifacts were originally stolen from indigenous Peruvians, which would have been a violation of international law.

Peru's appeal rested on the claim that while Spain may have ownership of the *Mercedes*, Peru was the rightful owner of the artifacts on board that had originated in Peru, as Peru "has a patrimonial interest in cargo that originated in its territory."¹⁷⁷ The Eleventh Circuit chose not to address the merits of Peru's claims. Instead, the court held that according to existing laws and for the "promotion of the comity interest," the cargo was not severable from the ship and, thus, immune from suit under the FSIA.¹⁷⁸

170. "For disputes between competing sovereigns over underwater cultural heritage discovered in international waters, there is no customary international law." *Id.* at 1147.

171. *Id.*

172. *Odyssey Marine II*, 657 F.3d at 1176.

173. *Id.*

174. *Id.*

175. See Redman, *supra* note 99 at 82.

176. While Spain's exploitation of Peru occurred several hundred years before the enactment of the FSIA, the Supreme Court held in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), that FSIA exceptions can apply retroactively. See *id.* at 85.

177. *Odyssey Marine II*, 657 F.3d at 1180.

178. *Id.* at 1181–82.

The Eleventh Circuit's decision in *Odyssey Marine II* shows a court hesitant to extend jurisdiction over ownership disputes of sunken vessels found in international waters. While perhaps a correct application of the FSIA, the court's decision neglected to address key questions of fairness. While *Odyssey Marine* might have acted underhandedly in its discovery and exportation of the artifacts, the court's decision neglected to take into account the significant costs and expenses incurred by *Odyssey Marine*. Indeed, without the company's efforts and expenditures, the rich cultural treasures of the *Mercedes* would still be lost beneath the waves.¹⁷⁹ Additionally, by refusing to address the merits of Peru's claims to the cargo that originated in Peru, the court intentionally avoided the issue of whether it was just to reward a former colonial power the fruits of its exploitation.

3. *Peru's Claims to the Cargo*

While both the district court and the Eleventh Circuit focused the bulk of their arguments on whether the United States had jurisdiction to hear the case, they both ignored one of the more interesting questions: how should courts deal with cargo found in shipwrecks that was arguably stolen from somewhere else? While the district court in *Odyssey Marine I* paid lip service to the difficulty of reconciling Spain's ownership claims with its bloody colonial past,¹⁸⁰ both the district court and Eleventh Circuit chose to dodge the issue on jurisdictional grounds. It is easy to understand why US courts may find it in their best interest to avoid weighing in on "Peru and Spain's dispute [] intertwined with centuries of mutual history."¹⁸¹ This Note is not a court opinion, and will thus proceed in analyzing how Peru's claims could have been handled differently. Examining the context of Peru's claims to the *Mercedes's* treasure sheds light on the competing values at stake when determining the ownership of centuries-old wrecks and their cargo.

In *Odyssey Marine I*, Judge Steven Merryday in the opening of his opinion noted that he "reviewed with particular interest and admiration the statement on behalf of Peru by Professor John Norton Moore. . . who offers a provocative and scholarly elaboration of his observation that this case is not 'about sovereign rights over wrecks . . . or the dispute between salvors and sovereigns.'"¹⁸² Judge Merryday also noted that Moore's "aspirational notion that cultural, historical, and archaeological 'linkage'" could be "the crucial linkage for recognizing sovereign state interest."¹⁸³ However, Judge Merryday ultimately dismissed Moore's

179. See generally Dave Werner, Note, *Piracy in the Courtroom: How to Salvage \$500 Million in Sunken Treasure Without Making a Cent*, 67 U. MIAMI L. REV. 1005 (2013).

180. See *Odyssey Marine I*, 675 F. Supp. 2d at 1127. The court also characterized Peru's claim as "an equitable one grounded on claims of exploitation by its former colonial ruler." *Id.* at 1145.

181. *Odyssey Marine I*, 675 F. Supp. 2d at 1147.

182. *Id.* at 1129.

183. *Id.*

arguments, finding that his theories "are not the governing tools of decision in this case in the United States district court."¹⁸⁴

Despite Judge Merryday's insistence that Moore's arguments were not applicable in a US court, examining Moore's affidavit provides important guidance for *how* Peru could assert its claim of ownership over the *Mercedes's* cargo. Moore distinguished Peru's claims from those of *Odyssey Marine*, noting that Peru is not "a private individual seeking to bring an action against a sovereign" and thus the "case does not present a simple case sovereign request for immunity."¹⁸⁵ Moore also argued that this district court was the proper place to adjudicate Peru's claims, as denying jurisdiction would "amount to a de facto adjudication" which would "effectively set aside international law and law of the sea repudiating colonialism and protecting national cultural heritage."¹⁸⁶ While the report in *Odyssey Marine I* said that current international law compels US district courts to respect the "traditional notions of international comity" and stay out of the dispute between Spain and Peru,¹⁸⁷ Moore argues the opposite: international law *requires* that the court address Peru's claims to the *Mercedes's* cargo.

Moore's argument is directly at odds with the court's assertion that there "is no customary international law" for "disputes between competing sovereigns over underwater cultural heritage."¹⁸⁸ Moore argues that the Convention on Underwater Cultural Heritage should govern, as the cargo of the *Mercedes* is over 200 years old and contains "objects of an archaeological and historical nature."¹⁸⁹ The Convention "severely restricts the law of salvage or law of finds" in regards to objects of cultural or archaeological significance.¹⁹⁰ Moore also points out that UNCLOS Article 149 gives preference of ownership of artifacts to "the State or country of origin, or the State of cultural origin, or the State of historical or cultural origin."¹⁹¹ While the United States is not a signatory UNCLOS, the United States has accepted other codified international laws, including UNCLOS's creation of a 200-mile EEZ.¹⁹² Moore argues that Article 149 is, in effect, customary international law. However, the district court was not persuaded, stating that UNCLOS Article 149 did not apply because the *Mercedes* and her cargo were not on the "seabed . . . beyond the limits of national

184. *Id.*

185. Affidavit of John Norton Moore at 5–6, *Odyssey Marine, Inc. v. Unidentified, Shipwrecked Vessel*, 675 F. Supp. 2d 1126 (M. D. Fla. 2009) (No. 07-cv-00614).

186. *Id.* at 6.

187. *Odyssey Marine I*, 675 F. Supp. 2d at 1147.

188. *Id.*

189. Affidavit of John Norton Moore, *supra* note 185, at 9. See *supra* Part II.B.2 for a discussion of the Convention on Underwater Cultural Heritage.

190. *Id.* at 9.

191. *Id.* at 7. Spain also claimed that it, not Peru, was the rightful "country of origin" because Peru was not in fact a country at the time the gold was extracted.

192. *Id.* at 6.

jurisdiction"¹⁹³. The court also disagreed that Article 149 was actually customary international law.¹⁹⁴

Moore's most persuasive arguments are those that highlight the inequities of awarding Spain ownership of the treasure. Moore notes that the treasure "has not been in the physical possession of Spain for over 200 years, . . . has never been within the boundaries of modern Spain,"¹⁹⁵ and "was taken from Peru in a period now widely understood as a shameful exploitation of the native population of Peru."¹⁹⁶ Peru's claim is supported by "the universal modern authority in opposition to colonialism, supporting preservation of culture, and protecting national sovereignty over natural wealth and resources."¹⁹⁷

Perhaps a sign of the strength of the argument that Peru is deserving of protection under international law to atone for the horrors inflicted upon its indigenous population by colonial Spain is that neither the district court nor Eleventh Circuit attempted to counter it. Out of the many competing claimants for the treasure of the *Mercedes*, it seems unjust that Spain, who stole the treasure, lost it, and then made no attempts to find it, should succeed on its claim. The court's holding in *Odyssey Marine* ignores the significant and costly efforts *Odyssey Marine* took to discover the *Mercedes*, as well as Peru's equitable claim to artifacts that originated in its territory.

B. The Wreck of the San José and Sea Search Armada, Inc. v. Republic of Colombia

The continuing legal dispute over the *San José* involves a formerly colonized nation, Colombia, bringing a claim of ownership to the salvaged artifacts from a sunken Spanish galleon.¹⁹⁸ The basic facts of the *San José* case appear similar to *Odyssey Marine*: A US treasure hunting company, Sea Search Armada, located a vessel in foreign waters, sought to claim ownership, and saw its claims dismissed by a US court.¹⁹⁹ While in *Odyssey Marine*, the court also dismissed the country of origin's claim to the salvaged artifacts, in *San José*, Colombia is continuing its salvage operation and opposing Spanish claims to the wreck.²⁰⁰

193. *Odyssey Marine I*, 675 F. Supp. 2d at 1146. The *Mercedes* was found approximately thirty miles off the Portuguese coast.

194. *Id.* (citing *United States v. Jho*, 534 F.3d 398, 406 n.6 (5th Cir. 2008)).

195. Affidavit of John Norton Moore, *supra* note 185, at 5–6.

196. *Id.* at 5.

197. *Id.* at 11.

198. Jim Wyss, *Colombia Plans to Salvage Storied Shipwreck Among Legal Challenges*, MIAMI HERALD (May 23, 2018), <https://www.miamiherald.com/news/nation-world/world/americas/colombia/article159904439.html>.

199. See *supra* Part III.A for a discussion of *Odyssey Marine*.

200. See *id.*; Jonathan Watts & Stephen Burgen, *Holy Grail of Shipwrecks Caught in Three-Way Court Battle*, THE GUARDIAN (Dec. 6, 2015), <https://www.theguardian.com/world/2015/dec/06/holy-grail-of-shipwrecks-in-three-way-court-battle>.

The *Sea Search Armada* case has its origins in a three-hundred-year-old naval battle. On June 8, 1708, in the midst of the War of Spanish Succession, British forces fired on the *San José*, a treasure galleon sailing from the port of Cartagena, Colombia, to Europe.²⁰¹ The galleon carried precious stones, silver, and gold from across Spain's vast colonial holdings.²⁰² A British cannon shot ignited the galleon's powder, creating a massive explosion, sending the ship, its crew, and its cargo to the seafloor, where it would remain undisturbed and undiscovered for over 250 years.²⁰³

I. Sea Search Armada v. Republic of Colombia

The legal dispute over the *San José* dates back to 1984, when Sea Search Armada (SSA), a private salvage company, claimed that the Colombian government had contracted with them to salvage the wreck.²⁰⁴ SSA alleged that it had disclosed the location of the wreck, but Colombia prohibited them from carrying out salvage operations. In 1989, Colombia passed a law stating that Colombia had all rights to the shipwreck site; SSA sued, arguing that the law violated Colombia's constitution. SSA won the lawsuit, but "Colombia refused to honor the ruling of the Colombia Supreme Court and permit SSA access to the site of the shipwreck."²⁰⁵

Over twenty years later, in 2010, SSA filed suit in the District Court for the District of Columbia, alleging breach of contract and conversion claims and requesting that the court enforce the ruling of the Colombian Supreme Court that SSA was entitled to half of the *San José's* treasure.²⁰⁶ Colombia moved to dismiss the case. The district court granted Colombia's motion, quickly deciding that both the breach of contract and conversion claims were time-barred, since both carried a three-year statute of limitations.²⁰⁷ The court also held that it could not enforce the judgment of the Colombia Supreme Court awarding SSA half of the *San José's* treasure, because the Uniform Foreign-Money Judgments Recognition Act, which allows US courts to enforce judgments from foreign jurisdictions, only applied to specific monetary judgments, and half of a wreck valued anywhere between \$4 billion and \$17 billion is "hardly a specific sum."²⁰⁸

One wonders whether SSA might have had better luck in court if it had hired better lawyers; the judge in the case describes the "rather prolix Complaint" which

201. Lang, *supra* note 47, at 384–85.

202. *See id.* at 385.

203. *Id.* at 386.

204. *Sea Search Armada*, 821 F. Supp. at 270.

205. *Id.*

206. *Id.*

207. *Id.* at 273–74.

208. *Id.* at 275.

"then careens off the tracks"²⁰⁹ as well as noting the Complaint "reads like a Patrick O'Brian glorious-age-of-sail novel and a John Buchan potboiler of international intrigue."²¹⁰ In any case, it is unlikely that SSA would be able to recover in US courts. However, the fate of the US-based salvage company is only a small part of the story—perhaps more salient will be the inevitable dispute between Colombia, who currently claims ownership, and Spain, who was the original owner of the *San José*.

2. *Sea Search Armada* Contrasted with *Odyssey Marine*

While the *San José* case bears some similarities to *Odyssey Marine*, the outcome in *Sea Search Armada* hinged on the application of a completely different area of law—contracts. *Sea Search Armada* necessarily focused on contract because SSA never made a claim of ownership to the vessel; the law of finds could not be applied.²¹¹ However, similar to the outcome in *Odyssey Marine*, the court again focused its decision on procedural issues.²¹² In *Sea Search Armada*, the court did not even discuss the merits of SSA's claim. There are also several important key factual differences between *Sea Search Armada* and *Odyssey Marine*. First, the *San José* is located sixteen miles off Colombia's coast,²¹³ whereas the *Mercedes* lies off the coast of Portugal. Additionally, *Sea Search Armada* did not address any competing claims of Spanish ownership. One reason there was no discussion of Spain's ownership claim is that *Sea Search Armada* was not an *in rem* action; the court was not asked to determine who was the rightful owner of the vessel.²¹⁴ Even if Spain had wanted to make a claim to the *San José*, it is unlikely that the court would have had jurisdiction. The vessel was not in US waters, and SSA had not deposited a piece of the ship with the court to establish constructive possession.²¹⁵

The *San José* wreck and its legal aftermath are a prominent example of a colonized country seeking to assert ownership over a sunken Spanish galleon. Spain may still pursue a legal claim to the wreck, although such a battle will likely take place outside US courts. If that happens, Colombia will have strong arguments for ownership—both the physical location of the wreck in Colombia's

209. *Id.* at 270–71.

210. *Id.* at 270.

211. *See* *Sea Search Armada*, 821 F. Supp. at 270-71. Although *Sea Search Armada* did bring a conversion claim, the court noted its skepticism of SSA's argument, stating "[e]ven were the conversion claim somehow to turn on Colombia's alleged refusal to comply with the Colombia Supreme Court's ruling, Plaintiff has failed to provide any dates for the Court to assess the timeliness of its Complaint." *Id.* at 273.

212. The court dismissed SSA's claims as time-barred. *Id.* at 270.

213. Watts & Burgen, *supra* note 200.

214. SSA's only claim relating to ownership was a conversion claim, which the court did not address the merits of, finding that claim was time-barred. *Id.* at 273.

215. *See supra* note 161 and accompanying text.

territorial sea and the legal principles of equity proposed by Moore. However, applying Moore's framework could also add a layer of complexity to the *San José* case. Spain's colonial holdings were vast, and it is likely that the treasure in its hold originated in several countries.²¹⁶ An application of Moore's framework may require Colombia to defeat competing claims from other South American countries.

Examining these two cases shows that shipwreck disputes encompass several different legal fields, including contracts, international law, sovereign immunity, and traditional common law principles regarding salvage and finds. This hodgepodge of laws shows that there is no clear legal regime to settle shipwreck disputes—the outcome of these cases depends largely on where the wrecks were found²¹⁷ and what court the claims were filed in.²¹⁸ This lack of certainty and the tendency of shipwreck claims (at least in US courts) to become tangled in layers of procedural wrangling could in the long-run discourage exploration and discovery of new wrecks and push off the discussion of who should rightfully own cultural artifacts indefinitely.

IV.

A NEW REGIME FOR DETERMINING OWNERSHIP OF SHIPWRECKS AND CULTURAL ARTIFACTS

Current case law in the United States leaves much to be desired in its adjudication of shipwreck ownership. US courts have often refused to address issues of colonial exploitation and the theft of cultural property from indigenous peoples. Current international law, as discussed in Part II, provides guiding principles but is sporadically enforced. In this Part, I propose a new regime for dealing with ancient shipwrecks that prioritizes the discovery and preservation of artifacts, while honoring the claims of formerly colonized countries seeking to reclaim their lost treasures. Such a scheme strikes a balance between compensating private companies for their efforts in discovering shipwrecks while recognizing the importance of restoring cultural property to its country of origin.²¹⁹

216. See *supra* Part I.A for a discussion of the extent of Spain's empire in the Americas.

217. Arguably, Colombia has been able to sustain its claim to the *San José* because the ship, while conclusively a Spanish warship, is only sixteen miles off its coast. See Watts & Burgen, *supra* note 208.

218. For example, the United States is not a party to UNCLOS and US courts seem hesitant to get involved with deciding questions of international law.

219. The actual implementation and enforcement of this scheme is out of scope for this paper. Several authors have discussed the merits of the formation of an international committee to adjudicate shipwreck disputes. See, e.g., Henn, *supra* note 96, at 192–96; Lang, *supra* note 47, at 415–20. While this author remains skeptical that "committees are power, and committees make things happen. Committees are the lifeblood of our democratic system," see *Parks and Recreation: Pilot*, NBC Television Broadcast Apr. 6, 2009, some form of international group is needed to balance the

A. *Ensure Private Companies are Awarded Finder's Fees*

Perhaps the only thing that is clear about shipwreck ownership disputes is that the deck is stacked against private companies' claims of ownership. While arguably not the most pressing issue when deciding how to deal with a history of colonialism and plunder, compensating private companies has some benefits. Without clear methods for establishing finders' awards, private treasure hunting companies may be hesitant to make their finds public at all, choosing instead to salvage treasure in secret and sell it on the black market.²²⁰ A better scheme would be one that reimburses salvors' costs with a predetermined finders award. This would encourage salvors to discover and report more shipwreck sites.²²¹ Treating private treasure hunting companies fairly would likely result in stronger protections for cultural property.

Additionally, creating a mechanism to reward private companies' salvage efforts would better guarantee fair compensation for their work. As discussed in Part I.B, salvage expeditions can cost millions of dollars. For example, in *Odyssey Marine*, the company utilized a \$2 million ROV.²²² The company also devoted additional resources to raise the treasure.²²³ Without the efforts of *Odyssey Marine*, it is likely that the *Mercedes* would still be lost beneath waves. However, because Spain was deemed to never have "abandoned" its ship, *Odyssey Marine* was left with nothing. Following *Odyssey Marine's* loss at the Eleventh Circuit, the company turned its efforts to locating deep-sea mineral deposits, finding shipwreck-discovery to be too risky an undertaking.²²⁴ Without private treasure hunters like *Odyssey Marine*, the bulk of marine artifacts would likely remain undiscovered. A Congressional report recognized that "more items are on public display as a result of artifacts [sport divers] have donated to museums and galleries than from any other source, including archaeologists."²²⁵

Encouraging and facilitating partnerships between private companies and national governments can help to spur discovery of new wrecks and uncover historically significant artifacts. States are not likely to mount and fund their own expeditions to recover shipwrecks, which partly explains their hesitancy to sign on to the Convention on Underwater Cultural Heritage.²²⁶ While *Odyssey Marine* was unsuccessful in laying claim to the *Mercedes*, the company has attempted to work with governments to recover artifacts from shipwrecks. In 2002, *Odyssey*

competing interests at stake in resolving shipwrecks. The composition and jurisdiction of such a committee is a topic for another day.

220. Werner, *supra* note 179, at 1030–31.

221. Varmer, *supra* note 118, at 294.

222. Capolitano, *supra* note 6.

223. However, Spanish archaeologists claim that *Odyssey Marine* damaged the wreck by carelessly recovering artifacts.

224. See Trigaux, *supra* note 36.

225. Harris, *supra* note 99, at 251–52 (quoting H. R. REP. No. 100-59, at 874 (1987)).

226. Henn, *supra* note 96, at 177.

Marine negotiated a deal with the British government to salvage *The Sussex*, a British warship which sank off the coast of Gibraltar in 1694.²²⁷ Odyssey Marine claimed to have located the ship in 2001 after searching for the ship since 1995.²²⁸ However, the original deal between Odyssey Marine and the British government appears to have stalled due to disputes with Spain over the salvage operations, as well as concerns from archaeologists over Odyssey Marine's methods.²²⁹ Although the deal between Odyssey Marine and the British government has not resulted in the recovery of any meaningful artifacts so far,²³⁰ partnerships between private companies and governments could have several key advantages. Enlisting private companies to help locate and salvage shipwrecks should result in more discoveries, as governments may not have the funds nor political will to mount a years-long, multimillion-dollar treasure search, while private companies backed by investors may.²³¹ Setting expectations between private companies and nations before salvage operations begin can also avoid the type of time-consuming and costly court proceedings,²³² seen in *Odyssey Marine and Sea Search Armada*.²³³

Finally, a collaborative deal worked out between private companies and governments could result in more uniform standards. Instead of the current paradigm, where private companies run their searches and salvage operations with little oversight, establishing set guidelines and processes upfront could ensure that salvors utilize proper archaeological techniques.²³⁴ Deals between private companies and national governments can mean that non-commercially valuable artifacts from a wreck are preserved and studied by archaeologists.²³⁵ Although budgeting for compensating private salvors may shift additional costs to governments, there are several ways to fund salvage awards. For example, it is

227. Capolitano, *supra* note 6; William Broad, 'Eureka!' Off Gibraltar: A Trove From 1694?, N.Y. TIMES (Feb. 24, 2002), <https://www.nytimes.com/2002/02/24/world/eureka-off-gibraltar-a-trove-from-1694.html>.

228. See Capolitano, *supra* note 6.

229. See Cahal Milmo, *Shipwrecks: The bullion dollar question*, THE INDEPENDENT (Jan. 20, 2005), <https://www.independent.co.uk/news/uk/this-britain/ship-wrecks-the-bullion-dollar-question-487403.html>.

230. Spain has refused to allow permits to Odyssey Marine to conduct exploration activities in its territorial waters following the controversy over the *Mercedes*. See Chris Chaplow, *HMS Sussex Part 3: Black Swan and Current Situation*, ANDALUCIA.COM, <http://www.andalucia.com/history/hms-sussex/black-swan>. Odyssey Marine also seems to be moving away from the treasure hunting business, instead focusing its efforts on locating deep-sea mineral deposits. Trigaux, *supra* note 36.

231. See Henn, *supra* note 96, at 193. Although the country of Colombia is funding its own salvage operation of the *San José*, it is possible that such an operation would not have been possible without the earlier efforts of SSA. See Lang, *supra* note 47, at 389 (noting that although Colombia claims it located the ship without assistance from SSA, their source is an "unnamed academic" who allegedly located the vessel by studying a map uncovered in the Library of Congress).

232. Henn, *supra* note 96, at 192.

233. See *supra* Part III for a discussion of these two cases.

234. Henn, *supra* note 96, at 194–95.

235. See Varmer, *supra* note 118, at 297.

possible that some types of artifacts can be sold on the open market without impairing the historic record. There has been a robust trade in coal and wood slivers from the *Titanic* and *Mary Rose*, objects deemed to have little archaeological value.²³⁶ Another option for compensating salvors is to award them intellectual property rights to their discoveries, such as exclusive photography rights.²³⁷

These agreements, of course, rely on trust between governments and private companies. As discussed in Part III.B, SSA alleges that the Colombian government reneged on its agreement to pay SSA a share of the *San José* treasure in exchange for SSA's efforts in locating the ship. Additionally, even when both parties proceed in good faith, as seen in the deal between Sea Hunt and the state of Virginia, Spain's successful claims over *La Galga* effectively derailed Sea Hunt's salvage operations.²³⁸

The lesson that should be learned from *Sea Hunt* is that governments must pay attention to the incentives they create for private salvors. A private company, afraid that its finds could be seized by national governments, is more likely to conduct its salvage operations covertly and secretly auction away any artifacts to private bidders.²³⁹ After the ruling against Odyssey Marine, Odyssey Marine's general counsel stated, "in the future no one will be incentivized to report underwater finds. . . . [A]nything found with a potential Spanish interest will be hidden or even worse, melted down or sold on eBay."²⁴⁰ While the statement may be hyperbolic,²⁴¹ the illicit trade in antiquities and cultural artifacts is a billion-dollar industry, and is second only to drug trafficking in terms of scale.²⁴² The trade and looting of artifacts is not limited to land. For example, the opening of all of Greece's waters to recreational scuba diving has led to concerns of looting of archaeological sites by private divers.²⁴³ Recreational divers in the United States have also been known to pocket historic artifacts they find on the seafloor.²⁴⁴

236. *Id.* at 292, 300.

237. See Justin S. Stern, *Smart Salvage: Extending Traditional Maritime Law to Include Intellectual Property Rights in Historic Shipwrecks*, 68 *FORDHAM L. REV.* 2489, 2528–42 (2000).

238. See *supra* notes 139–145 and accompanying text.

239. See Werner, *supra* 179, at 1030–31.

240. *Id.* at 1031.

241. *Id.*

242. Hughes, *supra* note 2, at 131.

243. The vast majority of ancient Greek bronzes were recovered from shipwrecks, since statutes on land were often melted down to make coins or weapons. Lefteris Papadimas & Daniel Flynn, *Sunken Greek Treasures at risk from scuba looters*, *REUTERS* (Feb. 22, 2009), <https://www.reuters.com/article/us-greece-treasures/sunken-greek-treasures-at-risk-from-scuba-looters-idUSTRE51M0C120090223>.

244. See Paull, *supra* note 39, at 365.

Some argue that the proper way to preserve shipwrecks and historical artifacts is to leave shipwrecks where they lie,²⁴⁵ and US courts' unforgiving treatment of private salvage operations means that important historical sites will likely remain undisturbed for future generations. Such an argument is also bolstered by the fact that many wrecks are also mass graves, and some believe that conducting salvage operations would be disrespectful to the dead.²⁴⁶ However, a policy that presumes that shipwrecks are best left alone ignores the research and educational potential of excavating wrecks. Shipwrecks serve as "time capsules"²⁴⁷ to the past, and discouraging excavation and exploration of wrecks means denying researchers important opportunities. The discovery and exploration of ancient shipwrecks have given researchers invaluable insights into the past. For example, the *Mary Rose*, an English warship which sank in 1545 and was raised in 1982, generated 19,000 artifacts.²⁴⁸ The *Vasa* is a Swedish flagship which sank on its maiden voyage in 1628 in Stockholm Harbor and laid almost perfectly preserved until it was raised by Sweden in 1961.²⁴⁹ Well-preserved Roman wrecks have also been raised and uncovered in the Mediterranean.²⁵⁰ A blanket preference for leaving shipwrecks where they lie will also reduce public access to these important historical artifacts. Leaving shipwrecks undisturbed means that only trained divers will be able to see them, a costly and often dangerous undertaking.²⁵¹ The idea that modern technology, such as video or virtual reality, could allow the public to access shipwrecks from dry land is an interesting one,²⁵² but it does not address the intangible value in being able to see historical artifacts in person.²⁵³ As will be discussed in Part IV.B, shipwreck

245. See Varmer, *supra* note 118, at 288. Varmer notes that artifacts may be better preserved under the sea, and that new technologies may be developed in the future that will allow archaeologists to study these artifacts without risking damage. *Id.* Important archaeological context may be lost when items are raised to the surface for study. *Id.* at 289–90.

246. See Peter Hershey, *Regulating Davy Jones: The Existing and Developing Law Governing the Interaction with and Potential Recovery of Human Remains at Underwater Cultural Heritage Sites*, 27 J. ENVTL. L. & LITIG. 363, 366–67 (2012).

247. Varmer, *supra* note 118, at 288.

248. Steven Morris, *Newly decked out Mary Rose reopens after £5m makeover*, THE GUARDIAN (Jul. 19, 2016), <https://www.theguardian.com/culture/2016/jul/19/mary-rose-newly-decked-out-reopens-5m-makeover>.

249. Kat Eschner, *The Bizarre Story of 'Vasa,' the Ship That Keeps On Giving*, SMITHSONIAN.COM, <https://www.smithsonianmag.com/smart-news/bizarre-story-vasa-ship-keeps-giving-180964328/>.

250. See, e.g., Oren Liebermann, *Divers discover ancient Roman treasure trove in shipwreck*, CNN (May 16, 2016), <https://www.cnn.com/2016/05/16/middleeast/roman-coins-treasure-shipwreck-israel/index.html>.

251. See Paull, *supra* note 39, at 364–65 (noting that recreational divers see shipwrecks as attractive dive sites).

252. See Varmer, *supra* note 118, at 291; Richard Devanney, *Hazards of Wreck Penetration*, SCUBA DIVER LIFE (Apr. 19, 2017), <https://scubadiverlife.com/hazards-wreck-penetration/>.

253. See David Brieber et al., *In the white cube: Museum context enhances the valuation and*

artifacts also may be closely tied to the histories of formerly colonized nations, and their return to their country of origin can help restore those nations' cultural patrimony.

Additionally, concerns about human remains can be assuaged by acknowledging the long temporal gaps between a sailor's death and the shipwreck's discovery. While we may rightfully be disturbed facing the corpses of sailors and soldiers who perished aboard the *U.S.S. Arizona* during Pearl Harbor²⁵⁴ or seeing the haunting images of rows of empty shoes on the wreck of the *Titanic*,²⁵⁵ we may have less visceral reactions when encountering remains of a Roman sailor or Renaissance soldier. As it becomes less likely that surviving relatives recall the disaster, excavating a wreck with human remains can be accomplished provided that the human remains are dealt with respectfully.

B. Relax the Presumption for Flagged Nations' Retaining Ownership

Another necessary change to the current law regarding shipwreck ownership is the need to reduce the emphasis on "flagged nations" and look more at the total historical context of a shipwreck. As Odyssey Marine argued in *Odyssey Marine II*, the warships and galleons of colonial powers bear little resemblance to modern naval vessels. Although technically "owned" by the Spanish crown, many galleons were primarily engaged in trade between the Americas and Europe.²⁵⁶ Although honing in on the exact identity of a ship does provide important historical context for artifacts, focusing on identifying the exact name of the ship to the exclusion of all else overlooks other important concerns.

The tortured reasoning that US courts use to determine if a wreck is "expressly abandoned" seems to focus on the least important part of wrecks. The value of historic wrecks, besides the pure monetary value of their cargo, is mostly found in their cultural and archaeological significance. However, US courts tend to ignore the history and cultural context and focus their inquiries solely on whether such a vessel is a "warship" and thus owned by a sovereign state. For example, in *Sea Hunt*, the Fourth Circuit spent several pages of its opinion analyzing the original meaning of the words in Article XX of a treaty ratified in 1763.²⁵⁷ The Fourth Circuit even chided the district court for its attempt to look at *La Galga* in its historical context. The district court noted that the treaty should be interpreted "together with the background of the complete change of

memory of art, 154 ACTA PSYCHOLOGICA 36 (2015) (finding that participants demonstrated greater appreciation and memory of art they saw in person in museum contexts than in digital reproductions).

254. See *id.* at 293.

255. See Arthur Martin, *Haunting pictures of boots and a coat at Titanic wreck site illustrate the human cost of the tragedy 100 years after ship sank*, THE DAILY MAIL (Apr. 15, 2012), <https://www.dailymail.co.uk/news/article-2130042/Titanic-100th-anniversary-Shoes-coat-wreck-site-implies-likely-resting-place-human-remains.html>.

256. See Tarver & Slape, *supra* note 19, at 117.

257. See *Sea Hunt*, 221 F.3d 634 at 644–47.

sovereignty in the North American colonies" after the end of the Seven Years War.²⁵⁸ The Fourth Circuit rejected the district court's interpretation,²⁵⁹ noting that the "plain meaning" of the words "continent of North America" meant land, and thus Spain had not abandoned *La Galga*, as the ship was in the sea.²⁶⁰

Currently, determining whether the ships' flagged nation should retain ownership over a wreck involves a mix of factors. One of the key questions US courts ask is whether the vessel was a military vessel or otherwise owned by a sovereign. However, looking at state-ownership of vessels dating from the Age of Exploration does not perfectly align with a vessel being "military" or not. State-owned ships were heavily engaged in private enterprise, including transporting cargo and people. For example, the Spanish crown had a complete monopoly on trade to and from the Americas until the late 1700s—so *any* Spanish vessel engaging in legal commercial activity between 1500-1700 was likely a vessel owned by the Spanish crown.²⁶¹ Additionally, trying to figure out the exact identity of a wreck and what country it came from can be a fraught endeavor: for example, in *Global Marine Exploration, Inc. v. The Unidentified, Wrecked, and (For Finders-Rights Purposes) Abandoned Sailing Vessel*,²⁶² Global Marine Exploration attempted to fend off a claim from France that a shipwreck was that of *La Trinité*, which sank off the coast of Florida in a hurricane in 1565.²⁶³ If the ship was *La Trinité*, then it was a vessel owned by the French crown and would be immune from arrest under the FSIA.²⁶⁴ Global Marine Exploration argued that the ship was not a French vessel, but a Spanish ship which had completed a raid on an early French colony, which would account for the presence of French cannons and a stone bearing the arms of France.²⁶⁵ While an interesting academic exercise for the court, involving delving into survivors' accounts and hypothesizing how far survivors of the shipwreck could reasonably have travelled on foot in the mid-sixteenth century,²⁶⁶ it is not clear how such an analysis fulfills the goals of equitably determining ownership. Other than for procedural purposes, there is no explanation of *why* determining if a four-hundred-year-old ship was originally French or Spanish should be a dispositive question regarding current ownership. Both countries have had 400 years to retrieve their wreck.

258. *Sea Hunt v. Unidentified Vessels or Vessel*, 47 F. Supp. 2d 678, 689 (E.D. Va. 1999).

259. *Sea Hunt*, 221 F.3d at 644 ("We disagree with the district court's interpretation.")

260. *Id.*

261. *See Tarver & Slape, supra* note 19, at 117.

262. 348 F. Supp. 3d 1221 (M.D. Fla. 2018).

263. *Id.* at 1224.

264. *Id.*; *see supra* notes 162–165 and accompanying text for a discussion of the FSIA.

265. Plaintiff's Response to Motion to Dismiss of Claimant Republic of France, at 5–6, *Glob. Marine Expl., Inc. v. The Unidentified, Wrecked, and (For Finders-Rights Purposes) Abandoned Sailing Vessel*, 348 F. Supp. 3d 1221 (M.D. Fla. 2018) (No. 16-cv-01742).

266. *See Glob. Marine Expl.*, 348 F. Supp. 3d at 1234–37.

Relying on the original country of ownership of old vessels further complicates negotiations between private companies and governments over salvage operations. For example, in both *Sea Hunt* and *Global Marine Exploration*, both companies had received permits from the states of Virginia²⁶⁷ and Florida,²⁶⁸ respectively, to conduct exploration and salvage operations in those states' waters. Both deals were scuttled when France and Spain stepped in and asserted ownership. Basing ownership decisions of wrecks solely on the original country of ownership creates uncertainty and ambiguity, particularly where the identity of the ship is disputed, as seen in both *Odyssey Marine*²⁶⁹ and *Global Marine Exploration*.²⁷⁰

When the exact identity of a ship cannot be determined, a preferable regime is one that looks at a wreck in its full historical context and focuses less on what flag the ship was sailing under. Because this paper argues that the place of origin of the artifacts is more important than the country of origin of the ship, spending time debating whether a ship was a French merchant vessel or warship misses the point, particularly since the designation of a vessel as a "warship" can be dispositive of any alternative ownership claims. A ship carrying cargo and settlers to the Americas is arguably more important to the history of France and Spain's former colonies, now independent countries, than to modern-day France and Spain. For example, the wreck of *La Trinité* changed the course of Florida's history. Had *La Trinité* made it to its destination, Florida may well have had a French, as opposed to Spanish, colonial presence, changing the course of United States history.²⁷¹ The rightful place of *La Trinité* and its artifacts is arguably not in France, but Florida. In fact, France and Florida have agreed to jointly restore and exhibit the artifacts from *La Trinité*,²⁷² suggesting that France itself recognizes the importance of the ship to Florida's history.

One of the main arguments for respecting countries' claims over their flagged vessels is that the United States has an interest in keeping private treasure hunters away from its own sunken military vessels.²⁷³ In the 1980s, the US State Department issued a letter stating that warships "sunk during military hostilities

267. *Sea Hunt*, 221 F.3d at 639.

268. Complaint in Admiralty in Rem, Glob. Marine Expl., Inc. v. The Unidentified, Wrecked, and (For Finders-Rights Purposes) Abandoned Sailing Vessel, ¶ 5, 348 F. Supp. 3d 1221 (M.D. Fla. 2018) (No. 16-cv-01742).

269. *Supra* note 159 and accompanying text.

270. *Supra* note 265 and accompanying text.

271. David DeMar, *Shipwreck That Changed History Found off Florida Coast*, THE NEW HISTORIAN (Dec. 17, 2016), <https://www.newhistorian.com/shipwreck-changed-history-found-off-florida-coast/7730/>.

272. Matt Soergel, *France and Florida agree: Wreckage of doomed 16th-century French fleet should be a public exhibit*, FLA. TIMES-UNION, (Dec. 27, 2018) <https://www.jacksonville.com/news/20181227/france-and-florida-agree-wreckage-of-doomed-16th-century-french-fleet-should-be-public-exhibit>.

273. *See supra* note 144 and accompanying text.

are presumed not to be abandoned."²⁷⁴ They issued the letter in response to an inquiry regarding Japanese ships sunk during World War II.²⁷⁵ However, vessels sunk during World War II are very different from centuries-old wrecks, and concerns over losing military technology or desecrating graves grow less important over time. Upholding or denying Spain's claim to the *Mercedes* likely has little impact on addressing claims to more recently sunk naval ships. Establishing a statute of limitations which says that wrecks are considered abandoned after two hundred years, or to wrecks that sank before the twentieth century, would not lead to a mass treasure-hunting run on sunken US warships.

C. *Ensure That the Countries' Where Treasure Originates Get Their Fair Share*

Once we relax the presumption that a ship's nation of origin should have ownership rights, we are left with the more difficult question of deciding who gets ownership. Current international law principles can be helpful but can only get us so far. Both UNCLOS articles 149 and 303 and the Convention on Underwater Cultural Heritage embody lofty goals but provide little practical guidance in resolving ownership disputes.²⁷⁶ In a post-colonial world, it is also important to consider the equitable considerations of awarding long-lost shipwrecks to former colonizers who plundered their treasure from indigenous people. A new ownership regime must take into account that many sunken treasures were stolen from exploited peoples.

The evolution of our perception of colonizers and private treasure hunters can be seen in the language of US courts' opinions. For example, in *Treasure Salvors*, the court opens by framing the case as "rooted in an ancient tragedy of imperial Spain, and embrac[ing] a modern tragedy as well. The case also presents the story of a triumph, a story in which the daring and determination of the colonial settlers are mirrored by contemporary treasure seekers."²⁷⁷ In contrast, by the time of *Odyssey Marine* and *Sea Search Armada*, the court seemed less inclined to reward private treasure hunters for their "daring and determination."²⁷⁸ However, this level of skepticism has not extended to Spain. US courts seem to give great deference to Spanish claims over wrecks, and the federal government has intervened in defending Spain's claims.²⁷⁹ Although this deference makes some sense in terms of the United States' national interest in protecting its own sunken naval vessels, couching arguments over ownership of long-lost ships in upholding "comity" between sovereign nations does a disservice

274. Berean, *supra* note 116, at 1278.

275. *Id.*

276. *See supra* Part II.B.

277. *Treasure Salvors*, 569 F.2d at 333.

278. *Id.*

279. The US government supported Spain's claims in both *Sea Hunt* and *Odyssey Marine*.

to Peru's history and the history of its indigenous people. As Moore notes, "an equally compelling . . . reason" to reward Peru some of the cargo from the *Mercedes* is that the artifacts "were removed during a period of odious colonialism, with a widespread looting of gold, silver and other precious commodities as the fruits of forced labor."²⁸⁰ Returning artifacts to Peru could signal that the international community recognizes the lasting harms of colonialism.

A more equitable approach to determining shipwreck ownership claims would be to make the recovered cargo severable from its ship, and to award artifacts to the country from which they originated. Although the Eleventh Circuit held in *Odyssey Marine II* that cargo was not severable under the ASA and Sunken Military Craft Act,²⁸¹ the court also acknowledged that neither statute speaks explicitly to the issue.²⁸² However, one downside of making cargo severable from a wreck is that it vastly complicates the process of determining ownership. For example, in the case of the *Mercedes*, twenty-five individuals also put forth claims to the cargo, claiming that they were descendants of the original owners of the cargo or else had an ancestral interest in the cargo.²⁸³ Adjudicating the provenance of every single artifact would be arduous and time consuming, as after hundreds of years it may be difficult, if not impossible, to identify the original owner of the cargo. Making cargo severable could also lead to disputes between multiple nations. The *San José* and its cargo are currently claimed by Colombia, but the wreck likely contains artifacts that originated elsewhere in the vast holdings formerly under Spanish colonial rule.

Various repatriation movements can provide guidance in addressing artifacts recovered from historic shipwrecks. Post-World War II, there has been a trend toward returning cultural patrimony to the people from whom it was stolen, most famously in the cases involving art stolen by the Nazis.²⁸⁴ However, unlike famous looted artworks, the artifacts found in shipwrecks are much less easily identifiable—they are often a mix of treasures, and oftentimes these cultural objects were melted down into non-descript gold ingots to save space in ships' holds.²⁸⁵ Unlike treasures uncovered in archaeological digs, which for the most part have not travelled far from their place of origin, treasures found in shipwrecks by their very nature are often hundreds if not thousands of miles away from their point of origin. The idea of repatriation also does not address the line between

280. Affidavit of John Norton Moore, *supra* note 185, at 11.

281. *Odyssey Marine II*, 657 F.3d at 1180.

282. *See id.* at 1181 (noting "[w]hile the SMCA and the ASA do not state cargo is part of the vessel for immunity purposes, they show the protections awarded to a sunken sovereign vessel also extend to the cargo aboard that vessel.").

283. *Id.* at 1168 ("one individual claimed an ancestral interest in any of Spain's treasure in Florida.").

284. O'Donnel, *supra* note 109, at 64–65.

285. *See* Cartwright, *supra* note 15 (describing Pizarro's melting down of Peruvian treasure during his conquest of the Incan empire).

object and art; does gold and silver bullion, although extracted through forced labor, have the same cultural value as a painting or statue? Additionally, the repatriation movement focuses primarily on art and artifacts once they have entered a private market. It does not provide much guidance on addressing conflicting interpretations of the origin of a certain object. Finally, and most importantly, repatriation movements are often influenced and swayed by public opinion.²⁸⁶ Certain repatriation efforts have gained widespread national attention, while other looted artifacts, such as the Benin Bronzes, remain ensconced in western museums.²⁸⁷

While repatriation as currently implemented may not be applicable in all ways to sunken artifacts, the goal of returning looted art and artifacts to their country of origin is still worth pursuing. The fact that the debate over ownership of sunken treasures comes *before* they have been sold on the market to buyers means that one hurdle of the art repatriation movement is already overcome. Instead of having to take property from a museum²⁸⁸ or private buyer who may have believed they were acting in good faith,²⁸⁹ the property raised from shipwrecks has no clearly established owner. Because many valuable artifacts found on ships, such as coins, come in multiples, if several formerly colonized countries make claims to the treasure, one potential solution is to divide it into shares. Another option is the creation of some kind of travelling exhibit, the proceeds of which could be split among several nations.²⁹⁰ This could potentially reconcile the two competing interests of honoring a country's claim to cultural property while also allowing global access.²⁹¹

While it may never be easy to fairly adjudicate who owns historic shipwrecks and their artifacts, a new paradigm is needed to establish ownership of sunken treasure taken from colonized nations. Such a theory lies in basic principles of fairness: Spain should no longer be rewarded for exploiting the labor of others. Rewarding the salvors for their efforts can encourage future shipwreck discoveries and prevent artifacts from disappearing from the archaeological record after being sold on the black market. Relaxing the presumption that the

286. See O'Donnell, *supra* note 109, at 50 (describing restitution as "bedeviled by 'politically radioactive' litigation"); Hughes, *supra* note 2, at 133.

287. Kiwara-Wilson, *supra* note 4, at 386

288. The famous portrait of Adele Bloch-Bauer I had been in the Austrian museum. O'Donnell, *supra* note 108, at 64-65.

289. See Hughes, *supra* note 2, at 133.

290. Both the treasures from Tutankhamun's tomb and artifacts from the *Titanic* went on blockbuster international tours. See Meredith Hindley, *King Tut: A Classic Blockbuster Museum Exhibition That Began as a Diplomatic Gesture*, HUMANITIES (Sept. 2015), <https://www.neh.gov/humanities/2015/septemberoctober/feature/king-tut-classic-blockbuster-museum-exhibition-began-diplom>; Andrew Wilson, *Why the Titanic Still Fascinates Us*, SMITHSONIAN MAG. (Mar. 2012), <https://www.smithsonianmag.com/history/why-the-titanic-still-fascinates-us-98137822/>.

291. See *supra* Part II.B.3 for a discussion of the competing theories of cultural nationalism and internationalism.

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original owners of ships should retain ownership of the cargo by default overlooks the impacts of colonialism and can lead to protracted disputes. Finally, a scheme that prioritizes claims by formerly-colonized countries recognizes the value of their stolen cultural artifacts and provides some restitution for a bloody colonial past.

CONCLUSION

From the shores of Hispaniola to a Florida district courtroom, this discussion of shipwrecks has sailed through space and time. Looking at historic shipwrecks in the context of cultural property, and not just as subjects of admiralty law, provides new avenues for dealing with the legacy of colonialism. The movement to repatriate and protect stolen cultural property, which first arose from the ashes of World War II, can also provide a means of redress to the victims of colonialism. A legal regime that treats artifacts recovered from shipwrecks as belonging to their country of origin is one small attempt to right the wrongs of the past.