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Why Conflict Between International Economic and Rights-Based Governance is Inevitable

*Desirée LeClercq*

Reconstructing the Principle of Non-Intervention and Non-Interference – Electoral Disinformation, *Nicaragua*, and the Quilt-work Approach

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Mobilizing Universalism: The Origins of Human Rights

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Willful Blindness: Applying a Drug Trafficking Theory of Liability to International Human Trafficking Prosecution

*Anne Miller Welborn Young*

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# WHY CONFLICT BETWEEN INTERNATIONAL ECONOMIC AND RIGHTS-BASED GOVERNANCE IS INEVITABLE

Desirée LeClercq\*

## ABSTRACT

*International organizations mandated to govern social rights are colliding with international organizations mandated to govern economic development. While disagreeing over the nature of overlap and conflict across international organizations, legal and social science scholars offer various proposals to unify global governance. Those proposals assume that unification will come naturally. That assumption is wrong.*

*The distinct legal instruments that govern international organizations render conflict inevitable and unification more challenging than commonly believed. By closely examining the pandemic-related activities carried out by the International Labor Organization (ILO), the World Bank, and the International Monetary Fund (IMF) in the same forty-one countries, the implications of that conflict become clearer. Governments must choose between competing approaches and activities to the detriment of coherence, national policies, and organizational legitimacy. To protect against those perils, international organizations must cooperate on an in-country basis, which would allow them to negotiate over conflicting policies while respecting their diverse mandates and government constituencies.*

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## INTRODUCTION

Social rights and economic development are colliding. Particularly during the COVID-19 pandemic, governments have struggled to reconcile their competing objectives of saving money through austerity and administering costly social protections. Governments often look to international organizations responsible for rights and economic development to provide cohesive advice and policies.<sup>1</sup> Those organizations have not risen to the occasion. For those of us who have worked within and studied international organizations for some time, that failure comes as no surprise.

This Article is about the inevitable tension between international organizations that govern economic development and those that govern social

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1. See Michael Zürn, *A Theory of Global Governance* 52-53 (2018) (describing the manner in which the authorities of international organizations are epistemic, meaning that those organizations provide interpretations, “expert knowledge,” and “moral authority” owing to their unique positions in global governance); see also *infra* Part I.

rights, particularly when their activities overlap.<sup>2</sup> International organizations have always been fragmented; their member governments designed them that way.<sup>3</sup> They have distinct legal instruments—agreements or constitutions—that define their objectives, priorities, and approaches.<sup>4</sup> These legal instruments, much like the US Constitution,<sup>5</sup> are not easily amended.<sup>6</sup> Their terms, conditions, and ideological underpinnings significantly control their activities.<sup>7</sup> Therefore, when discharging their unique legal instruments, it is natural that those organizations tend not to perform in unison.<sup>8</sup> The more significant yet underexplored issues concern the implications of overlap and conflict for governments, vulnerable populations, and global governance.

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2. Overlap in this context means, as described above, the activities and policies of more than one international organizations with the appropriate mandate and subject-matter expertise target a common issue. See Richard Herr & Edmund Chia, *The Concept of Regime Overlap: Towards Identification and Assessment*, in *Overlapping Maritime Regimes: An Initial Reconnaissance* 18 (B W Davis ed. 1995); see generally Matthias Kranke, *Exclusive Expertise: The Boundary Work of International Organizations*, 2 *Rev. Int'l Pol. Econ.* (2020); Oran R. Young, *Institutional Linkages in International Society: Polar Perspectives*, 2 *Glob. Governance* 6 (1996).

3. See *infra* Part II.B.

4. See MALCOLM N. SHAW, *INTERNATIONAL LAW* 944 (2014) (arguing that the “nature, status and authority of [international] organizations will therefore depend primarily upon the terms of the constituent instruments or constitutions under which they are established.”).

5. See generally Douglas Linder, *What in the Constitution Cannot be Amended*, 23 *ARIZ. L. REV.* 717 (1981) (discussing the limitations to constitutional amendments).

6. See JAN KLABBERS, *ADVANCED INTRODUCTION TO THE LAW OF INTERNATIONAL ORGANIZATIONS* 29 (2015) (describing the constitutional amendments process as “a cumbersome and protracted process . . .”). Recognizing the difficulties in formal constitutional amendments, international organizations make subtle changes through their internal interpretations of their constitutional instruments. See Julian Arato, *Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations*, 38 *YALE J. INT'L L.* 289, 290 (2013) (describing the phenomena of “informal constitutional change or transformation” and arguing that it can lead to “dramatic” changes in organizational behavior). I do not disagree that international organizations can internally change their own processes. See generally Desirée LeClercq, *Sea Change: New Rulemaking Procedures at the International Labour Organization*, 22 *ILSA J. INT'L & COMP. L.* 105 (2015) (arguing that the International Labor Organization changed its amendments process through treaty). However, I disagree that those types of internal changes can be as “dramatic” as to go against the very ideological grain of constitutional direction. This point is further elaborated in Part II.

7. See JAN KLABBERS, *INTERNATIONAL ORGANIZATIONS* XV (2005) (describing the “hurdle in the shape of the organization’s mandate” including economic organizations that may only consider human rights obligations “if these can be subsumed as economic considerations . . .”).

8. See SHAW, *supra* note 4, at 46-47 (noting the increasing fragmentation across international organizations’ activities).

Scholars justifiably lament fragmented<sup>9</sup> global governance.<sup>10</sup> They point out, for example, the notoriously conflicting economic policies advanced by the World Bank<sup>11</sup> and the International Monetary Fund (IMF), on the one hand, and the labor policies advanced by the rights-based International Labor Organization (ILO), on the other.<sup>12</sup> Although those organizations all participate within the United Nations (UN) system's penumbra and have committed to the UN's Sustainable Development Goals (SDGs),<sup>13</sup> their policies and activities continue to diverge. The resulting fragmentation pits economic policies against rights policies, requiring governments to choose between international authorities and associated resources.<sup>14</sup>

The multidimensional nature of the COVID-19 pandemic provides rich material against which to weigh scholarly theories of overlap and conflict. The national lockdowns and business closures to "flatten the curve" impacted over 81 percent of the global workforce's 3.3 billion people,<sup>15</sup> resulting in the "most severe

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9. See Harlan Grant Cohen, *Fragmentation*, in CONCEPTS FOR INT'L L. 315 (2020) (arguing that concerns over fragmentation in the international legal order have been a significant source of anxiety for international lawyers).

10. See, e.g., ZÜRN, *supra* note 3, at vi (describing global governance and the international organizations with it as "fundamentally flawed" and efforts to resolve global crises as "meager at best."); BRUCE JENKS & BRUCE JONES, UNITED NATIONS DEVELOPMENT AT A CROSSROADS iii (NYU Center on Int'l Coop., Aug. 2013) ("the UN development system is hopelessly fragmented and has not adapted to fundamental changes in the global economy, and as a consequence, its impact is in doubt."); Rakhyun Kim, *Is Global Governance Fragmented, Polycentric, or Complex? The State of the Art of the Network Approach*, 22 INT'L STUDIES REV. 903 (2020).

11. The Bank fits into the Specialized Agency category through a 1947 agreement that recognizes the Bank as an "independent specialized agency" of the UN as well as a member or observer in many UN bodies. See SUMMARY OF AGREEMENT BETWEEN THE BANK AND THE UNITED NATIONS,

[https://timeline.worldbank.org/themes/timeline/pdfs/web/viewer.html?file=/timeline.worldbank.org/sites/timeline/files/timeline/archival-pdfs/event12\\_UNagt\\_summary\\_30151250.pdf](https://timeline.worldbank.org/themes/timeline/pdfs/web/viewer.html?file=/timeline.worldbank.org/sites/timeline/files/timeline/archival-pdfs/event12_UNagt_summary_30151250.pdf). The term "World Bank" traditionally refers to two institutions of the World Bank Group that engage with the public sector: the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). This Article will similarly use the term World Bank to refer to both entities.

12. See, e.g., Franz Christian Ebert, *A Public Law Perspective on Labour Governance by International Financial Institutions*, 17 INT'L ORG. L. REV. 105, 113-118 (2020) (describing conflicts between the IMF's labor-market guidance to governments and the International Labor Organization's labor norms).

13. See *infra* Part II.

14. Compare with Tamar Megiddo, *Beyond Fragmentation: On International Law's Integrationist Forces*, 44 YALE J. INT'L L. 115, 116 (2019) (arguing that States mitigate the harmful effects of fragmentation in international law by "reconcil[ing] their various international legal obligations without forsaking their domestic agendas").

15. See ILO Monitor: COVID-19 and the World of Work 2 (2nd ed., 7 April 2020), at [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms\\_740877.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_740877.pdf) [hereinafter, ILO Second Monitor]. See also World Bank, *COVID-19 Response Paper*, at 7 (noting that three out of every four workers in the global workforce have been impacted by job closures).

crisis since the Second World War.”<sup>16</sup> The loss of jobs and factory closures stalled the production of goods along supply chains,<sup>17</sup> slowing global economic growth to a projected 3 percent—a far worse rate than during the 2008-09 economic crisis.<sup>18</sup> In a vicious cycle, employment losses drove down national economies, further contributing to “devastating impacts on employment.”<sup>19</sup>

More than ever, labor and economic recoveries have needed to converge to combat the multidimensional nature of the crisis. If the ILO, the World Bank, and the IMF hoped to assist their government members in recovering, their respective activities must have coalesced quickly and meaningfully.<sup>20</sup> Despite the urgency and importance, however, their respective activities remained siloed and, at times, conflicted with one another.

This Article is both comparative and normative. In Part I, I compare the COVID-19 recovery activities of the ILO, the IMF, and the World Bank in the same countries at the same time. I focus on those organizations, given their longstanding tensions and specific scholarly attention. Two principal questions guide my analysis. First, are those overlapping activities complementary, inconsistent, or incompatible? Second, if and when those overlapping activities are incompatible, what are the implications for governments and the legitimacy<sup>21</sup> of the international organizations?

After describing several cases of incoherence and incompatibility across COVID-19 recovery activities, Part II turns to my normative claim. Current scholarship presupposes that overlap and conflict between international

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16. See ILO Second Monitor, *supra* note 15, at 3. See also IMF, WORLD ECONOMIC OUTLOOK v (April 2020) at xii (“[i]t is very likely that this year the global economy will experience its worst recession since the Great Depression, surpassing that seen during the global financial crisis a decade ago.”),

<https://www.imf.org/en/Publications/WEO/Issues/2020/04/14/weo-april-2020>; see also World Bank, GLOBAL ECONOMIC PROSPECTS 136-37 (June 2020),

<https://www.worldbank.org/en/publication/global-economic-prospects>.

17. See ILO Monitor: COVID-19 and the world of work 2 (1st. ed., March 18, 2020), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms\\_738753.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_738753.pdf) [hereinafter, ILO First Monitor]; GLOBAL ECONOMIC PROSPECTS, *supra* note 16, at 143.

18. See WORLD ECONOMIC OUTLOOK, *supra* note 16, at xiv.

19. See UN Policy Brief: The World of Work and COVID-19, 13 (June 2020), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms\\_748428.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/genericdocument/wcms_748428.pdf).

20. *Id.*

21. Drawing from Klaus Dingwerth and Antonia Witt, the term “legitimacy” refers to “a property of rightfulness actors ascribe to an institution” whereas the term “*legitimation*” refers to “the process through which the institution...acquires that property in the eyes of a particular audience.” See Klaus Dingwerth & Antonia Witt, *Legitimation Contests: A Theoretical Framework*, in INTERNATIONAL ORGANIZATION UNDER PRESSURE: LEGITIMATING GLOBAL GOVERNANCE IN CHALLENGING TIMES 31 (Klaus Dingwerth, Antonia Witt, Ina Lehmann, Ellen Reichel, & Tobias Weise eds., 2019). By de-legitimation, I refer to the loss of that property in the eyes of a particular audience.

organizations' activities are temporary, benign, or otherwise naturally reconcilable.<sup>22</sup> That scholarship under-appreciates the inevitable gridlock between economic and rights-based policies and over-appreciates the constructive process of evolving norms.<sup>23</sup> Drawing from the legal charters of the ILO, World Bank, and IMF, I argue that the respective rights-based and economic approaches of those international organizations will inevitably conflict. That inevitability has significant implications for governments, which must prioritize competing international obligations. It also has significant implications for vulnerable populations such as workers who depend on public resources and legislative protections. Finally, inevitable conflict implicates global governance more broadly, which already faces a legitimacy crisis.

In Part III, I propose a modest solution that reconciles tensions, or at least raises institutional awareness of organizational overlap. Specifically, using a pre-existing UN platform, international organizations should require their staff to discuss in-country projects during the design stage (*ex-ante*). That project-level coordination would allow organizations to negotiate their diverse approaches on a narrow (and thus resolvable) basis before imposing conflicting obligations and priorities on governments.

## I. COVID-19 ACTIVITIES

Scholars are fascinated by the fragmentation of international organizations.<sup>24</sup> Some of that fascination centers on tensions between economic and rights-based governance.<sup>25</sup> For example, governments in developing countries have a vested

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22. See, e.g., Benjamin Faude & Julia Fuss, *Coordination or conflict? The causes and consequences of institutional overlap in a disaggregated world order*, 9 GLOB. CONSTITUTIONALISM 268, 285 (2020) (arguing that institutional overlap can lead to coordination); Nico Krisch, Francesco Corradini & Lucy Lu Reimers, *Order at the margins: The legal construction of interface conflicts over time*, 9 GLOB. CONSTITUTIONALISM 343, 347 (2020) (arguing that institutional “conflicts [are] part of social processes that define the relation between different norms over time”).

23. See *infra*, Part II.

24. See Megiddo, *supra* note 14, at 115-16 (noting that the question of fragmentation “has been haunting international law scholars for the past two decades”). As Megiddo notes, scholars have traditionally struggled to define fragmentation and have used the term to apply to “such a vast array of phenomena that all of international law’s development in the past century seems enveloped in it.” *Id.* at 118 (citing Anne Peters, *Fragmentation and Constitutionalism*, in THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW 1011, 1012 (Anne Orford, Florian Hoffmann & Martin Clark eds., 2016)). This Article uses the term fragmentation to denote the different (although not necessarily harmful or incompatible) processes, commitments, and norms adopted across international organizations within the same sub-fields or subject matters. Through that lens, this Article examines the impact of fragmentation on member States.

25. See Robert G. Blanton, Shannon Lindsey Blanton & Dursun Peksen, *The Impact of IMF and World Bank Programs on Labor Rights*, 68 POL. RES. QUART. 324, 324-25 (2010) (describing concerns among labor advocates that the World Bank and IMF’s economic policies will be carried out to the detriment of rights).

interest in attracting economic resources,<sup>26</sup> and economic-based international organizations such as the IMF and the World Bank provide those resources.<sup>27</sup> However, rights-based international organizations such as the ILO are at a decisive disadvantage: although they provide technical assistance and capacity-building, they do not offer financial resources.<sup>28</sup> When the policies of the respective organizations differ, governments, particularly those in developing countries, may be more likely to follow the approach linked to tangible economic resources to the detriment of rights.

Although the international system is fragmented, it also overlaps. Various international organizations—inadvertently or not—tend to work on cross-cutting policy areas.<sup>29</sup> Scholars examining economic and rights-based international organizations have, until now, been unable to identify direct overlap between those organizations in the same country at the same time.<sup>30</sup>

For example, a government may request the ILO's advice and assistance while considering whether to ratify an ILO convention<sup>31</sup> or respond to the ILO supervisory bodies' comments and recommendations.<sup>32</sup> Those same governments may seek financial resources from the IMF<sup>33</sup> or investment loans from the World Bank.<sup>34</sup> Nevertheless, those requests, and the related activities across those organizations, will vary temporally and thematically; overlap would be coincidental.

The pandemic has synchronized the timing and objectives of international organizations' activities. As discussed above, the pandemic's multidimensional

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26. *Id.* at 325 (describing the manners in which World Bank and IMF policies influence government policies).

27. *Id.*

28. See generally ILO, RULES OF THE GAME: AN INTRODUCTION TO THE STANDARDS-RELATED WORK OF THE INTERNATIONAL LABOUR ORGANIZATION 118 (2019) [hereinafter, RULES OF THE GAME] (describing the ILO's assistance to its government members, which is limited to technical assistance such as advice, missions, promotional activities, and workshops).

29. For an explanation of why that overlap may be taking place across economic and social policy areas, see *infra* Part II.

30. For a recent effort, see Damien Grimshaw, *International Organisations and the future of work: How new technologies and inequality shaped the narratives in 2019*, 62 J. IND. REL. 477, 479 (2020) (comparing the flagship reports of five international organizations).

31. See ILO, ILC 95th Sess., Rep. VI, The Role of the ILO in technical cooperation, para. 27 (2016) (describing ILO assistance “to assist in ratification”), <https://www.ilo.org/public/english/standards/reim/ilc/ilc95/pdf/rep-vi.pdf>.

32. See RULES OF THE GAME, *supra* note 28, at 109 (describing ILO technical assistance including follow up to the supervisory bodies' comments).

33. See IMF, *IMF Lending* (noting that “The IMF's various lending instruments are tailored to different types of balance of payments need as well as the specific circumstances of its diverse membership”), <https://www.imf.org/en/About/Factsheets/IMF-Lending>.

34. See World Bank, *Financing* (describing various World Bank financing programs available to governments), <https://www.worldbank.org/en/what-we-do/products-and-services/financing-instruments>.

nature requires multidimensional recovery efforts.<sup>35</sup> The ILO, the World Bank, and the IMF maintain websites dedicated to COVID-19 to ensure transparency regarding their contributions.<sup>36</sup> Those websites act as portals of information concerning their recovery objectives and in-country activities, thus enabling an examination that identifies the direct overlap between those organizations in the same country at the same time.

From January<sup>37</sup> to June 2020, the ILO, the IMF, and the World Bank initiated simultaneous COVID-19 recovery activities in the same forty-one countries.<sup>38</sup> Those recovery activities overlapped across four labor and economic policies: (1) occupational safety and health (OSH); (2) labor legislation; (3) wages and employment benefits; and (4) income tax. To categorize the nature and degree of divergence across overlapping activities, the following Sections categorize activities as either: (i) complementary; (ii) inconsistent; or (iii) incompatible with one another. Apart from OSH activities, as explained below, most of those overlapping activities were either inconsistent or incompatible.

#### A. Complementary Labor-Related Policies

First, the good news. All of the overlapping forty-one COVID-19 recovery activities that implicated national OSH policies were complementary. The World Bank's COVID-19 programs all expressly aimed to "strengthen national systems for public health preparedness" in beneficiary countries.<sup>39</sup> Similarly, the ILO's COVID-19 projects provided resources and technical guidance to governments concerning OSH practices and resources.<sup>40</sup> In their activities, the ILO and the

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35. See *supra* Introduction.

36. See ILO, *COVID-19 and the world of work (COVID-19 and the world of work)* (2020), <https://www.ilo.org/global/topics/coronavirus/lang--en/index.html> [hereinafter, ILO COVID website]; IMF, *The IMF and COVID-19 (Coronavirus)* (Sept. 2020), <https://www.imf.org/en/Topics/imf-and-covid19> [hereinafter, IMF COVID website]; World Bank, *The World Bank Group and COVID-19 (coronavirus)*, (Sept. 2020), <https://www.worldbank.org/en/who-we-are/news/coronavirus-covid19> [hereinafter, World Bank COVID website].

37. Although the World Health Organization did not formally declare the spread of COVID-19 to be a pandemic until March 2020, the disease had begun to spread and thus warranted international assistance as early as mid-January, 2020. This Article therefore includes activities that began in mid-January, when international organizations effectively began providing COVID-19 dedicated assistance to their member governments.

38. Afghanistan, Bangladesh, Benin, Bolivia, Bosnia & Herzegovina, Burkina Faso, Cabo Verde, the Central African Republic (CAF), Chad, the Democratic Republic of Congo (DRC), Côte d'Ivoire, Djibouti, Ecuador, Egypt, Ethiopia, Gabon, the Gambia, Ghana, Georgia, Honduras, Jordan, Kenya, the Kyrgyz Rep., Liberia, Malawi, the Maldives, Mali, Mauritania, Moldova, Mongolia, N. Macedonia, Rwanda, São Tomé & Príncipe (STP), Senegal, Sierra Leone, Tajikistan, Togo, Tunisia, Uganda, Uzbekistan, and Yemen.

39. See World Bank, *Saving Lives, Scaling-up Impact and Getting Back on Track* World Bank Group COVID-19 Crisis Response Approach Paper, 17, para. 38 (June 2020).

40. See ILO COVID website, *supra* note 36.

World Bank both incorporated the guidelines established by the World Health Organization (WHO).<sup>41</sup>

To illustrate, in Bangladesh, the World Bank's COVID-19 project provided resources such as personal protective equipment (PPE) and provided guidance to health workers on the WHO's OSH procedures.<sup>42</sup> While the World Bank's project targeted the healthcare sector, the ILO collaborated with the WHO to design and translate COVID-19 workplace guidance throughout the country and provide OSH assistance for local garment factories.<sup>43</sup> This complementarity also took place in Yemen, where the ILO distributed medical kits for "both apprentices and master crafts persons,"<sup>44</sup> while the World Bank provided OSH resources and materials to the healthcare industry.<sup>45</sup> These activities were not duplicative but instead reinforced and strengthened national OSH measures.

### *B. Inconsistent Labor-Related Policies*

In contrast to their complementary OSH policies, some of the labor-related policies between the ILO and the World Bank were inconsistent. By "inconsistent," I mean that their COVID-19 activities targeted the same labor-related policy but applied different legal standards. I carried out this examination at the projects' nascent stages. At this point, it was premature to determine whether those policies would be benign or incompatible; nevertheless, there was sufficient information to raise preliminary flags.

One notable example concerns the simultaneous policy guidance provided by the ILO and the World Bank concerning the same national labor laws. Through its supervisory machinery and COVID-19 activities, the ILO advises governments on ways they might align their national laws with international labor standards.<sup>46</sup> However, the World Bank's recovery projects included sustainable development

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41. *See id.*; World Bank COVID website, *supra* note 36.

42. *See* World Bank, Bangladesh: COVID-19 Emergency Response and Pandemic Preparedness Project 5 (March 2020), <http://documents1.worldbank.org/curated/en/926091585406468147/pdf/Project-Information-Documents-Bangladesh-COVID-19-Emergency-Response-and-Pandemic-Preparedness-Project-P173757.pdf>.

43. *See* ILO, Country Policy Responses: Bangladesh (2020), <https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang-en/index.htm#BD>.

44. *See* ILO, Country Policy Responses: Yemen (2020), <https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang-en/index.htm#YE>.

45. *See* World Bank, *Yemen COVID-19 Response Project (P173862)* (March 2020), <http://documents1.worldbank.org/curated/en/410151585105238966/pdf/Project-Information-Documents-Yemen-COVID-19-Response-Project-P173862.pdf>.

46. *See, e.g.*, ILO, ILO Standards and COVID-19 (coronavirus) FAQ (2020).

commitments<sup>47</sup> that required governments to comply with those same national labor laws in twelve<sup>48</sup> out of the World Bank's forty-one projects. The ILO's advice may have resulted in no changes or changes that did not impact the World Bank's project. It is equally possible that the ILO may have incentivized progressive legislative amendments, which could then have conflicted with the commitments contained in the World Bank's projects. In any event, the different objectives of those projects show a lack of coordination at the design stage. Two examples of these inconsistent activities are provided below.

In the Maldives, the World Bank's COVID-19 project contained a sustainable development commitment ensuring compliance with the government's laws, regulations, and ratification of the ILO's fundamental conventions.<sup>49</sup> However, the ILO's supervisory bodies have raised concerns about whether the government—through those same national labor laws—effectively implements its commitments to the ILO's conventions.<sup>50</sup> If the government ends up revising its labor laws to address the ILO's supervisory concerns, it runs the risk of contravening the World Bank's sustainable development commitment, and vice versa.

Similarly, in Georgia, the World Bank's COVID-19 project committed the government to respect the existing national labor code.<sup>51</sup> Simultaneously, the ILO's COVID-19 project aimed to revise that same labor code to align with the ILO's norms.<sup>52</sup> Once again, if the government ends up amending its labor code in response to the ILO's efforts, the World Bank's incorporation of the outdated labor code may raise substantive questions, and vice versa.

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47. By "sustainable development" commitments, this Article is referring to the World Bank's Environmental and Social Standards (ESS) that are incorporated into all of the World Bank's in-country programs. Further details are provided *infra* Part II.B.1.

48. Egypt, Ethiopia, Ghana, Georgia, Jordan, Kenya, the Kyrgyz Republic, Liberia, Maldives, Rwanda, Tajikistan, and Uzbekistan.

49. See World Bank, Maldives COVID-19 Emergency Response and Health Systems Preparedness Project 6 (Mar. 2020),

<http://documents1.worldbank.org/curated/en/644271585022364356/text/Appraisal-Environmental-and-Social-Review-Summary-ESRS-Maldives-COVID-19-Emergency-Response-and-Health-Systems-Preparedness-Project-P173801.txt>.

50. See ILO, ILC, 108th Sess. Direct Request, Worst Forms of Child Labor Convention, 1999 (No. 182) – Maldives (2019).

51. See World Bank, Appraisal Environmental and Social Review Summary Appraisal Stage – Georgia, 10 (Apr., 2020),

<http://documents1.worldbank.org/curated/en/223811587860848921/text/Appraisal-Environmental-and-Social-Review-Summary-ESRS-Georgia-Emergency-COVID-19-Project-P173911.txt>.

52. See ILO, Country Policy Responses: Georgia (July 1, 2020)

<https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm#GE>.

*C. Incompatible Labor-Related Policies*

Many of the labor-related policies across the organizations' COVID-19 activities were incompatible. By "incompatible," I mean that governments could not implement the policy mandated in one organization's activity without violating the commitment or disregarding the recommendation within the framework of another organization's activity. I include both commitments and recommendations because I intend to show the destabilizing impact of incompatible activities on national priorities and policies, not necessarily to show legal or financial penalties for noncompliance. Those incompatible activities arose most frequently between the COVID-19 activities of the ILO and the IMF, but also arose between some ILO and World Bank activities.

Twenty-one<sup>53</sup> of the IMF's COVID-19 loan arrangements encouraged increased public spending to recover from the pandemic upon the condition that the government revert to the IMF's traditional structural and fiscal policies "as soon as" or "once" the pandemic passed. Thirteen<sup>54</sup> of its arrangements, by contrast, explicitly called for immediate reductions not only in wages, but also in worktime programs and employment benefits, while calling for increases in taxes. Furthermore, contrary to the IMF's assurances,<sup>55</sup> the IMF's COVID-19 arrangements frequently incorporated the recipient governments' pre-pandemic commitments. Ten<sup>56</sup> of those arrangements incorporated commitments that implicated labor policies.

For example, in April 2020, the IMF prepared a Staff Report recommending the approval of the Central African Republic (CAF) request for disbursement under the IMF's Rapid Credit Facility (RCF) of a \$38 million loan, which the IMF Executive Board approved.<sup>57</sup> In its staff report, the IMF listed the specific reasons for recommending the approval of the CAF's request.<sup>58</sup> Among those reasons, the IMF emphasized that: "The authorities must continue implementing the policies and structural reforms to which they committed under the ECF arrangement."<sup>59</sup> The IMF's "ECF arrangement," in turn, referred to its three-year arrangement

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53. Bangladesh, Benin, Burkina Faso, Chad, Côte d'Ivoire, Djibouti, Ecuador, Gabon, Ghana, Honduras, Jordan, Kenya, the Kyrgyz Republic, Mali, Mauritania, Moldova, Mongolia, N. Macedonia, Tunisia, Uganda, and Uzbekistan.

54. Bangladesh, Benin, Burkina Faso, Cabo Verde, Chad, Côte d'Ivoire, Djibouti, Honduras, Jordan, Kenya, the Kyrgyz Republic, Moldova, and N. Macedonia.

55. *See infra* Part II.B.1.

56. Bosnia & Herzegovina, Cabo Verde, Cent. Afr. Rep., Dem. Rep. Congo, Ethiopia, Georgia, Honduras, Liberia, Malawi, Rwanda, Senegal, Sierra Leone, São Tomé and Príncipe, Tunisia.

57. *See* IMF, *Request for Disbursement Under the Rapid Credit Facility – Central African Republic*. International Monetary Fund African Dept. (Apr., 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/04/28/Central-African-Republic-Request-for-Disbursement-under-the-Rapid-Credit-Facility-Press-49378>.

58. *Id.*

59. *Id.* at p.10, para. 27.

under the Extended Credit Facility.<sup>60</sup> That arrangement, which the IMF Executive Board approved for \$115.1 million on December 20, 2020, called for several specific structural reforms.<sup>61</sup> Those reforms included amending the labor code to “improve the business environment” by capping fines for labor violations<sup>62</sup> and “strengthening” the tax on wages by removing previously granted exceptions to the income tax.<sup>63</sup>

While the IMF’s COVID-19 activities in the CAF invoked pre- or extra-pandemic lending conditionality, the ILO and World Bank COVID-19 activities in that country aimed to protect workers. The World Bank’s COVID-19 project focused on strengthening the capacity and conditions of civil servants’ work.<sup>64</sup> The ILO’s project specifically focused on strengthening the capacity of national workers to adjust to the work-related impacts of COVID-19 under existing labor laws.<sup>65</sup> At the same time, the ILO’s supervisory bodies were advising the CAF government to base its COVID-19 response on policies on “tripartite consultations and social dialogue.”<sup>66</sup>

If the CAF government had raised income taxes and amended its labor code to grant employers greater latitude to violate labor standards, as promised, it would have undermined the ILO’s attempts to improve labor protections and terms and conditions of work under current legislation. Doing so would also have foreclosed tripartite consultations and social dialogue. Finally, by reforming its labor code accordingly, the CAF government could have undermined the World Bank’s COVID-19 project, so long as the IMF’s efforts to curb public spending and raise income taxes in the country affected civil servants.

The CAF case was not extraordinary. In Senegal, for instance, the IMF’s COVID-19 arrangement stressed that “macroeconomic policies continue to be guided by the objectives of the [current arrangement] to the extent possible.”<sup>67</sup>

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60. See IMF, *Request for Three-Year Arrangement Under the Extended Credit Facility – Central African Republic*, International Monetary Fund African Dep. (Jan. 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/01/13/Central-African-Republic-Request-for-a-Three-Year-Arrangement-under-the-Extended-Credit-48940>.

61. *Id.*

62. *Id.* at 16, para. 28.

63. *Id.* at 14, para. 18.

64. See World Bank, *Appraisal Environmental and Social Review Summary Appraisal Stage – Central African Republic*, at pp. 7-8 (Apr., 2020).

65. See ILO, *Country Policy Responses: Central African Republic* (2020), <https://www.ilo.org/global/topics/coronavirus/country-responses/lang--en/index.htm#CF>.

66. The ILO submitted its request to the CAF under the ILO’s Tripartite Consultation Convention, which the CAF has ratified. See ILO, ILC, 109th Sess. *Direct Request. Tripartite Consultation (International Labour Standards) Convention, 1976 (No. 144) – Central African Republic* (2021).

67. See IMF, *Senegal: Request for Disbursement Under the Rapid Credit Facility and Purchase Under the Rapid Financing Instrument*, 2 (Apr., 2020),

Notably, one of those policies included relaxing “rigid” labor regulations to strengthen the private-sector climate.<sup>68</sup> Meanwhile, the ILO’s COVID-19 project included advising the Senegalese government on implementing existing labor regulations through dialogue with workers.<sup>69</sup> Under the ILO’s Freedom of Association Convention, which the Senegalese government has ratified, the ILO’s supervisory bodies were urging the government to amend its labor regulations to strengthen the rights and protections afforded to workers in joining and forming unions.<sup>70</sup> Like the CAF case, if the Senegalese government were to relax (and thus weaken) its labor protections as demanded by the IMF, it could not simultaneously adopt stronger labor protections through social dialogue as requested by the ILO.

There were additional incompatibilities between the IMF and the ILO’s COVID-19 activities concerning wages and employment benefits. For instance, in Djibouti, the ILO worked with the Ministry of Labor and the workers’ and employers’ associations to mitigate the impact of COVID-19 on the national labor market and social protection scheme.<sup>71</sup> Meanwhile, the IMF’s COVID-19 loan arrangement required the Djiboutian government to reduce the “costs of production,” including labor costs.<sup>72</sup> Those activities were incompatible. The Djiboutian government could not have cooperated with the ILO and its social partners to enhance workers’ terms and conditions of employment while weakening the terms and conditions of employment for the IMF.

In Jordan, the ILO worked with the Ministry of Labor and the Ministry of Social Development to mitigate the negative impacts of the pandemic on employment benefits.<sup>73</sup> This assistance included technical advice on social security protection.<sup>74</sup> Simultaneously, the IMF awarded the Jordanian government emergency financial assistance because the government took immediate measures

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<https://www.imf.org/en/Publications/CR/Issues/2020/04/16/Senegal-Request-for-Disbursement-Under-the-Rapid-Credit-Facility-and-Purchase-Under-the-49335>.

68. See IMF, *Senegal: Request for a Three-Year Policy Coordination Instrument* (Jan. 2020), at 9 <https://www.imf.org/en/Publications/CR/Issues/2020/01/18/Senegal-Request-for-a-Three-Year-Policy-Coordination-Instrument-Press-Release-Staff-Report-48958>.

69. See ILO, *Country Policy Responses: Senegal* (June 2020),

<https://www.ilo.org/global/topics/coronavirus/country-responses/lang--en/index.htm#SN>.

70. See ILO, ILC, 109th Sess. Observation. *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) – Senegal* (2021).

71. See ILO, *Country Policy Responses: Djibouti* (April 2020),

<https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm#DJ>.

72. See IMF, *Djibouti: Requests for Disbursement Under the Rapid Credit Facility and Debt Relief Under the Catastrophe Containment and Relief Trust* (May 2020), at 10 <https://www.imf.org/en/Publications/CR/Issues/2020/05/12/Djibouti-Requests-for-Disbursement-Under-the-Rapid-Credit-Facility-and-Debt-Relief-Under-the-49410>.

73. See ILO, *Country Policy Responses: Jordan* (May 2020),

<https://www.ilo.org/global/topics/coronavirus/regional-country/country-responses/lang--en/index.htm#JO>.

74. *Id.*

to “maintain macroeconomic stability” that included a “temporary reduction in social security contributions.”<sup>75</sup> Like the example above, the government could not have cooperated with the ILO to strengthen social security protection while simultaneously reducing social security contributions as stipulated in the IMF award.

In these incompatible cases, recall that the IMF’s COVID-19 activities were linked to immediate financial assistance while the ILO’s activities were linked to advice and capacity building. Governments in developing countries faced severe economic constraints and hardships during the pandemic. They would reasonably have been more attracted to the IMF’s activities than the ILO’s activities. Although those financial resources benefit national economies and societies, they do not benefit vulnerable workers. The latter were central to the ILO’s activities and were suffering from the labor and employment shocks of the pandemic.

## II.

### THE EXPLANATIONS FOR OVERLAP AND CONFLICT

The COVID-19 pandemic provides a unique opportunity to compare overlapping efforts and policies across international organizations and within recipient governments. It also exposes the conflicting approaches of the ILO, the IMF, and the World Bank. The ILO, which takes a rights-based approach, offers its members assistance to enable governments to formulate labor and economic policies.<sup>76</sup> The ILO’s activities are process-oriented, meaning the ILO bases its advice and assistance on consultations with the government and local stakeholders.<sup>77</sup> The IMF and the World Bank, by contrast, take an economic approach and offer governments financial resources based on prescribed policies.<sup>78</sup> Some of those policies reduce public spending for labor policies or concretize existing labor law commitments.<sup>79</sup> The contrast between these respective approaches is significant.

Although the pandemic synthesized the timing of those international organizations’ activities, the UN’s previous initiatives to align economic and social rights had already facilitated their substantive overlap.<sup>80</sup> Recognizing the social consequences of globalization, in 2015, the UN integrated the objectives

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75. See IMF, *Jordan: Request for Purchase Under the Rapid Financing Instrument*, 10, para. 19 (May 2020) <https://www.imf.org/en/Publications/CR/Issues/2020/05/28/Jordan-Request-for-Purchase-Under-the-Rapid-Financing-Instrument-Press-Release-Staff-Report-49462>.

76. See *infra*, Part II.B.2.

77. *Id.*

78. See *infra*, Part I.B.1.

79. *Id.*

80. See UN, *Transforming Our World: The 2030 Agenda for Sustainable Development* (2020) [hereinafter, Knowledge Platform],

<https://sustainabledevelopment.un.org/post2015/transformingourworld/publication>.

and activities of participating international organizations through the 2030 Agenda for Sustainable Development (2030 Agenda).<sup>81</sup> The 2030 Agenda is the “central platform” for the Sustainable Development Goals (SDGs),<sup>82</sup> which are seventeen goals that cut across human, labor, and environmental standards.<sup>83</sup>

To encourage coordination between economic and rights-based international organizations, the 2030 Agenda and the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Agenda)<sup>84</sup> cross-reference one another.<sup>85</sup> Recognizing “the interlinkages between the financing for development process and the means of implementation of the post-2015 development agenda,” the Addis Ababa Agenda emphasizes “proper and effective follow-up of the financing for development outcomes and all the means of implementation of the [SDGs].”<sup>86</sup> To that end, the World Bank, the IMF, and other participating institutions pledged to channel their public investments into developing countries.<sup>87</sup>

The SDGs increased overlap across international organizations’ activities. For instance, relevant to the SDGs that focus on decent work,<sup>88</sup> the World Bank’s development activities have begun to incorporate international labor rights.<sup>89</sup> For its part, the ILO’s assistance to governments now integrates labor-market policies often associated with macroeconomic development.<sup>90</sup>

Various fields of scholarship—including law and the social sciences—examine the consequential overlap in the organizations’ activities and offer different theories to consider its implications. Those theories fail to appreciate governments’ immediate needs to receive complimentary international assistance, as explained below. They also fail to acknowledge that the legal instruments of each of those organizations frame the mandates, priorities, ideological

81. See UN resolution adopted by the General Assembly on 25 September 2015 Transforming our world: the 2030 Agenda for Sustainable Development, A/Res/70/1 (2015), <https://sustainabledevelopment.un.org/post2015/transformingourworld> (accessed Oct. 31, 2021) [hereinafter, “UN SDGs”].

82. See UN, *Transforming our world: the 2030 Agenda for Sustainable Development*, (Sept 2020), [http://www.un.org/ga/search/view\\_doc.asp?symbol=A/RES/70/1&Lang=E](http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E).

83. See *Knowledge Platform*, *supra* note 80.

84. See UNGA, 69/313 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (hereinafter, Addis Ababa Action Agenda) (July 2015), <https://sustainabledevelopment.un.org/frameworks/addisababaactionagenda>.

85. See UN, Transforming our world: the 2030 Agenda for Sustainable Development, *supra* note 64, at para. 40.

86. See ADDIS ABABA ACTION AGENDA, note 66, paras. 130-31.

87. See World Bank, Financing for Development at the World Bank Group (July 2018).

88. See, e.g., UN SDGs, *supra* note 81 (“Goal 8. Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all”).

89. For a description of the World Bank’s efforts, see *infra* Part II.B.1.

90. See Anne Trebilcock, The ILO as an Actor in International Economic Law: Looking Back, Gazing Ahead, 10 EUR. Y.B. INT’L ECON. L. 3, 24-26 (2019).

approaches, and activities of international organizations. Consequently, the theories too easily assume reconciliation and too quickly disregard significant implications for governments and governance. All the same, those works offer helpful insight into international organizations' institutional complexities and offer thoughtful, long-term proposals that are nevertheless far more sanguine than my own.

#### A. *Previous Theories Behind Overlap and Conflict*

Legal scholars are increasingly applying a social science lens<sup>91</sup> to understand overlap and conflict across international organizations. They do so by examining both the phenomena and the fragmented international legal regime's normative,<sup>92</sup> sociological,<sup>93</sup> and political implications.<sup>94</sup> Adopting a bottom-up approach, those scholars consider how overlap and conflict develop,<sup>95</sup> how international organizations address conflict through informal networks of collaboration,<sup>96</sup> and the effects of overlapping activities on both international law and the laws of organizations' member States.<sup>97</sup> They nevertheless disagree on the causes and effects of overlap and conflict, as described below.

##### 1. *Theoretical Causes of Overlap and Conflict*

Although scholars seem to agree that fragmentation may lead to overlap and conflict, they disagree on the causes of that fragmentation. Some scholars argue that because international organizations are State-made entities, fragmentation across regimes is inherently "State-driven."<sup>98</sup> Fragmentation may consequently reflect a principal-agent relationship under which powerful State principals deliberately "protect their dominance and discretion by creating a system that only they have the capacity to alter."<sup>99</sup> If and when a specific legal system fails to work

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91. See Jan Klabbbers & Guy Fiti Sinclair, *On Theorizing International Organizations Law: Editors' Introduction*, 31 EUR. J. INT'L L. 489, 489-91 (2020).

92. See Christian Kreuder-Sonnen & Michael Zürn, *After fragmentation: Norm collisions, interface conflicts, and conflict management*, 9 GLOB. CONSTITUTIONALISM 241, 242-43 (2020).

93. See Kranke, *supra* note 2, at 1-2.

94. See Bessma Momani & Mark Hibben, *Cooperation or Clashes on 19th Street? Theorizing and Assessing IMF and World Bank Collaboration*, 6 JIOS 27, 28-29 (2015).

95. See Kranke, *supra* note 2, at 1-2.

96. See *id.*

97. See Kreuder-Sonnen & Zürn, *supra* note 92, at 242-43.

98. Megiddo, *supra* note 14, at 120.

99. *Id.* (quoting Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595, 625 (2007)); see also Gisela Hirschmann, *International organizations' responses to member state contestation: from inertia to resilience*, 97 Int'l Aff. 1963, 1965 (2021) (discussing the "principal-agent approach, according to which [international organizations], as the agents of their member States, make efforts to satisfy the principals' demands").

in their favor, those States may simply “abandon or threaten to abandon” it.<sup>100</sup> Other scholars counter that fragmentation is not so deliberate but rather is the result of disorganized national processes. That theory considers that different domestic authorities within States (agencies and ministries) handle different issues and simply fail to communicate with one another.<sup>101</sup>

Other scholars, including in legal and social science domains, view overlap and conflict across international organizations as a logical consequence of an evolving ecosystem.<sup>102</sup> In that respect, legal pluralism within international law may simply reflect the proliferation of organizations and tribunals against the backdrop of an increasingly diverse global society.<sup>103</sup>

## 2. Theoretical Effects of Overlap and Conflict

In addition to disagreeing on the cause of overlap and conflict, scholars also disagree on their effects.<sup>104</sup> Some scholars dismiss concerns that discernible conflict causes *actual* harm, arguing that those concerns overly rely on “snapshots” of international organizations’ activities.<sup>105</sup> Conclusions drawn from short-term impacts, they argue, are misleading.<sup>106</sup> Governments may face conflicting norms for a “relatively short” period.<sup>107</sup> However, those conflicting norms might later settle and conflate, enabling a dynamic and organic evolution of international and national laws and norms.<sup>108</sup> Consequently, we must study the implications of overlap “from a historical distance” and not just during “phases of friction.”<sup>109</sup>

Many scholars further argue that organizational conflicts, to the extent they exist, may be reconciled.<sup>110</sup> For example, in their recent study, Christian Kreuder-

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100. See Megiddo, *supra* note 14, at 122.

101. *Id.* at 120.

102. See, e.g., José E. Alvarez, *International Organizations: Then and Now*, 100 AM. J. INT’L L. 324, 338 (2006) (describing constructivist views of international organizations); Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 13 FINNISH Y.B. INT’L L. 273, 276-78 (2002) (same).

103. Megiddo, *supra* note 14, at 120.

104. *Id.* at 121.

105. See Nico Krisch et al., *supra* note 22, at 347.

106. *Id.*

107. *Id.*

108. *Id.* at 348; Jutta Brunnée & Stephen J. Toope, *Persuasion and Enforcement: Explaining Compliance with International Law*, 2002 FINNISH Y.B. INT’L L. 273, 276-79 (2002); Megiddo, *supra* note 14, at 116 (arguing that fragmentation benefits the international legal order because States faced with conflicting norms will “build bridges between international law’s various legal regimes and promote integration between them”).

109. See Krisch et al., *supra* note 22, at 347-48.

110. See, e.g., ZÜRICH, *supra* note 1, at 11 (“contestations can lead to institutional adaptation, re-legitimization, and a deepening of global governance”); Ebert, *supra* note 12, at 128-29 (arguing that consultations across international organizations may resolve ideological conflict).

Sonnen and Michael Zürn argue that we should focus less on institutional differentiation and more on the “[lacking] coordination between different norms, rules and authorities.”<sup>111</sup> That coordination may lead to cohesion by creating, for instance, clearly delineated responsibilities.<sup>112</sup>

This scholarship coalesces around the assumption that, when viewed correctly, overlapping activities across international organizations are benign or even beneficial.<sup>113</sup> Echoing the principal-agent theory, Tamar Megiddo suggests that governments faced with overlapping or even conflicting guidance from international legal bodies may actually “adopt a proactive, creative approach to try to reconcile their various obligations.”<sup>114</sup> Those governments will be “incentivized by the different regimes to find common ground between their commitments in order to plan and execute policies that are compatible with all of their obligations.”<sup>115</sup>

### 3. *Weakness in Theories*

This Article does not adjudicate the above theories of overlap and conflict. It is sufficient to note that many of those theories are optimistic, perhaps unrealistically so. They assume innate benefits to governments and eventual normative cohesion and consequently neglect the deeply ingrained ideological tensions between economic and rights-based international organizations. In reality, despite the active efforts of the UN and even member governments to prompt coherence, the IMF and World Bank’s programs continue to advance their institutional objectives to foster economic growth. Those programs undermine the ILO’s rights-based programs that advocate for labor protections at the expense of public savings.<sup>116</sup>

Franz Ebert traces these residual tensions, pointing out that the World Bank’s projects commit recipient governments to national legislation that could conflict with ILO norms.<sup>117</sup> Ebert also notes the prevalence of consultations between the

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111. See Kreuder-Sonnen & Zürn, *supra* note 92, at 243.

112. See Momani & Hibben, *supra* note 94, at 28-29; See Kranke, *supra* note 2, at 3.

113. See, e.g., Alvarez, *supra* note 102, at 338-339 (explaining the “institutional ethos” of evolving interactions of international organizations); See, e.g., Krisch, et al., *supra* note 22, at 344 (arguing that organizational overlap “may in the long term be a pathway for change in an otherwise rigid structure of international law and contribute to the construction of relations between its different norms”); Megiddo, *supra* note 14, at 116.

114. Megiddo, *supra* note 14, at 125.

115. *Id.*

116. See generally Blanton, et al., *supra* note 25, at 324-336 (finding that IMF and World Bank policies impact domestic labor policies); Ebert, *supra* note 12, at 106 (noting the “significant implications” of the economic approach for the ILO’s labor rights).

117. See Franz Christian Ebert, *Labour Standards and the World Bank. Analysing the Potential of Safeguard Policies for Protecting Workers*, in LABOUR STANDARDS IN INTERNATIONAL ECONOMIC LAW 273, 278 (Springer 2018) (arguing that the World Bank’s activities “have in practice pushed for reforms to reduce the protection of domestic labour law.”).

IMF and member governments on labor policies such as unemployment benefits, minimum wages, working hours, employment laws, severance payments, social safety nets, and collective-bargaining mechanisms.<sup>118</sup> He argues that “IMF members may see these recommendations as a statement of potential conditions they would have to fulfill in order to have access to the Fund’s financial resources.”<sup>119</sup> Ebert finds that “there is no evidence” that the IMF has ever consulted the ILO on labor law-related policies in formulating its labor-related conditions.<sup>120</sup>

If the above principal-agent theories are true, individual governments wield sufficient power to avoid organizational conflict by prompting evolution.<sup>121</sup> Those theories overlook a critical detail: individual governments must secure agreement and the necessary consensus among other diverse government members of international organizations for that evolution to take root.<sup>122</sup> This Section describes how governmental initiatives have failed to garner the necessary support and, consequently, could not galvanize the requisite evolution.

First, consider the United States, which is a powerful government member of the World Bank.<sup>123</sup> Through its project-financing process, the US government tries to reconcile economic and rights-based policies within those organizations.<sup>124</sup> By congressional mandate, the US government screens all World Bank projects before it approves them.<sup>125</sup> One of those screening objectives is to protect

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118. See Ebert, *supra* note 12, at 114-15 (describing the IMF’s Art. IV Consultations).

119. *Id.* at 122.

120. *Id.* at 118.

121. See Julia Gray, *Life, Death, or Zombie? The Vitality of International Organizations*, 62 INT’L STUD. Q. 1, 4 (2018) (identifying weaknesses in the traditional principal-agent theory in international organization, which overlooks factors such as the organizations’ internal bureaucracies).

122. See *id.* at 9 (showing empirically that international organizations with diverse memberships tend not to be used by their members); see generally Maria Josepha Debre & Hylke Dijkstra, *Institutional design for a post-liberal order: why some international organizations live longer than others*, 27 EUR. J. INT’L REL. 311, 315 (2020) (arguing that international organizations must be able to adapt to diverse government members that exert pressure from multiple angles); Mette Eilstrup-Sangiovanni & Daniel Verdier, *To Reform or to Replace? Institutional succession in international organizations*, EUR. UNIV. INST. WORKING PAPERS RSC 2021/20 4 (2021) (noting that institutional reform is “vulnerable to veto players and may involve high transaction costs”).

123. For a description of the United States’ role in ensuring that the IMF and World Bank activities respect labor rights, see Desirée LeClercq, *A Rules-Based Approach to Jam’s Restrictive Immunity: Implications for International Organizations*, 58 HOUS. L. REV. 55, 77-79 (2020). See also ZÜRN, *supra* note 1, at 113 (describing the United States’ cooperation with the U.K. to set up the IMF and the World Bank).

124. See IFC, 2005 Sustainability Report 14 (2005),

[https://www.scribd.com/fullscreen/16944917?access\\_key=key-1duzq2vi5a8mn4yookx3](https://www.scribd.com/fullscreen/16944917?access_key=key-1duzq2vi5a8mn4yookx3).

125. See S. REP. NO. 115-282, at 78-79 (2018). For a critique of the “scores of instructions” that Congress has enacted to direct Bank policy, see Kristina Daugirdas, *Congress Underestimated: The Case of the World Bank*, 107 AM. J. INT’L L. 517, 519 (2013). Congress first introduced this statutory requirement in 1994, based on an amendment introduced by senators Bernie Sanders and Barney Frank. See SARAH BABB, BEHIND THE DEVELOPMENT BANKS 170 (2009).

internationally recognized worker rights.<sup>126</sup> The US government confirms that international organizations such as the World Bank have agreed to its rights commitments as *quid pro quo* to funding the development programs in question through an interagency process.<sup>127</sup> As Philip Alston and Mary Robinson note, however, those kinds of internal rights-based efforts have been largely unsuccessful.<sup>128</sup> That is because the World Bank's *other* government members have strenuously resisted, thus forcing the World Bank to "avoid controversy" by mainly sticking to its traditional approach.<sup>129</sup>

A second example concerns China, another powerful government that sought to change the World Bank's reporting methodology. In June 2020, responding to allegations of "data irregularities" in its flagship *Doing Business* reports published in 2018 and 2020,<sup>130</sup> the World Bank initiated an external audit.<sup>131</sup> The auditors discovered that China had complained to the World Bank's leadership about the country's initial ranking in those reports.<sup>132</sup> The audit traced a series of internal World Bank actions to "boost China's ranking" by making various methodological changes to the report.<sup>133</sup> In September 2021, facing significant public outcry for changing its methodology as urged by China, the World Bank announced that it was discontinuing its *Doing Business* report altogether.<sup>134</sup> While China's efforts were undoubtedly self-serving, the reactions of other governments and the public more broadly suggest that State-driven efforts are met with greater resistance than the above theories appreciate.

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126. See 22 U.S.C. §§ 262p–4p, 262o–2(a)(9). Previous appropriations bills have gone further and required the executive director to "evaluate borrowing member countries' recognition of internationally recognized worker rights, and to include the status of such rights as an integral part of the [international organization's] policy dialogue with each borrowing country." U.S. DEP'T OF THE TREASURY, FY2010 REPORT TO CONGRESS ON LABOR ISSUES AND THE INTERNATIONAL FINANCIAL INSTITUTIONS 3-4 (2011), <https://www.treasury.gov/resource-center/international/development-banks/Documents/20110131%20FY2010%20Labor%20Report.pdf>.

127. See S. REP. NO. 115-282, at 78-79 (2018).

128. See Philip Alston & Mary Robinson, *The Challenge of Ensuring the Mutuality of Human Rights and Development Endeavours*, in HUMAN RIGHTS AND DEVELOPMENT 4 (Philip Alston & Mary Robinson eds., 2009).

129. *Id.*

130. See RONALD C. MACHEN ET AL., INVESTIGATION OF DATA IRREGULARITIES IN *DOING BUSINESS 2018* AND *DOING BUSINESS 2020* (2021) (report prepared by WilmerHale), <https://thedocs.worldbank.org/en/doc/84a922cc9273b7b120d49ad3b9e9d3f9-0090012021/original/DB-Investigation-Findings-and-Report-to-the-Board-of-Executive-Directors-September-15-2021.pdf>.

131. *Id.* at para. 1.

132. *Id.* at paras. 3-5.

133. *Id.* at para. 10.

134. See World Bank, *World Bank to Discontinue Doing Business Report* (Sept. 16, 2021), <https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report>.

A third example concerns developed countries' failed efforts to galvanize a rights-based evolution in the trade context.<sup>135</sup> The World Trade Organization (WTO) oversees multilateral trade rules.<sup>136</sup> Scholars and rights advocates have repeatedly argued that the WTO's trade rules prioritize profits over labor rights by encouraging firms to reduce production costs at the expense of rights protections.<sup>137</sup> They have consequently called on the WTO to link trade and labor rights.<sup>138</sup> Within the WTO, however, developed and developing member countries sharply disagree on the trade-labor link. Over the past thirty years, developed countries such as the United States and EU Member States have advocated for protecting labor rights at the WTO. Many developing countries have resisted out of fear that the link would enable disguised protectionism.<sup>139</sup> The WTO's trade rules, consequently, continue to omit labor-rights protections.<sup>140</sup>

In addition to garnering the necessary consensus among members, internal efforts to transform institutional policy must also attract the support of the international organizations' staff (or "bureaucracies").<sup>141</sup> Building on Julia Gray's studies on the role and influence of international organizations' staff on internal

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135. See, e.g., Klye Bagwell & Robert W. Staiger, *The WTO as a Mechanism for Securing Market Access and Property Rights: Implications for Global Labor and Environmental Issues*, 15 J. ECON. PERSP. 69, 69 (2001) (acknowledging the advocacy call for labor protections at the WTO).

136. See Elaine Hartwick & Richard Peet, *Neoliberalism and Nature: The Case of the WTO*, 590 THE ANNALS OF THE AM. ACADEMY OF POL. & SO. SCI. 188, 191 (2003) ("The penultimate GATT trade negotiations, the Uruguay Round, lasting from 1986 to 1994, signified a new phase in world trading history within a new era of neoliberal globalization.").

137. See, e.g., Robert Howse, *The World Trade Organization and the Protection of Workers' Rights*, 3 J. SMALL & EMERGING BUS. L. 131, 132-133 (1999) (describing the positions of free trade and rights advocates concerning trade policy); Yasmin Moorman, *Integration of ILO Core Rights Labor Standards into the WTO*, 339 COLUM. J. TRANSNAT'L L. 555, 557 (2000) (arguing that the WTO's process conflicts with the ILO's concepts of nondiscrimination to the detriment of international labor rights).

138. The literature is replete with advocacy efforts to establish a formal "linkage" between trade and social standards in the WTO. For an apt description of the literature and debate, see Chantal Thomas, *Should the World Trade Organization Incorporate Labor and Environmental Standards?*, 61 WASH. & LEE L. REV. 347, 372-73 (2004). See also Simon Tay, *Trade and Labor*, in DEVELOPMENT, TRADE, AND THE WTO 463, 468 (Bernard Hoekman, Aaditya, & Philip English eds., 2002) (noting the "many suggestions" for the WTO to take up labor matters).

139. See, e.g., WOLFGANG PLASA, RECONCILING INTERNATIONAL TRADE AND LABOR PROTECTION 20-24 (2015) (listing the failed efforts of governments such as the United States and within the European Union to place labor standards on the WTO agenda); Desirée LeClercq, *The Disparate Treatment of Rights in U.S. Trade*, 90 FORD. L. REV. 1, 14-15 (2021) (describing the efforts by the United States and other developed countries to align labor and economic policies at the WTO since the 1990s, and the accusations of developing countries of disguised protectionism).

140. See LeClercq, *supra* note 139, at 12-14 (describing how efforts to embed social liberal values such as labor rights in multilateral trade failed to manifest).

141. See, e.g., Hirschmann, *supra* note 99 at 1963-64.

policies,<sup>142</sup> Gisela Hirschmann further describes how those staff members “limit and push back against contestation by member states.”<sup>143</sup>

All of these scenarios—whether horizontally across members or vertically between members and internal bureaucracies—demonstrate that evolution in international organizations is not as automatic or organic as commonly believed. And while scholars contentedly wait for the gradual percolation of cohesive norms, developing countries face conflicting commitments and advice concerning their economic and rights-based policies.

Until now, this Article has described and addressed various theoretical accounts of conflict between economic and rights-based approaches. In the next Section, I trace that conflict to the international organizations’ constitutive instruments. Through a legal institutionalist lens, I demonstrate how governments deliberately designed those constitutive instruments to achieve specific rights or economic objectives.

In that sense, governments have contributed to international organizations’ various pathways and the internal resistance to change. Recall, for example, that developing countries blocked attempts to align the WTO’s economic approach with labor rights<sup>144</sup> and have resisted a rights-based approach within economic-based organizations.<sup>145</sup> Governments may make those incompatible contributions deliberately—they may benefit from the legal ambiguity that arises when international legal commitments conflict. They may also do so inadvertently; it is possible that governmental agencies fail to communicate across national economic and rights-based strategies.

Nevertheless, the overlap and conflict during the COVID-19 pandemic demonstrate how the activities of international organizations might cause confusion, redirect resources, and even harm the rights of the populations within countries. Perhaps, then, the pandemic might mark a critical inflection point. Member governments aware of the immediate costs of conflict may adopt a greater tolerance for cross-pollination across international organizations. I discuss that possibility in Part III.

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142. See Gray, *supra* note 121, at 1-2 (describing the importance of staff in formulating international organizations’ reactions to member State contestation).

143. Hirschmann, *supra* note 99 at 1967; see also Steffen Eckharda, Ronny Patz, Mirco Schönfeld & Hilde van Meegdenburg, *International bureaucrats in the UN Security Council debates: A speaker-topic network analysis*, 28 J. EUR. PUB. POL’Y 1, 2 (2021) (applying a quantitative corpus analysis to further show how UN “officials tabled [a] controversial policy option ... until it received sufficient attention and support”).

144. See Plasa, 139 note 139, at 20-24.

145. See generally Alston & Robinson, *supra* note 128, at 4.

*B. Legal Institutional Theory*

Legal instrumentalism explains and corrects some of the false assumptions that undergird scholarly theories conceptualizing organizational overlap. It is a pragmatic theory that emphasizes the primacy of achieving the law's objectives over abstracting ideologies and principles under an *a priori* normative view.<sup>146</sup> It assumes that laws and rules form a “body of practical tools for serving substantive goals.”<sup>147</sup> In the international organizations' context, legal instruments—such as articles of agreements—inform their institutional ideologies, pathologies, operation methods, and policies.<sup>148</sup> Accordingly, when and where international organizations' activities overlap, their legal instruments will shape and substantiate the nature of that overlap, the modus of the resolution, and the implications for populations and member governments.<sup>149</sup>

This Section applies a legal institutionalist lens to explicate conflict across organizations like the World Bank, the IMF, and the ILO. This approach is bound to draw the ire of my constructivist legal colleagues who dismiss institutionalism as being “overly legalistic.”<sup>150</sup> Julian Arato, for instance, argues that the activities of international organizations are more fluid than their formal constitutions would suggest.<sup>151</sup> He contends that their activities instead reflect a “wide array of laws and customs . . . developed through legislation, judgment, convention or other practices.”<sup>152</sup> I agree with Arato's argument that, through their interpretive processes, international organizations enjoy a particular policy space along the margins. As will be discussed below, for example, the World Bank has taken some steps towards incorporating social protection within the framework of specific lending programs. Nevertheless, as the COVID-19 activities demonstrate, those steps only go so far. Policy space does not allow, nor is anyone suggesting that it allows, organizations to abdicate their constitutional objectives altogether.

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146. See Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory about Law and Its Use*, 66 *CORNELL L. REV.* 863, 863 (1981)

147. *Id.*

148. This Article focuses on the constitutional instruments of international organizations. It nevertheless acknowledges that members of international organizations may continue to adopt legal instruments that govern internal operations over time. See, e.g., Alvarez, *supra* note 102, at 327 (arguing that when international organizations have created so many international treaties that “States can no longer keep up with their respective reporting obligations,” so those organizations create an internal hierarchy of “‘core’ obligations” that did not exist at their founding).

149. See KLABBERS, *supra* note 6, at 3 (explaining that the instruments of international organizations define their mandates as well as functions relevant to achieving that mandate).

150. See Arato, *supra* note 6, at 303.

151. *Id.* at 302.

152. *Id.*

Because of their legal instruments, the ILO, the IMF, and the World Bank's policy objectives are innately different.<sup>153</sup> The following Sections describe those legal instruments. They explain how the IMF and World Bank's legal instruments prioritize fiscal growth, often calling for governmental austerity through prescriptive methodologies. The ILO's legal instruments, by contrast, prioritize governmental support for fundamental labor rights through a process-oriented methodology. Through that lens, the COVID-19 recovery activities were necessary and predictable means of achieving the organizations' constitutional ends.

### 1. *Legal Instruments behind the Economic Approach*

According to its Articles of Agreement, the World Bank aims to provide financial assistance to countries through loans and the facilitation of capital investments.<sup>154</sup> Within its overarching mandate to reduce poverty, the World Bank's members adopted a World Bank strategy that sets out its twin goals of ending extreme poverty and promoting shared prosperity in partner countries.<sup>155</sup> Towards those goals, the World Bank's investment projects provide loans, grants, and guaranteed financing to governments that ensure "social development and inclusion."<sup>156</sup> Its investment projects include policy guidance and technical support on labor and working conditions, among other social policies.<sup>157</sup> Its targeted assistance enables "countries to design and implement labor regulations, income protection and active labor market programs" to create new jobs and increase employment rates.<sup>158</sup> The World Bank's activities also emphasize the rule of law, which focuses on enforcing extant laws in recipient countries.<sup>159</sup>

Following up on its commitments under the UN SDGs, in August 2016, the World Bank adopted an Environmental and Social Framework (ESF).<sup>160</sup> The ESF

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153. *See infra* Part II.B.1. *See also* KLABBERS, *supra* note 6, at 116 (discussing the innate difference in economic and rights-based mandates).

154. *See* World Bank, IBRD Articles of Agreement 1, 3 (2012).

155. *See* WORLD BANK, THE WORLD BANK ENVIRONMENTAL AND SOCIAL FRAMEWORK, 1 (2017), <https://thedocs.worldbank.org/en/doc/837721522762050108-0290022018/original/ESFFramework.pdf>.

156. *Id.*

157. *Id.* at 31.

158. *See* World Bank, Labor Markets Overview, (April 2018),

<https://www.worldbank.org/en/topic/labormarkets>.

159. *See* World Bank, Justice and Development (2020),

<https://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>.

160. *See, e.g.,* World Bank, *Review and Update of the World Bank's Safeguard Policies: Environmental and Social Framework (Proposed Third Draft)* 5 (July 20, 2016) (discussing the development of the then-draft Framework to "support both Bank and borrowers in realizing the Sustainable Development Goals (SDGs)"), <https://documents1.worldbank.org/curated/en/748451469107442841/pdf/107175-BR-R2016-0145-IDA-R2016-0198-Box396279B-PUBLIC.pdf>.

contains ten Environmental and Social Standards (ESS) that set out conditions for borrowers when undertaking public sector projects that include international labor standards.<sup>161</sup> Under ESS2—the second standard of the ESS—borrowers must promote non-discrimination and prevent the use of all forced and child labor. Borrowers must also “support the principles of freedom of association and collective bargaining . . . in a manner consistent with national law.”<sup>162</sup>

According to the World Bank, its COVID-19 recovery activities expressly “remain aligned with . . . the Twin Goals of eliminating extreme poverty and promoting shared prosperity in a sustainable manner.”<sup>163</sup> It earmarked \$160 billion in funds to assist governments in recovering from the pandemic’s “health, economic and social shocks.”<sup>164</sup> In keeping with the World Bank’s emphasis on the rule of law, its COVID-19 activities held governments to their commitments to their extant labor laws.<sup>165</sup> Those activities, as explained in Part I, were inconsistent with the ILO’s process-oriented rights activities.

Unlike the World Bank’s instruments, the IMF’s instruments do not authorize it to provide in-country projects, nor does its mandate extend to equity or social issues. Instead, its objective is to “promote international monetary cooperation” and “orderly exchange arrangements among members.”<sup>166</sup> To do so, the IMF monitors countries’ economic and financial policies, provides technical assistance and training to countries, and provides members with financing.<sup>167</sup>

For its part, the IMF earmarked \$1 trillion to support governments through COVID-19 dedicated lending arrangements.<sup>168</sup> Those funds, including its loan instruments, provided “vital emergency medical and other relief efforts while these members combat the impact of the pandemic.”<sup>169</sup> Through its Catastrophe Containment and Relief Trust (CCRT), the IMF also offered immediate debt

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161. See World Bank, *The World Bank Environmental and Social Framework*, *supra* note 155, at 15.

162. *Id.* at 31.

163. See *supra* note 39 at 12, para. 27.

164. See World Bank, *World Bank Group’s Operational Response to COVID-19 (coronavirus) – Projects List*, (Sept 2020), <https://www.worldbank.org/en/about/what-we-do/brief/world-bank-group-operational-response-covid-19-coronavirus-projects-list>.

165. Although the World Bank is committed to upholding the rule of law, there are disagreements within its institution as to the exact meaning of the rule of law and how the rule of law should manifest in its programs. For a detailed analysis of this phenomena, see Alvaro Santos, *The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 266-277 (David M. Trubek & Alvaro Santos eds., 2006).

166. IMF, ARTICLES OF AGREEMENT (1944), 2, <https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf>.

167. See IMF, ABOUT THE IMF: OVERVIEW: HOW WE DO IT (2008) [hereinafter, ABOUT THE IMF], <https://www.imf.org/external/about/howwedo.htm>.

168. See IMF, *COVID-19 Financial Assistance and Debt Service Relief* (Oct. 27, 2021) <https://www.imf.org/en/Topics/imf-and-covid19/COVID-Lending-Tracker>.

169. *Id.* at 1.

service relief to a limited number of countries<sup>170</sup> and augmented its existing loan programs to accommodate evolving needs during the pandemic.<sup>171</sup>

According to the IMF, its emergency lending measures did “not entail program-based conditionality or reviews.”<sup>172</sup> Despite that assurance, the IMF’s COVID-19 recovery loans often expressly incorporated the conditions and commitments that recipient governments made in pre-pandemic loan arrangements.<sup>173</sup> Those prior loans reflect the IMF’s institutional objective to promote fiscal order by restricting public spending.<sup>174</sup> Some of the IMF’s COVID-19 loan arrangements authorized recipient governments to invest in public spending for labor-related policies. Those arrangements also made clear that governments were to roll back that spending the moment conditions improved.<sup>175</sup>

The IMF’s COVID-19 loan arrangements reflect its charter, which prioritizes public savings and fostering an appealing investment climate in recipient countries. Like the World Bank’s activities, the IMF’s fiscal-driven activities conflicted with the ILO’s rights-based and process-oriented activities. Those types of conflict are not new.

Before the pandemic, scholars described instances in which the strict austerity measures imposed through conditionality were carried out at the expense of rights. Since the 1980s, the IMF and the World Bank have linked their financing to structural adjustment programs.<sup>176</sup> Those programs often include labor-related austerity measures<sup>177</sup> implicating national laws and policies.<sup>178</sup> For instance, some programs require recipient governments to adopt labor-market flexibility

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170. See IMF, *Questions and Answers: The IMF’s Response to COVID-19* (Apr. 2021), <https://www.imf.org/en/About/FAQ/imf-response-to-covid-19>.

171. *Id.*

172. See IMF, *Transcript of IMF Press Briefing* (May 2020), 2, <https://www.imf.org/en/News/Articles/2020/05/21/tr052120-transcript-of-imf-press-briefing>; see also *Questions and Answers: the IMF’s Response to COVID-19*, *supra* note 170.

173. See *supra* Part I.C.

174. *Id.*

175. *Id.*

176. See Momani & Hibben, *supra* note 94, at 29-32; see also IMF, *Questions and Answers: The IMF’s Response to COVID-19*, *supra* note 170.

177. See World Bank, *Annual Report* (1980); see also James Cypher & James Dietz, *The Process of Economic Development* 517 (2d ed. 2004).

178. See Franz Christian Ebert, *Labour standards and the world bank. Analysing the potential of safeguard policies for protecting workers*, in *LABOUR STANDARDS IN INTERNATIONAL ECONOMIC LAW* 273–304 (Henner Gött, ed. 2018); Valentin Lang, *The economics of the democratic deficit: The effect of IMF programs on inequality*, *REV INT’L ORGS* (2020); LeClercq, *supra* note 123, at 79-80; Mark Anner & Teri Caraway, *International institutions and workers’ rights: Between labor standards and market flexibility*, 45 *STUD. IN COMP INTERN’L DEV.* 151, 161-64 (2010).

measures,<sup>179</sup> which the IMF and World Bank view as necessary for domestic economic growth.<sup>180</sup>

The IMF and World Bank's requisite labor-market measures have had immediate impacts on national labor policies. For instance, labor advocates have linked those measures to higher discrimination levels, lower unionization rates,<sup>181</sup> income inequality and relatively lower wages,<sup>182</sup> and unemployment.<sup>183</sup> The labor-market policies also grant employers broader authority to hire and fire employees, determine working hours, and relax restrictions on temporary labor contracts.<sup>184</sup> Failure to satisfy the terms of the IMF and World Bank's conditionality has led to economic and fiscal discipline, including the cut-off of loan disbursements and even the failure "to receive loans elsewhere."<sup>185</sup>

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179. The term "labor market flexibility" is a broad term that refers to various internal and external policies. Internal flexibility refers to flexibility in the production process, in payment and location of workers, and in hiring and firing. External flexibility involves the labor market across regions, sectors, and wages. See Janine Berg and David Kucera, *Labour Institutions in the Developing World: Historical and Theoretical Perspectives*, in IN DEFENCE OF LABOUR MARKET INSTITUTIONS 9, 22-23 (ILO 2008).

180. See Blanton, et al., *supra* note 25, at 326.

181. See Nathan D. Martin & David Brody, Workers of the Less Developed World Unite? A Multi-Level Analysis of Unionization in Less Developed Countries, 72 AM. SOCIO. REV. 562-84 (2007).

182. See Blanton, et al., *supra* note 25, at 325 (and citations therein).

183. See, e.g., BOB HEPPLER, LABOUR LAWS AND GLOBAL TRADE 17-18 (2005); Yossi Dahan, Hanna Lerner & Faina Milman-Sivan, *Shared Responsibility and the International Labour Organization*, 34 MICH. J. INT'L L. 675, 683 (2012) (arguing that "exploitation of workers in the global labor market occurs on an institutional level, namely, in existing regulations of the global economy that have been determined by global institutions (for example, the International Monetary Fund, World Bank, and World Trade Organization (WTO)) or through intergovernmental agreements."); ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD 39-40 (2d ed. 2012) (describing the discourse of development, whereby modernization took priority over social, cultural, and political elements); RUMU SARKAR, INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, & GLOBAL FINANCE 276 (2009) ("[t]he human cost of adjustment policies could be measured in terms of sharply increased unemployment levels, reductions in real wages, and drastically reduced social services to the most vulnerable segments of the population."); PIA RIGGIROZZI, ADVANCING GOVERNANCE IN THE SOUTH: WHAT ROLES FOR INTERNATIONAL FINANCIAL INSTITUTIONS IN DEVELOPING STATES? 155 (Timothy Shaw ed., 2009) ("despite successfully tackling problems of hyperinflation and economic stabilization, externally led neoliberal reforms impacted negatively on State-society relations and . . . created vulnerabilities and insecurity particularly among low-income groups, which suffered the most from the costs of economic recession and high rates of unemployment.");

184. *Id.*; see also Bernhard Reinsberg; Thomas Stubbs; Alexander Kentikelenis; & Lawrence King, *The Political Economy of Labor Market Deregulation During IMF Interventions*, 45 INT'L INTERACTIONS 532, 533 (2019).

185. See Anner & Caraway, *supra* note 178, at 160 ("Not only can they cut off loan disbursements, but their disapproval often results in the failure of developing countries to receive loans elsewhere.");

Put broadly, rights scholars criticize the IMF and World Bank's economic approach for being at odds with "worker rights *writ large*."<sup>186</sup> Rather than prioritizing labor outcomes, the economic approach considers labor rights by assessing "the effects of unions and labor standards on economic outcomes."<sup>187</sup> Describing that approach, Mark Anner and Teri Caraway note the distaste for trade union monopolies, high wages, and high public spending, all of which are policies encouraged by rights-based organizations such as the ILO.<sup>188</sup> Against this backdrop, the IMF and World Bank's COVID-19 activities referencing austerity and concretizing substandard labor legislation<sup>189</sup> are not surprising.

## 2. *Legal Instruments behind the Rights-Based Approach*

As the UN agency mandated to develop, promote, and supervise international labor standards, the ILO's constitutional objectives vary significantly from those of the World Bank and the IMF. Declaring that labor "is not a commodity," the ILO's Constitution commits it to work with other "international bodies" to "promote the economic and social advancement" of less developed countries.<sup>190</sup> Its policies aim to encourage member countries to ratify and effectively implement the international labor rights considered fundamental to decent work and living conditions.<sup>191</sup>

Concerning economic policy, the ILO urges developing countries "to find ways to stabilize and gradually formalise, rather than to flexibilize, destabilise and informalize their labour markets further in order to climb higher up the development ladder."<sup>192</sup> Conceding that traditional economists view international labor standards "as being costly and therefore hindering economic development," the ILO stresses that its system of standards is nevertheless "often accompanied by improvements in productivity and economic performance."<sup>193</sup>

The ILO's mandate also provides it with a distinct operation method. As opposed to the prescriptive methods of the IMF and the World Bank, the ILO formulates its activities and standards through a tripartite, consultative process as

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186. See Blanton, et al., *supra* note 25, at 325-27 (arguing that IMF and World Bank policy conditions "create negative consequences for collective labor rights.") (emphasis added).

187. See Anner & Caraway, *supra* note 178, at 156.

188. *Id.*, at 158.

189. See *supra* Part I.B-C.

190. See ILO CONST. (as amended 1974).

191. See RULES OF THE GAME, *supra* note 28, at 13, 25.

192. See ILO, ECONOMIC AND LABOUR MARKET ANALYSIS DEPARTMENT (EMP/ELM) (2013), <https://www.ilo.org/empelm/lang--en/index.htm>.

193. See RULES OF THE GAME, *supra* note 28, at 14.

required by its Constitution.<sup>194</sup> In that sense, the ILO's policy recommendations and assistance are process-oriented and rest on consultations with employers' and workers' national representatives.<sup>195</sup>

The ILO's Constitution also sets out its supervisory system, an intricate machinery composed of cyclical reporting, dialogue, and technical assistance.<sup>196</sup> If a government ratifies an ILO convention and fails to implement it in law or in practice, the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) issues a public report outlining the ILO's concerns. The Committee on the Application of Standards (CAS) at the ILO's annual Labor Conference may then examine those reports.<sup>197</sup> The ILO's reports feed into its technical assistance by flagging issues and legislation of concern, ensuring that its in-country programs are coherent with its broader labor governance.<sup>198</sup>

The ILO's rights-based COVID-19 recovery measures reflect its institutional design. Its activities consist primarily of technical assistance and advice that the organization crafts through consultations and programs.<sup>199</sup> Those activities vary depending on request<sup>200</sup> and range from drafting labor legislation (through consultations with the governments and national representatives of workers and employers<sup>201</sup>), providing labor-market advice on COVID-19 recovery, and consulting on wages and employment benefits to ensure that recovery efforts are compatible with the ILO's international labor standards.<sup>202</sup>

Just as rights advocates have criticized the World Bank and IMF's policies, economists have criticized the ILO's labor-rights interventions. Some complain that the ILO's emphasis on trade unions creates "rent-seeking costs."<sup>203</sup> Under that view, the types of policies advanced by unions create less competitive product

194. See, e.g., ILO CONST., art. 7 (stipulating that the ILO's Governing Body is made up of members of government and representatives of employers and workers); RULES OF THE GAME, *supra* note 28, at 14 ("The ILO's unique tripartite structure ensures that these standards are backed by governments, employers and workers alike.").

195. RULES OF THE GAME, *supra* note 28, at 14; Teri L. Caraway, Stephanie J. Rickard & Mark S. Anner, *International negotiations and domestic politics: The case of IMF labor market conditionality*, 27-61 INT'L ORG. (2012).

196. See ILO CONST, arts. 22-30; RULES OF THE GAME, *supra* note 28, at 105.

197. See RULES OF THE GAME, *supra* note 28, at 106-07.

198. See ILO, *Technical assistance and training*, <https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/technical-assistance-and-training/lang--en/index.htm>.

199. Only those activities that were publicly listed on the ILO's COVID-19 dedicated website were included in this Article.

200. See, e.g., ILO, *Inclusive Labour Markets, Labour Relations and Working Conditions Branch* (Sept. 2020), <https://www.ilo.org/travail/lang--en/index.htm>.

201. See, e.g., ILO, ILO Standards and COVID-19 (coronavirus) FAQ (2020), at 7-8.

202. *Id.* at 10.

203. See generally Zafiris Tzannatos, *The Impact of Trade Unions: What do Economists Say*, in IN DEFENCE OF LABOUR MARKET INSTITUTIONS 152 (Janine Berg & David Kucera eds., 2008) (describing various economist views of trade union policies).

markets, distort the market, result in inefficiency, and are associated with “large distributional costs” to society.<sup>204</sup> Against that backdrop, the ILO’s COVID-19 recovery activities furthered its constitutional ends, but its process-oriented methodologies and focus on associational rights conflicted with the prescriptive methods and market-oriented approaches of the IMF and the World Bank.

### C. Implications of Overlap and Conflict

The implications of inter-organizational conflict are significant, particularly for the government members and, ultimately, their populations that will bear the costs of incoherence. At best, incoherent activities may confuse recovery priorities and policies. Should labor laws be flexible to accommodate governments’ needs while protecting rights, or should they remain static? Should governments invest in long-term public projects or restrict public spending to enable longer-term fiscal recovery?

Whichever path they choose, governments in developing countries must prioritize some organizational approaches to the detriment of others.<sup>205</sup> Those governments were already struggling to reconcile their economic development objectives while ensuring costly social rights.<sup>206</sup> Faced with economic shocks, those governments are more likely to prioritize whichever approach is linked to direct financing over that which is merely linked to technical assistance.

This latter consequence does not bode well for the ILO’s rights-based approach. It also does not bode well for the vulnerable workers within those countries who counted on the ILO’s approach to strengthen labor laws and broaden public safety nets.

The conflict between economic and rights-based approaches will also have significant implications for developed countries such as the United States. As mentioned, the US government prefaces its financial contributions to organizations on the condition that economic policies align with rights-based policies.<sup>207</sup> Nevertheless, as demonstrated in the COVID-19 recovery activities, the governments’ ability to influence the broader programming and in-country activities in organizations like the World Bank and the IMF has not effectuated meaningful evolution.<sup>208</sup>

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204. *Id.* at 152; see also Richard B. Freeman, *Labor Market Institutions and Policies: Help or Hinderance to Economic Development*, Proceedings of the World Bank Annual Conference on Development Economics 118 (1992) (describing the “Bank Distortion View” that considers labor-rights “interventions [as] first and foremost distortions”).

205. See ZÜRN, *supra* note 1, at 12-13 (describing the connection between contestation and delegitimization of international organizations).

206. See Ebert, *supra* note 12, at 122.

207. See *supra* Part II.A.3.

208. *Id.*

In addition to immediately impacting governments, the innate conflict across overlapping international organizations is perilous for global governance more broadly. For instance, governments frustrated with international organizations' internal processes and policies may simply form new organizations that better reflect their ideals and priorities.<sup>209</sup> The resulting proliferation of international organizations contributes to further overlap and competition.<sup>210</sup> It also contributes to global governance's decentralization and delegitimization.<sup>211</sup> In the trade context, for instance, governments have simply given up on the international organizations' platform, opting instead to govern social rights in trade through their bilateral and multilateral trade agreements.<sup>212</sup> The imposition, interpretation, and enforcement of rights within those individual efforts raise additional concerns of compatibility and coherence.<sup>213</sup>

Governments, vulnerable populations, and the broader UN system do not have time to wait for competing norms across overlapping international organizations to evolve. Developing countries need immediate resources and coherent advice, even if they are suspicious of marrying social and economic approaches more broadly on multilateral platforms. Developed countries are increasingly demanding cohesion across economic and rights approaches. International organizations are viewed less as epistemic authorities and more like ineffective competitors.<sup>214</sup> The international system requires immediate solutions.

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209. See Mariana Mota Prado & Steven J. Hoffman, The promises and perils of international institutional bypasses: Defining a new concept and its policy implications for global governance, 10 *TRANSN'TL LEG. THEORY* 275, 276 (2019) (“Just like surgeons grafting new pathways around blocked arteries in coronary bypasses, global governors are increasingly responding to clogged international institutions by creating new ones that work . . . .”); Tyler Pratt, Angling for Influence: Institutional Proliferation in Development Banking, 65 *INT'L STUD. QUART.* 95, 95 (2021) (noting that the number of international organizations have increased from less than 100 in 1950 to over 300 in 2000); KLABBERS, *supra* note 7, at 10 (arguing that some recent international organizations amount to nothing more than “interest groups, defending and promoting the interests of their member States.”).

210. See Prado & Hoffman, *supra* note 209, at 276; see also KLABBERS, *supra* note 7, at 7 (attributing the difficulty in identifying the true number of proliferating international organizations due to the fact that there is no longer “agreement on what actually constitutes an international organization.”).

211. See Pratt, *supra* note 209, at 95-96 (describing the competition, reduced legitimacy and redundancy associated with the proliferation of international organizations).

212. See Vineet Hegde, Jan Wouters & Akhil Raina, *Is the rules-based multilateral trade order in decline? Current practices, trends and their impact*, 10 *CAMB. INT'L L.J.* 32, 40-46 (2021) (describing the various State practices that have arisen outside of the WTO's context). For a description of the prevalence of labor rights in trade agreements, see Jordi Agustí-Panareda, Franz Christian Ebert & Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 *COMP. LAB. L. & POL'Y J.* 347, 354-55 (2015).

213. *Id.* at 361-67 (describing the potential incoherence between the labor rights incorporated in trade agreements and the ILO's system of labor rights); SHAW, *supra* note 4, at 47 (noting the fear that “the rise of specialized rules and mechanisms that have no clear authority” may lead to “inconsistency in the interpretation and development of international law.”).

214. See *supra* Introduction.

A conflict that is attributable to distinctive legal instruments will be more difficult to remedy than an issue-specific or organization-specific conflict, however.<sup>215</sup> International organizations will have to do more than cooperate. They will either need to reconcile incompatibilities within their legal instruments—what promises to be a lengthy if not improbable process<sup>216</sup>—or find short-term solutions that enable their respective institutions to foster solutions on a narrower basis. The next Part describes my proposal for the latter.

### III.

#### CALL FOR NARROW COORDINATION

The ILO, the IMF, and the World Bank answer to different legal instruments. They have different priorities, different approaches, and, consequently, different in-country activities. Scholars examining overlapping activities and conflict propose various platforms for institutional-level coordination under the assumption that economic and rights-based institutional mandates and approaches might somehow evolve and thus reconcile naturally.<sup>217</sup> That assumption has proven to be wrong. As evidence, I describe previous unsuccessful efforts across economic and rights-based organizations to coordinate on an institutional basis. I offer a more modest proposal for a mandatory mechanism of *ex-ante* coordination. That proposal would require the staff members of international organizations to resolve project-level conflicts while avoiding more significant institutional tensions.

##### A. *The Failure of Institutional Coordination*

The scholarly theories examining organizational overlap and conflict presuppose that institutional approaches and normative values are fluid.<sup>218</sup> Those scholars will likely disagree with my legal institutionalist approach given its rigidity in law and impatience with construction. I do not suggest that evolution within institutional practices, norms, and conceptions is impossible. Indeed, the legal instruments of international organizations likely contain sufficient ambiguities and hortatory aspirations to enable some movement towards

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215. See Klaus Dingwerth, Antonia Witt, Ina Lehmann, Ellen Reichel, & Tobias Weise, *Introduction*, in *INTERNATIONAL ORGANIZATIONS UNDER PRESSURE: LEGITIMATING GLOBAL GOVERNANCE IN CHALLENGING TIMES 1* (Klaus Dingwerth, Antonia Witt, Ina Lehmann, Ellen Reichel, & Tobias Weise eds., 2019) (“Like any organization, the [World] Bank cannot imply press the reset button and reinvent itself. Instead, it is constrained by the identity it has acquired up until today.”).

216. See KLABBERS, *supra* note 7, at 116 (describing aspirations to harmonize rights-based and economic approaches as “a pipe dream, as it presupposes the sort of shared theory of justice which, in a pluralist and divided world, is lacking.”).

217. See, e.g., Ebert, *supra* note 12, at 129 (advocating for inter-organizations consultation when more than one international organization’s “normative *acquis*” is at issue).

218. See *supra*, Part II.A.

coherence, eventually.<sup>219</sup> To the extent that evolution might ever occur, however, the process would be gradual and incremental and would turn on the will of diverse governments. Tellingly, despite the possibility of such an evolution and cohesion, previous efforts across organizations to reconcile their economic and rights-based approaches on a grander scale have ended in stalemate.

The ILO, the IMF, and the World Bank leaders have previously acknowledged the potential for conflict across overlapping activities and have attempted to reconcile their conflict on an institutional basis.<sup>220</sup> Owing to the close relationship between the IMF Managing Director and the ILO Director-General in the 1990s, for example, the IMF agreed to endorse the ILO's fundamental labor rights, pledged to defer to the ILO's expertise on labor standards, and granted the ILO observer status at its annual meetings.<sup>221</sup> Since 1999, the ILO has likewise enjoyed observer status at the IMF/World Bank Development Committees.<sup>222</sup> That collaboration conceptually, seems to bolster scholarly theories of internal evolution and reconciliation discussed above.

To the disappointment of many,<sup>223</sup> this institutional collaboration has not aged well. As observed by Francis Maupain, the former ILO legal advisor, the IMF and ILO agreement dissolved during the European debt crisis.<sup>224</sup> To assist their members in recovering economically, the IMF reverted to austerity at the expense of social rights, thus confirming "the fragility" of the process.<sup>225</sup> The World Bank's efforts to resolve tensions with the ILO's approach have also proven ineffective.<sup>226</sup> Even though the World Bank's ESS2 projects reference

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219. See, e.g., WORLD BANK, IBRD ARTICLES OF AGREEMENT, *supra* note 154, at art. I(iii) (promoting assistance in "raising productivity, the standard of living *and conditions of labor* in their territories") (emphasis added); IMF, ARTICLES OF AGREEMENT, *supra* note 166, at art. I(ii) (indicating that one purpose of the IMF is to "contribute thereby to the promotion and maintenance of high levels of employment and real income").

220. See Anner & Caraway, *supra* note 185, at 162-63; IMF, Independent Evaluation Office of the International Monetary Fund, *The IMF and Social Protection* 33 (2017) [hereinafter *The IMF and Social Protection*]

221. See *id.* at 157.

222. *Id.*

223. See, e.g., Hannah Murphy, *The World Bank and Core Labour Standards: Between Flexibility and Regulation*, 21 REV. INT'L POL. ECON. 399, 400 (2014) ("Most critically for the [ILO], trade unions and pro-labour governments, the work of the Bank over the past 20 years has at best undermined, at worst directly contradicted, the ILO's mandate and activities in promoting government regulation of labour markets in accordance with its conventions."); Suzan Kang, *Labor and the Bank: Investigating the Politics of the World Bank's Employing Workers' Index*, CUNY ACADEMIC WORKS 484 (2010) ("The World Bank has dealt with and responded to criticisms about its labor-related practices from organized labor, the ILO, and civil society for several decades.") (and citations therein), at [https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1204&context=jj\\_pubs](https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1204&context=jj_pubs).

224. See Francis Maupain, *The Future of the International Labour Organization in the Global Economy* 101 (2013).

225. *Id.*

226. See Ebert, *supra* note 12, at 118.

labor standards, as described earlier, that institutional step has not resolved economic and labor rights tensions.<sup>227</sup>

As the World Bank attempts to fold social rights into its economic approach, it also risks conflicting with the IMF's economic activities, which have not warmed to a social approach.<sup>228</sup> A 2020 IMF Independent Auditing Report notes that the IMF and the World Bank are increasingly working on the same issues.<sup>229</sup> The IMF and World Bank are consequently searching for ways to reconcile their approaches, including proposals to delineate responsibilities to avoid overlap.<sup>230</sup>

### *B. An Alternative: Project-Level Coordination*

The legal instruments of international organizations have chartered different economic and social paths. Despite the efforts of some governments to push for coherence, other governments—particularly in developing countries—have resisted efforts to marry social and economic approaches. Rather than attempt to resolve legal, institutional, and ideological differences on a broad scale, international organizations should take a more modest approach: they should negotiate their economic and social objectives on a country-level basis before implementing their activities.

This *ex-ante* coordination would require organizations to resolve their disagreements at the project level before presenting governments with incompatible directives. It would nevertheless enable staff to find common ground or at least raise institutional awareness of potential conflict. In sum, the coordination would enable coherent assistance in countries without requiring broader support for institutional-level policies. This Section explains the three elements of this coordination and its potential benefits and drawbacks.

First, international organizations should *require* that their staff coordinate on the project level. International organizations participating in the UN system have already committed to implementing the SDGs.<sup>231</sup> By mandating coordination, including on thorny issues that would be easier for staff to ignore or otherwise “actively shape,”<sup>232</sup> those organizations would satisfy their SDG commitment. Those organizations would also ensure that their staff participate in small-scale reconciliation rather than “limit and push back against” normative changes.<sup>233</sup>

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227. *See supra* Part II.B.

228. *See* Momani, et al., *supra* note 94, at 27-29; Kranke, *supra* note 2, at 1-3; THE IMF AND SOCIAL PROTECTION, *supra* note 220, at 1.

229. *See* IMF, Independent Evaluation Office of the International Monetary Fund, IMF Collaboration with the World Bank on Macro-Structural Issues 1 (2020).

230. *Id.*

231. *See supra* Part II.

232. *See* Hirschmann, *supra* note 99 at 1966.

233. *Id.* at 1967 (describing how staff members prevent member state contestation from effectuating institutional resolutions).

Second, international organizations should specify that those inter-organizational consultations occur during the *ex-ante* design stage. This requirement will pose challenges for process-oriented organizations such as the ILO that design their programs in consultation with the recipient governments. Nevertheless, the ILO's tripartite membership should welcome an extra layer of consultations to ensure coherence.

Third, and responsive to the second element above, coordination should focus on raising awareness and bargaining over approaches rather than pre-determined outcomes. Drawing from the ILO's consultation processes, that objective should not "require negotiations leading to an agreement."<sup>234</sup> Instead, the key will be for international organizations to consider "the views of those concerned . . . before decisions are taken."<sup>235</sup>

The COVID-19 activities described in Part I offer examples of how this *ex-ante* coordination could have helped international organizations avoid inconsistency and incompatibility. First, had the ILO and World Bank staffers coordinated on the ESS2 language in their overlapping COVID-19 activities in the Maldives and Georgia,<sup>236</sup> the World Bank could have agreed on the appropriate laws and standards to include in the ESS2 towards its shared objectives to promote economic recovery while respecting labor standards. Second, in the CAF,<sup>237</sup> the World Bank and the IMF could have also agreed on the exact scope and extent of public-sector spending within the scope of IMF conditionality. Third, had the IMF and ILO coordinated their COVID-19 activities in the CAF, they could have explored ways to ensure that labor legislation attracted corporate investments while protecting workers. For instance, labor protections are often linked to industrial stability and reduced strike activity, which are in turn linked to a more attractive investment climate.<sup>238</sup>

My proposal aims to advance coordination along policy lines, but I recognize that it faces several potential drawbacks. At the outset, the proposal requires that the respective organizations' leadership agree to implement the *ex-ante* coordination mechanism. That agreement may not come easily. As mentioned earlier, international organizations are composed of diverse governments that disagree on economic and rights-based approaches. In addition, the staff members of those organizations may not want to compromise on issues of constitutional

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234. ILO, PROMOTE TRIPARTITE CONSULTATION: RATIFY AND APPLY CONVENTION NO. 144, 6 (2011), [https://www.ilo.org/ifpdial/information-resources/publications/WCMS\\_159700/lang-en/index.htm](https://www.ilo.org/ifpdial/information-resources/publications/WCMS_159700/lang-en/index.htm).

235. *Id.* at 7.

236. For a discussion of those overlapping activities, *see supra* Part I.B.

237. For a discussion of those overlapping activities, *see supra* Part I.C.

238. *See generally* George S. Pultz, *Multinational Regulation of MNE Labor Relations*, 4 B.C. INT'L & COMP. L. REV. 409, 419-20 (1981) (discussing efforts of multinational enterprises to attract investments by imposing codes of conduct regulating labor relations).

importance. Continuing to operate in a silo may be easier, and, at times, ignorance of conflict and its potential impact on vulnerable populations may be bliss.

While many tensions across economic development and rights may be resolvable on a narrow basis, some may not be. It is difficult to imagine, for instance, how governments might simultaneously relax punitive fines on employers for violating labor laws and strengthen compliance with labor laws. A persistent failure to achieve desired results may further deter future cooperation.

Despite these drawbacks, the diverse governments within international organizations may still agree to the proposed mechanism as a whole. Those governments stand to benefit from collaboration, either as developing countries facing inconsistent and incoherent activities or as developed countries seeking to reconcile economic and rights-based approaches. Finally, the overlap and conflict across economic and rights-based approaches have rendered programming inefficient, at best. Member governments would want to see their organizations succeed on an institutional level.<sup>239</sup>

By sitting down at the negotiation table, even if staff members cannot reach a consensus, the resulting activities across international organizations will be informed and deliberate. Although the respective legal instruments of economic and rights-based international organizations frame different approaches, they do not *require* conflict. That is, the IMF and World Bank's legal instruments do not explicitly require the derogation of rights, nor does the ILO's Constitution require governments to invest in costly welfare projects. There are gray areas between the mandated approaches. Those areas may be identified and exploited but only if there is an opportunity for discussion.

### C. Existing Coordination Platform

Assuming that international organizations agree to adopt a mandatory, *ex-ante* coordination process, the UN system already offers a platform within the context of the SDGs. The United Nations Department of Economic and Social Affairs (UNDESA) oversees the implementation of the 2030 Agenda and provides substantive support and capacity building to achieve the SDGs.<sup>240</sup> The UN harmonizes its development activities within its umbrella United Nations Country Teams (UNCTs). Its UNCTs operate in over 131 countries and include inputs from participating international organizations.<sup>241</sup>

The UNCT prompts inter-agency coordination and decision making at the national level. Through the UNCTs, the UN requests that international organizations “plan and work together . . . to ensure the delivery of tangible results

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239. See Herr & Chia, *supra* note 2, at 11–25.

240. See UN System Chief Executives Board for Coordination: Country Teams (Mar. 23, 2017), <https://www.unsystem.org/content/country-teams>.

241. See UN Sustainable Development Group, *How We Work*, <https://unsdg.un.org/about/how-we-work> (last visited Sept. 20, 2021).

in support of the development agenda of the Government.”<sup>242</sup> The Resident Coordinator (RC) position leads the current UNCT process and is responsible for ensuring “system-wide accountability” and “coordinating UN support to countries in their implementation of the 2030 Agenda.”<sup>243</sup> There are currently 129 RCs leading 131 UNCTs.<sup>244</sup>

Although the UN General Assembly designed the RC position to ensure inter-organizational coordination, survey results from RCs soon revealed frustration over their “ad hoc” relationships with organizations such as the World Bank and the IMF.<sup>245</sup> The RC was accordingly unable to integrate coordination,<sup>246</sup> an omission reflected in COVID-19 activities. While many of the ILO’s COVID-19 activities referenced participation within the UNCT framework, the World Bank and IMF projects did not. The voluntary nature of coordination has proven inadequate to bring economic-based international organizations to the table. As described earlier,<sup>247</sup> my proposal would remedy this gap by requiring staff to participate.

In January 2019, the UN attempted to strengthen the RC’s role and authority within the framework of the 2030 Agenda.<sup>248</sup> Noting that the process received “unanimous support from Member States,”<sup>249</sup> the UN nevertheless conceded that the reform’s success must be measured through dimensions such as the coherence of policy support and “the discipline of the UN system to act and support countries as one.”<sup>250</sup>

If the yardstick for RC reform is the support of countries “as one,” then, based on its COVID-19 activities, the UN’s recent efforts have fallen short. The UN has even attempted to redress its residual fragmentation during the pandemic by launching a new UN Framework for the Immediate Socio-Economic Response

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242. *Id.*

243. *Id.*

244. See UN, *The UN Resident Coordinator system - an overview* (Nov. 2020) <https://unsdg.un.org/sites/default/files/QCPR-Info-Brief-2-UN-RC-System-UN-DOCO-Nov-2016.pdf>.

245. See UN, DESA Survey of Resident Coordinators 2017 Development Cooperation Policy Branch Department of Economic and Social Affairs United Nations. United Nations Department of Economic and Social Affairs 50 (Feb. 2017 Draft).

246. See Susanna P. Campbell & Anja T. Kaspersen. *The UN’s Reforms: Confronting Integration Barriers*. 15 INT’L PEACEKEEPING 470, 475 (2008) (“Integration reforms have largely fallen short of their efficiency aims because they have failed to establish incentives and mechanisms to encourage UN agencies to share resources and invest in collaborative efforts.”).

247. See *supra*, Part II.B.

248. See UN, *UN development system reform 101 | United to Reform* (Dec. 2018) <https://reform.un.org/content/un-development-system-reform-101>

249. *Id.*

250. *Id.*

to COVID-19 (SERF).<sup>251</sup> Under that framework, the UN is implementing Socio Economic Response Plans (SERPs) to support countries and populations. However, like the UNCTs, the SERF merely *invites* coordination with organizations like the IMF and the World Bank.<sup>252</sup> Since launching the SERF, the UN reports that the World Bank has provided “some input” in just over one-half of the SERPs and that the IMF has only provided “some input” in about thirty-two percent of the SERPs.<sup>253</sup>

The UN system is trying to improve coordination between international organizations within its ambit. It should direct its efforts at ensuring that participation is mandatory, *ex-ante*, and on an in-country project basis.<sup>254</sup> That its recent efforts have enjoyed sufficient support from government members speaks well for additional strengthening efforts.

There remain many international organizations, and thus organizational activities, that are beyond the UN system’s purview. Therefore, it is critical for the UN system to consult international organizations on the ground to ensure comprehensive coordination. Of course, identifying all relevant international organizations and then enticing their participation may not be possible. Nevertheless, even if participation were limited to the international organizations participating in the UN system, the resulting coordination would mark a significant improvement.

#### CONCLUSION

The implications of overlap and conflict across economic and rights-based international organizations are far-reaching. International organizations imposed incompatible commitments and policies on member governments while vulnerable populations struggled under the weight of a multidimensional pandemic. This incompatibility hindered global governance. It also introduced uncertainty and competing expertise when governments and their populations needed coordination.

As they say, never waste a good crisis. In his early work on institutional linkages, Oran Young argues that “incompatible arrangements” of overlapping

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251. See UN, *A UN Framework for the immediate socio-economic response to COVID-19* 2-4 (Apr. 2020), <https://unsdg.un.org/sites/default/files/2020-04/UN-Framework-for-the-immediate-socio-economic-response-to-COVID-19.pdf>.

252. *Id.* at 23.

253. See UNDP-UNDCO, *UN COVID-19 Response in Action*, Info. Bull., Iss. 2 1 (Oct. 2020), <https://www.undp.org/content/dam/undp/library/covid19/Info%20Bulletin%20SE%20Response%20Issue%202-October.pdf>.

254. Compare with MANAGEMENT AND ACCOUNTABILITY FRAMEWORK OF THE UN DEVELOPMENT AND RESIDENT COORDINATOR SYSTEM, Sec. 2.2 (“The UNCT *can* also include representatives of the wider UN system, for example, the Bretton Woods institutions.”) (emphasis added) (ed. Apr. 1-26 2019), <https://unsdg.un.org/sites/default/files/UNDS-MAF-2019-country-level-component-FINAL-editorial-rev-26APR.pdf>.

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institutions can galvanize “the development of unusually effective international regimes by stimulating efforts to think in whole-ecosystems terms and to devise integrated management practices.”<sup>255</sup> His optimism may hold true today, both within the immediate COVID-19 context and the broader context of global governance. The pandemic drew awareness to the interdependence of economic and rights-based policies. It also presented the global system with the urgent need to institutionalize mandatory yet realistic coordination. That coordination, if achieved, will benefit international organizations, their members, and the broader governance system by ensuring more robust responses to global needs in the future.

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255. See Young, *supra* note 2, at 1, 7.



# Reconstructing The Principle of Non-Intervention and Non-Interference – Electoral Disinformation, *Nicaragua*, and the Quilt-work Approach

Xuan W. Tay\*

*In Nicaragua, the International Court of Justice defined intervention as coercion of a State's sovereign choices. This is accepted as unquestioned lex lata by virtually all international legal scholarship. Troublesomely, the coercion definition fails to reckon with dangerous methods of twenty-first century interpositions such as electoral disinformation campaigns. In response, scholars call for the cardinal principle of non-intervention and non-interference to be redefined to prohibit, among other things, disruptive and persuasive interferences.*

*This Article makes two novel propositions. First, it argues the coercion definition is an incomplete statement of the lex lata. A close examination of the textual history reveals States never even managed to define the principle of non-intervention and non-interference. Rather, the principle has functioned as an empty container, evolving rapidly against the backdrop of burgeoning economic interdependence, the Cold War, and decolonization. Indeed, States have sought to prohibit some manifestations of non-coercive interpositions, such as electoral interference and subversive propaganda.*

*Second, this Article contends that attempts to redefine a principle which is inherently fluid and evolutionary are bound for futility. Borrowing from the policy-oriented perspective of international law, this Article instead proposes a “Quilt-work” approach, which suggests that States work toward identifying and prohibiting specific manifestations, or “sub-norms,” of dangerous interventions and interferences. The sum of these sub-norms would resemble a quilt of concrete rules that can guide State behavior even without an overarching definition of intervention and interference. This unprecedented and pragmatic approach to international lawmaking has far-reaching implications for other international law conundrums.*

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## INTRODUCTION

The time is ripe to rethink how the principle of non-intervention and non-interference (“PNIVIF”) applies when a State uses non-coercive measures to interpose itself in the sovereign affairs of another. Despite its being a fundamental duty of statehood, the principle that forbids intervention or interference has often languished as an afterthought. It is not expressly codified in any international treaty, and it is often outshone by its doctrinal cousin, the use of force.<sup>1</sup> Nonetheless, the International Court of Justice (“ICJ”) made an influential statement on the principle in *Military and Paramilitary Activities in and Against Nicaragua*.<sup>2</sup> In that case, the ICJ defined intervention as the coercion of a State’s sovereign choices. Virtually all scholarship on the subject has since treated *Nicaragua*’s pronouncement as unquestioned *lex lata*.<sup>3</sup>

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1. Russell Buchan, *Cyber Attacks: Unlawful Uses of Force or Prohibited Interventions*, 17 J. CONFLICT & SEC. L. 211, 221 (2012).

2. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, ¶ 205 (June 27).

3. See, e.g., TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 317 (Michael N. Schmitt ed., 2013) [hereinafter TALLINN MANUAL 2.0]; Christopher T. Stein, *Hacking the Electorate: A Non-Intervention Violation Maybe, but Not an Act of War*, 37 ARIZ. J. INT’L & COMP. L. 29, 43 (2020); Duncan Hollis, *The Influence of War; the War for Influence*, 32

Recent transnational events have created fresh reasons to doubt the cogency of defining intervention as coercion. One phenomenon stands out: foreign electoral disinformation campaigns. In 2016, the US presidential election fell victim to what Special Counsel Robert Mueller decried as “sweeping and systematic” interference.<sup>4</sup> Historically, a minority of States have treated elections as opportunities for interposition. The United States and the Soviet Union are reported to have interposed in one out of every nine executive-level elections during the Cold War.<sup>5</sup> What is striking about the 2016 election is the scale and effectiveness of the disinformation campaign. One study estimated that over thirty million US social media users shared content purportedly created by the Internet Research Agency (“IRA”), an entity based in Russia, between 2015 and 2017.<sup>6</sup> Other reports found that some States took similar measures in the more recent 2020 US presidential election.<sup>7</sup>

Disinformation campaigns are methods of influence operations (“IO”), which refer to the integrated use of a State’s levers of power to foster attitudes and behaviors in a foreign target audience.<sup>8</sup> Unlike other IO tools, disinformation campaigns are especially reprovable because of their fraudulent character. Free speech norms are abused to turn open, democratic societies against themselves.<sup>9</sup> Their potential for mischief has been aggravated in today’s information age.<sup>10</sup> Notably, social media has capacitated the unfiltered and virulent dissemination of

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TEMP. INT’L & COMP. L.J. 31, 40 (2018); Eric Corthay, *The ASEAN Doctrine of Non-Interference in Light of the Fundamental Principle of Non-Intervention*, 17 ASIAN-PAC. L. & POL’Y J. 1, 13–14 (2016); Dan Efrony & Yuval Shany, *A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice*, 112 AM. J. INT’L L. 583, 641 (2018); Michael N. Schmitt & Andru E. Wall, *The International Law of Unconventional Statecraft*, 5 HARV. NAT’L SEC. J. 349, 354 (2014); Buchan, *supra* note 1, at 222–23; Philip Kunig, *Intervention, Prohibition of*, OXFORD PUB. INT’L L. ¶¶ 5–6,

<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1434> (last updated Apr. 2008).

4. ROBERT S. MUELLER, III, U.S. DEP’T OF JUSTICE, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, at 1 (Mar. 24, 2019), <https://www.justice.gov/storage/report.pdf> [hereinafter MUELLER REPORT].

5. Dov H. Levin, *Partisan electoral interventions by the great powers: Introducing the PEIG Dataset*, 36 CONFLICT MGMT. & PEACE SCI. 88, 89 (2016).

6. PHILIP N. HOWARD ET AL., COMPUTATIONAL PROPAGANDA RESEARCH PROJECT, THE IRA, SOCIAL MEDIA AND POLITICAL POLARIZATION IN THE UNITED STATES, 2012–2018, at 3 (2018), <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2018/12/The-IRA-Social-Media-and-Political-Polarization.pdf>.

7. David E. Sanger & Julian E. Barnes, *U.S. Warns Russia, China and Iran Are Trying to Interfere in the Election. Democrats Say It’s Far Worse.*, N.Y. TIMES (July 24, 2020), <https://nyti.ms/3jDBrac>.

8. See ERIC V. LARSON ET AL., FOUNDATIONS OF EFFECTIVE INFLUENCE OPERATIONS: A FRAMEWORK FOR ENHANCING ARMY CAPABILITIES, at 2 (2009).

9. Nathalie Marechal, *Networked Authoritarianism and the Geopolitics of Information: Understanding Russia Internet Policy*, 5 MEDIA & COMM. 29, 37 (2017).

10. See Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 214 (2017).

disinformation.<sup>11</sup> Elections, being junctures for the realignment of political power, are especially vulnerable.

It is no wonder that prominent international lawyers have sought recourse through PNIVIF. Two days prior to the 2016 US presidential election, the US State Department's top lawyer, Brian Egan, remarked that a cyber operation that undermines another country's ability to hold an election constitutes a "clear violation" of the principle.<sup>12</sup> One of Egan's predecessors, Harold Koh, also expressly echoed these sentiments.<sup>13</sup>

There is but one problem—these views cannot be reconciled with *Nicaragua*. The test of coercion finds unlawfulness only when an interposing act compels a State to make a sovereign choice it otherwise would not. Disinformation campaigns are not only merely persuasive; they may not even be directed at affecting a State's *choices* to begin with. Additionally, *Nicaragua*'s understanding of a State's sovereign will appear predisposed to government prerogatives. It is therefore unclear whether disinformation campaigns, targeting voters rather than the government, can be regarded as coercive of some sovereign will.

Most scholars, responding to this quandary, tend to abide by a singular narrative. They accept *Nicaragua*'s definition of coercion as *lex lata* and proceed to call for a new definition of PNIVIF to deal with twenty-first century interpositions. In this vein, some scholars propose a test of "disruption" to prohibit cyber-attacks with significantly disruptive effects.<sup>14</sup> Others have made the case for a test of "consequentiality," which would treat some persuasive interpositions as coercive.<sup>15</sup> In a recent article, Stephen Townley called for coercion to be reimagined as a "standard" rather than a "rule."<sup>16</sup>

This Article defies the dominant narrative to offer two novel propositions. First, I argue *Nicaragua* is an incomplete statement on the *lex lata*. A proper examination of PNIVIF's textual history actually reveals that most States have held to a prohibition on certain types of non-coercive interpositions. Second, I contend that calls to redefine PNIVIF represent a deficient solution. PNIVIF is an amorphous and evolutionary principle that functions as an "empty container," allowing States to lay down rules on the infinite ways in which they interact with one another. The trouble with attempts at defining the principle is that they are

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11. See *infra* text accompanying notes 74–78.

12. Brian J. Egan, *International Law and Stability in Cyberspace*, 35 BERKELEY J. INT'L L. 169, 175 (2017).

13. HAROLD H. KOH, THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW 83–84 (2018).

14. See Ido Kilovaty, *Doxfare: Politically Motivated Leaks and the Future of the Norm on Non-Intervention in the Era of Weaponized Information*, 9 HARV. NAT'L SEC. J. 146, 172–73 (2018).

15. See Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 249, 257 (Jens David Ohlin et al. eds., 2015).

16. Stephen Townley, *Intervention's Idiosyncrasies: The Need for a New Approach to Understanding Sub-Forcible Intervention*, 42 FORDHAM INT'L L.J. 1167, 1200 (2019).

either too restrictive, thus confining the principle's ability to respond to twenty-first-century methods of interposition, or too broad as to be edentate. Instead, I advance a novel method of international lawmaking—the “Quilt-work” approach. This approach eschews all attempts at defining PNIVIF, and conversely proposes that States work toward identifying, negotiating, and coming to agreement on *specific manifestations*, or “sub-norms,” of non-coercive interference in an incremental manner. As more of these sub-norms are identified, they aggregate into a quilt, thus establishing concrete rules for guiding State behavior that can evolve to meet new circumstances.

In scrutinizing UN General Assembly (“UNGA”) Resolutions, bilateral and regional treaties, and State pronouncements, this Article demonstrates that States have never managed to define PNIVIF, let alone restrictively define intervention as coercion. The textual history makes clear that the principle's content has been in perpetual motion, transforming from a limited rule against armed intervention into a broader one against various subtler interpositions in the twentieth century context of increasing economic interdependence, decolonization, and the Cold War. *Sans* definition, States nonetheless managed to concur, or come close to concurring, on certain manifestations of PNIVIF. These manifestations include norms against non-coercive interpositions, such as certain categories of merely persuasive or destabilizing interferences. PNIVIF is an unruly corpus, and it is reductive to define it as coercion.

The inherently amorphous and evolutionary nature of PNIVIF underscores the central conundrum of this Article—how can concrete rules be created to give certainty to a principle which constantly changes? In this regard, scholarly attempts to redefine PNIVIF are inadequate, because they bear the risks of under- or over-inclusivity, auto-interpretation, and arbitrariness. Relying on the policy-oriented perspective of international law,<sup>17</sup> this Article argues it is not necessary to furnish an ideal definition that draws a clear line between permissible and impermissible interpositions. Instead, it proposes a Quilt-work approach, which focuses on augmenting the *process* by which States identify and negotiate the content of PNIVIF. By disaggregating a fluid principle into thinner threads, the Quilt-work approach adroitly navigates the demands of flexibility and certainty, creating tangible benchmarks against which State conduct can be measured without inhibiting the principle's evolution. This is made clear by the Quilt-work approach's potential application not only to disinformation campaigns, but also to hybrid conflicts and complex problems of cyber attribution. In sum, the Quilt-work approach suggests that there is no need to define an empty container: it is sufficient that the container's contents are clearly known.

All in all, this Article sketches a way forward for PNIVIF to be applied to electoral disinformation campaigns, which stand as one of the greatest threats to democratic systems today. This distinguishes the Article from others in the

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17. See generally Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT. L.F. 53 (1956).

electoral interference scholarship which find answers in an attempt to redefine PNIVIF,<sup>18</sup> human rights frameworks,<sup>19</sup> proposals for new treaties,<sup>20</sup> or domestic law.<sup>21</sup> In so doing, it pioneers a new approach to international lawmaking that has far-reaching implications. The Quilt-work approach can be used to clarify other fields of PNIVIF, such as those relating to hybrid conflict or cyber operations. The same approach may also be analogically applied to revitalize other international legal concepts which stand uneasily between certainty and flexibility, such as those relating to sovereign equality and State responsibility.

This Article defines disinformation campaigns as deliberate State efforts to spread false information with the intent to deceive. Disinformation ought to be distinguished from misinformation, which is non-deliberate.<sup>22</sup> The word “campaign” also points to their prolonged and concerted nature. While I will primarily draw from examples of the 2016 US presidential election, it serves to note that these were not isolated incidents. Electoral interpositions, mostly covert, are supposedly not uncommon tools of US foreign policy either.<sup>23</sup> Notably, some have accused the Central Intelligence Agency (“CIA”) of using “fake news” to foment the violent overthrow of the Allende government in Chile.<sup>24</sup> Rather, it is the apparent effectiveness, sophistication, and cutting-edge nature of the 2016 disinformation campaign that leads this Article to rely on it as illustration.

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18. See *supra* text accompanying notes 12–15.

19. See, e.g., JENS DAVID OHLIN, *ELECTION INTERFERENCE: INTERNATIONAL LAW AND THE FUTURE OF DEMOCRACY* (2020) (approaching electoral interference from the perspective of the self-determination right); William J. Aceves, *Suing Russia: How Americans Can Fight Back against Russian Intervention in American Politics*, 43 *FORDHAM INT'L L.J.* 1 (2019) (relying on the rights of political participation and freedom from racial discrimination).

20. See, e.g., Christina Lam, *A Slap on the Wrist: Combatting Russia's Cyber Attack on the 2016 U.S. Presidential Election*, 59 *B.C. L. REV.* 2167 (2018); Logan Hamilton, *Beyond Ballot-Stuffing: Current Gaps in International Law regarding Foreign State Hacking to Influence a Foreign Election*, 35 *WIS. INT'L L.J.* 179 (2017); Ashley C. Nicolas, *Taming the Trolls: The Need for an International Legal Framework to Regulate State Use of Disinformation on Social Media*, 107 *GEO. L.J. ONLINE* 36 (2018).

21. See, e.g., Joshua Geltzer, *A Checklist for Protecting Our Elections from Foreign Meddling*, *JUST SECURITY* (Jan. 12, 2018), <https://www.justsecurity.org/50948/checklist-protecting-elections-foreign-meddling/>; Andrew Moshirnia, *Countering Pernicious Images: Memetic Visual Propaganda and the 2018 Elections*, 50 *SETON HALL L. REV.* 79 (2019); Eric Manpearl, *Securing U.S. Election Systems: Designating U.S. Election Systems as Critical Infrastructure and Instituting Election Security Reforms*, 24 *B.U. J. SCI. & TECH. L.* 168 (2018).

22. Dean Jackson, *Issue Brief: Distinguishing Disinformation from Propaganda, Misinformation, and “Fake News”*, *NAT'L ENDOWMENT FOR DEMOCRACY* (Oct. 17, 2017), <https://www.ned.org/issue-brief-distinguishing-disinformation-from-propaganda-misinformation-and-fake-news/>.

23. Ishaan Tharoor, *The Long History of the U.S. Interfering with Elections Elsewhere*, *WASH. POST* (Oct. 13, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/10/13/the-long-history-of-the-u-s-interfering-with-elections-elsewhere/>.

24. See, e.g., Ariel Dorfman, *Now, America, You Know How Chileans Felt*, *N.Y. TIMES* (Dec. 16, 2016), <https://nyti.ms/2hQR7Ks>.

Part I of this Article elaborates on the coercion definition under *Nicaragua* and explains why it is ill-fit for electoral disinformation campaigns. Part II excavates the textual history of PNIVIF to demonstrate that coercion is an under-inclusive definition of *lex lata*. Part III makes a case for the Quilt-work approach as a method to progressively clarify PNIVIF.

## I.

RECOUNTING *NICARAGUA*

The cardinal duty<sup>25</sup> of States to not intervene or interfere in each other's sovereign affairs is a rule of customary international law.<sup>26</sup> At its heart, the principle aspires to protect the independence of States from illegitimate forms of interpositions.<sup>27</sup> Simultaneously, international law recognizes that external influence is unavoidable in an increasingly interdependent world, and therefore inextricable from foreign policy.<sup>28</sup> Finding an “acceptable balance” between idealism and reality was, up until *Nicaragua*, a fixation for international lawyers.<sup>29</sup>

This proved to be an elusive task.<sup>30</sup> Few captured the miasma of collective exasperation as evocatively as Percy Winfield:

The subject of intervention is one of the vaguest branches of international law. We are told that intervention is a right; that it is a crime; that it is the rule; that it is the exception; that it is never permissible at all. A reader, after perusing Phillimore's chapter upon intervention, might close the book with the impression that intervention may be anything from a speech of Lord Palmerston's in the House of Commons to the partition of Poland.<sup>31</sup>

*Nicaragua* was indubitably an important judgment of its time. It reaffirmed the political independence of a Developing World State facing down a global

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25. *Nicar. v. U.S.*, 1986 I.C.J. at 192, 199 (separate opinion by Sette-Camara, J.). Some authorities have gone further to characterize the principle as a *jus cogens* norm. See, e.g., ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* 147–48 (1986).

26. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 202.

27. 1 EMER DE VATEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE* § 54 (1758).

28. See Wolfgang Friedmann, *Intervention and the Developing Countries*, 10 VA. J. INT'L L. 205, 207 (1969); Rep. of the Special Comm. on Principles of Int'l L. concerning Friendly Rels. and Co-operation among States, ¶¶ 205–207, U.N. Doc. A/5746 (Nov. 16, 1964) [hereinafter 1964 SPECIAL COMMITTEE REPORT]. The Third World Approaches to International Law (TWAAIL) perspective is naturally wary of interpositions and perceive them as hegemonic exercises. See, e.g., Henry J. Richardson III, *Critical Perspectives on Intervention*, 29 MD. J. INT'L L. 12, 18 (2014). It suffices to note that all States, including states in the Third World, attempt to influence and interpose on other States.

29. Rosalyn Higgins, *Intervention and International Law*, in *INTERVENTION IN WORLD POLITICS* 29, 273 (Hedley Bull ed., 1984).

30. See, e.g., HENRY BONFILS, *MANUEL DE DROIT INTERNATIONAL PUBLIC* 156 (4th ed. 1905); THOMAS J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW* 125 (University of Michigan Library, 5th ed. 1913); WOLFGANG FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* 267 (University Presses of California, Columbia and Princeton eds., 1964).

31. P. H. Winfield, *The History of Intervention in International Law*, 3 BRIT. Y.B. INT'L L. 130, 130 (1922-1923).

superpower. It implicitly confirmed that non-forcible interventions, such as economic or political interpositions, can be unlawful.<sup>32</sup> Above all, the Court rescued a fundamental tenet of international law from the nadir of nebulosity by defining intervention as coercion.

This Part elaborates on the content of the test of coercion. The line drawn by the Court nonetheless falls short of capturing emerging methods of damaging foreign interpositions, not least disinformation campaigns in elections.

#### A. *Defining Intervention as Coercion*

According to *Nicaragua*, coercion “forms the very essence of” prohibited intervention.<sup>33</sup> “Coercion,” as an unqualified word, is nonetheless imprecise. What kind of behavior amounts to coercion? Who is being coerced?

First, coercion always bears on a State’s choices. Only acts that compel the target State to make choices it otherwise would not freely make are coercive.<sup>34</sup> In *Nicaragua*, the Court found that the United States provided material support and assistance to the *Contras*, a rebel group waging violent insurgency against the ruling socialist government.<sup>35</sup> In doing so, the United States sought to compel changes in Nicaraguan governmental policy, which constituted coercion.<sup>36</sup> The Court’s focus on choice closely follows the early twentieth century writings of eminent jurists.<sup>37</sup> According to Thomas Lawrence, intervention “endeavors to compel [a State] to do something which, if left to itself, it would not do.”<sup>38</sup> Lassa Oppenheim more forcefully declared that intervention is “always dictatorial interference, not interference pure and simple.”<sup>39</sup>

Second, intervention must bear on sovereign prerogatives.<sup>40</sup> Such prerogatives include the *domaine réservé*, or a State’s choice of political, economic, or social system.<sup>41</sup> Naturally, these are fluid concepts that metamorphosize as sentiments about the role of the State changes over time.<sup>42</sup>

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32. *See* *Nicar. v. U.S.*, 1986 I.C.J. ¶ 205.

33. *Id.*

34. *Id.*; *see also* Maziar Jamnejad & Michael Wood, *The Principle of Non-Intervention*, 22 LEIDEN J. INT’L L. 345, 348 (2009); Marcelo Kohen, *The Principle of Non-Intervention 25 Years after the Nicaragua Judgment*, 25 LEIDEN J. INT’L L. 157, 161 (2012).

35. *Nicar.*, 1986 I.C.J. ¶ 240.

36. *Id.* at ¶ 242.

37. *See, e.g.*, ELLERY STOWELL, INTERVENTION IN INTERNATIONAL LAW 317–318 (John Byrne & Co. ed., 1921); WILLIAM E. HALL, INTERNATIONAL LAW § 10 (7th ed. 1917).

38. LAWRENCE, *supra* note 30, at 119.

39. I LASSA OPPENHEIM, INTERNATIONAL LAW: A TREATISE 222 (1912).

40. *Nicar.*, 1986 I.C.J. ¶ 205.

41. *Id.*

42. Katja S. Ziegler, *Domaine Réservé*, OXFORD PUB. INT’L L. ¶ 1, <https://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1398> (last updated Apr. 2013).

Third, *Nicaragua* further held that the interposition must be carried out “with a view” to coercion of another State.<sup>43</sup> Intent is therefore another indispensable element.<sup>44</sup> The element of intent prevents the intervention principle from being spread too thinly. Because States are always adjusting their policies in response to the conduct of others, the element of intent ensures that no State can claim coercion simply because it feels compelled to react to another State going about its own business.

Fourth, coercion, on its plain meaning, only contemplates interpositions of sufficient magnitude. Influence which “could reasonably be resisted” is not coercive.<sup>45</sup> In *Nicaragua*, the Court had little difficulty concluding material support for the *Contras*’ violent insurgency constituted a clear breach of the non-intervention principle. However, it was unable to say the same of economic actions Nicaragua had complained of, including the United States’ trade embargo and cessation of economic aid.<sup>46</sup> Presumably, the Court bore doubts about the gravity of the United States’ economic actions.

For the majority of experts who contributed to the Tallinn Manual 2.0,<sup>47</sup> coercion would exclude merely persuasive interpositions, such as “criticism, public diplomacy, propaganda, retribution, mere maliciousness, and the like.” The dividing line between coercion and persuasion appears to be that coercion introduces an external factor, such as an express threat, which weighs against the target’s existing preferences.<sup>48</sup> By contrast, persuasion operates by convincing the target to reassess the validity of those preferences. It follows that no coercion occurs if the target State comes to its own decisions, even if it was misled or talked into them.<sup>49</sup>

Fifth, coercion’s bearing on choices has led it to be described as a compulsion of the target State’s “sovereign will.” An often-overlooked question is who, exactly, represents the metaphorical “sovereign will?”<sup>50</sup> The traditional view resolves the question in favor of government prerogatives.<sup>51</sup> The doctrine of consent is key to this analysis. On this doctrine, no intervention occurs if there is

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43. *Nicar.*, 1986 I.C.J. ¶ 241.

44. TALLINN MANUAL 2.0, *supra* note 3, at 321–322; *cf.* Watts, *supra* note 15, at 249 (offering a different interpretation of Nicaragua’s position on the requirement of intent).

45. Jamnejad & Wood, *supra* note 34, at 348.

46. *Nicar.*, 1986 I.C.J. ¶¶ 123–125, 244–245.

47. The Tallinn Manual 2.0 is an influential document authored by nineteen international law experts which analyses how international law applies to cyberspace. *See* TALLINN MANUAL 2.0, *supra* note 3.

48. *Id.* at 318–319.

49. Ido Kilovaty, *The Elephant in the Room: Coercion*, 113 AM. J. INT’L L. UNBOUND 87, 88 (2019).

50. On this note, it has been pointed out that the “metaphorical abstraction” of the “sovereign will” “tends to confuse rather than assist analysis.” *See* Lori Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence over Domestic Affairs*, 83 AM. J. INT’L L. 1, 5 (1989).

51. Tom Ruys, *Of Arms, Funding and Non-Lethal Assistance – Issues Surrounding Third-State Intervention in the Syrian Civil War*, 13 CHINESE J. INT’L L. 13, 42 (2014).

government consent, since such consent is itself an expression of sovereign will.<sup>52</sup> Contrastingly, military assistance for dissidents, insurgents, and opposition groups is generally illegal.<sup>53</sup> *Nicaragua* hewed to tradition when it held intervention is “allowable at the request of the government,” but not at the request of an opposition faction.<sup>54</sup> The Court does, however, appear to hint at a limited exception to the doctrine of consent when it wrote that it is “not here concerned with the process of decolonization.”<sup>55</sup>

Consequently, coercion, comprehensively composed, is an (1) intentional (2) compulsion of choices that are (3) sovereign in nature. Such compulsion (4) is not merely persuasive, and (5) typically affects the government’s choices.

### B. Electoral Disinformation Campaigns and Nicaragua

“The lie is a condition of life.”<sup>56</sup> Throughout history, humans have often weaponized deception. In his quest for empire, Genghis Khan dispatched spies, disguised as merchants, to intimidate cities by exaggerating the ferocity of the Mongolian army.<sup>57</sup> During the Cold War, planting false information in foreign newspapers appeared to be a go-to for world superpowers.<sup>58</sup> Military deception has been, and continues to be, commonplace in combat.<sup>59</sup>

Operationally speaking, State-led campaigns to spread disinformation are rarely *ad hoc*, but usually prolonged and concerted. The alleged interposition in the 2016 US presidential election is no exception. Extensive intelligence collection on US think tanks, lobbying groups, and candidates’ campaigns allegedly laid the groundwork for this campaign.<sup>60</sup> Demographic preferences, pressure points, and incendiary issues were identified therefrom. To lend believability to falsehoods,<sup>61</sup> alleged Russian trolls falsified and stole US

52. TALLINN MANUAL 2.0, *supra* note 3, at 323.

53. Tom J. Farer, *Harnessing Rogue Elephants: A Short Discourse on Foreign Intervention in Civil Strife*, 82 HARV. L. REV. 511, 511 (1969); Philip Jessup, *The Spanish Rebellion and International Law*, 15 FOREIGN AFF. 260, 268–269 (Jan. 1937).

54. *Nicar. v. U.S.*, 1986 I.C.J. ¶ 246.

55. *Id.* at ¶ 206.

56. This quote is typically attributed to Friedrich Nietzsche.

57. Terry Beckenbaugh, *Genghis Khan*, in GREAT COMMANDERS 35, 52 (Christopher R. Gabel & James H. Willbanks eds., 2013).

58. MARK CONNELLY ET AL., PROPAGANDA AND CONFLICT: WAR, MEDIA AND SHAPING THE TWENTIETH CENTURY 185–189 (2019).

59. See Christopher M. Rein, *Introduction: Multi-Domain Deception*, in WEAVING THE TANGLED WEB: MILITARY DECEPTION IN LARGE-SCALE COMBAT OPERATIONS 1, 1 (Christopher M. Rein ed., 2018);

Sean Watts, *Low-Intensity Cyber Operations and the Principle of Non-Intervention*, in CYBER WAR: LAW AND ETHICS FOR VIRTUAL CONFLICTS 249, 257 (Jens David Ohlin et al. eds., 2015).

60. OFF. OF THE DIR. OF NAT’L INTEL., ICA 2017-01D, ASSESSING RUSSIAN ACTIVITIES AND INTENTIONS IN RECENT US ELECTIONS 2 (Jan. 6, 2017) [hereinafter ODNI REPORT].

61. Criminal Complaint at 4, *U.S. v. Khusyaynova* (E.D. Va. Sept. 28, 2018) (No. 1:18-MJ-464).

identities.<sup>62</sup> Bots were used to repost disinformation and distort social media algorithms to win “eyeballs.”<sup>63</sup> The content of the disinformation was also customized to their target audience. Memes, for example, were mainly directed at younger internet users.<sup>64</sup> Additionally, the operation also allegedly fed certain demographic groups incorrect voting procedures to suppress their votes.<sup>65</sup> Whereas most of the disinformation geared toward US audiences was propagated covertly, there was also an overt side to the campaign. The report of the US Director of National Intelligence (“ODNI Report”), for instance, accused Russian State-run media of unabashedly promoting false messages concerning the US elections to Russian and international audiences.<sup>66</sup>

Disinformation campaigns are typically employed in coordination with other “hybrid”<sup>67</sup> instruments of State power—prominently cyber-ops and other IO capabilities. Russian agents stand accused of engaging in cyber-hacks, gaining electronic access to voting machines, and resorting to doxing.<sup>68</sup> As is characteristic of the “hybrid” playbook, these instruments could be used in synchronization. After John Podesta, Hillary Clinton’s campaign manager, had his personal emails hacked and published on WikiLeaks, their contents were misrepresented to falsely insinuate that Clinton had attended a satanic dinner party.<sup>69</sup> Doxing was thus used to lend credence to disinformation tactics. The extent of coordination and scale distinguishes State-led disinformation campaigns from mere misinformation or fake news.

Elections are sensitive times for States. High passions and opportunities for the realignment of political power render States relatively vulnerable to IOs.<sup>70</sup> Not

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62. Indictment at ¶¶ 4, 6, 35–36, 41, U.S. v. Internet Rsch. Agency L.L.C. (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF).

63. Gabe O’Connor & Avie Schneider, *How Russian Twitter Bots Pumped Out Fake News During The 2016 Election*, NAT’L PUB. RADIO (Apr. 3, 2017), <https://www.npr.org/sections/alltechconsidered/2017/04/03/522503844/how-russian-twitter-bots-pumped-out-fake-news-during-the-2016-election>.

64. Nicholas Thompson & Issie Lapowsky, *How Russian Trolls Used Meme Warfare to Divide America*, WIRED (Dec. 17, 2018), <https://www.wired.com/story/russia-ira-propaganda-senate-report/>.

65. *Id.*

66. ODNI REPORT, *supra* note 60, at iii.

67. Hybrid tactics refer to a State’s coordination of multiple instruments of power, kinetic and non-kinetic, military and non-military, to achieve operational goals. Such instruments include economic sanctions, cyber-ops, IOs, and even lawfare. Whereas conventional military operations permit vertical escalation and de-escalation, hybrid tactics allow for the horizontal synchronization of different instruments of power.

68. Doxing is the exfiltration and leaking of sensitive information.

69. Ben Popken, *Russian Trolls Pushed Graphic, Racist Tweets to American Voters*, NBC NEWS (Nov. 30, 2017), <https://www.nbcnews.com/tech/social-media/russian-trolls-pushed-graphic-racist-tweets-american-voters-n823001>.

70. MEGAN WARD ET AL., FORMATIVE BATTLES: COLD WAR DISINFORMATION CAMPAIGNS AND MITIGATION STRATEGIES 2–3 (2019),

[https://www.wilsoncenter.org/sites/default/files/media/documents/publication/cold\\_war\\_disinformation\\_campaign.pdf](https://www.wilsoncenter.org/sites/default/files/media/documents/publication/cold_war_disinformation_campaign.pdf).

all methods of IOs are reprovable. What differentiates disinformation campaigns, and renders them especially dangerous, is their fraudulent character. Disinformation tugs at intuitive biases,<sup>71</sup> such as over-confidence in our own beliefs and our desire for validation.<sup>72</sup> In a startling statistic, 24,483 participants in 206 experiments conducted over four decades were only able to discern lies from truths 54 percent of the time—a statistic that is only marginally better than the toss of a coin.<sup>73</sup>

Modern developments have increased the effectiveness of disinformation campaigns exponentially. Worryingly, social media has emerged as a material source of unverified news,<sup>74</sup> possessing the capacity to spread virulently through cyberspace.<sup>75</sup> Social media algorithms, which encourage spiraling recirculation in virtual echo-chambers,<sup>76</sup> facilitate the proliferation of disinformation.<sup>77</sup> Technologies, such as Deepfake,<sup>78</sup> make falsehoods harder to spot.

Disinformation campaigns bear certain unique characteristics when utilized against elections. Unlike other IOs aimed at duping government actors, electoral disinformation targets voters. It is conventionally assumed that electoral disinformation campaigns seek to swing votes in favor of the perpetrator's

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71. Herbert Lin & Jackie Kerr, *On Cyber-Enabled Information/Influence Warfare and Manipulation* 8-9 (Stan. U. Ctr. for Int'l Security & Cooperation, Working Paper, 2017), <https://cisac.fsi.stanford.edu/publication/cyber-enabled-informationinfluence-warfare-and-manipulation>.

72. See generally Dale Griffin & Amos Tversky, *The Weighing of Evidence and the Determinants of Confidence*, in *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* 230 (Thomas Gilovich et al. eds., 2002); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); DOUGLAS RUSHKOFF ET AL., *THE BIOLOGY OF DISINFORMATION: MEMES, MEDIA VIRUSES, AND CULTURAL INOCULATION* (2018), <https://www.iftf.org/partner-with-iftf/research-labs/digital-intelligence-lab/research-archive/biology-of-disinformation/>; Bence Bago et al., *Fake News, Fast and Slow: Deliberation Reduces Belief in False (but Not True) News Headlines*, 149 J. EXPERIMENTAL PSYCH. 1608 (2020); Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303 (2010). See also Cass Sunstein et al., *How People Update Beliefs about Climate Change: Good News and Bad News*, 102 CORNELL L. REV. 1431 (2017); Edward Glaeser & Cass Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 6 (2014).

73. Charles Bond Jr. & Bella DePaulo, *Accuracy of Deception Judgments*, 10 PERSONALITY & SOC. PSYCH. REV. 214, 230 (2006).

74. Elisha Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RSCH. CTR. (Sep. 7, 2017), <https://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

75. DAVID PATRIKARAKOS, *WAR IN 140 CHARACTERS: HOW SOCIAL MEDIA IS RESHAPING CONFLICT IN THE TWENTY-FIRST CENTURY* 133 (2017).

76. Chris Meserole, *How Misinformation Spreads on Social Media—and What to Do about It*, BROOKINGS (May 9, 2018), <https://www.brookings.edu/blog/order-from-chaos/2018/05/09/how-misinformation-spreads-on-social-media-and-what-to-do-about-it/>.

77. See generally Michela del Vicario et al., *Echo Chambers: Emotional Contagion and Group Polarization on Facebook*, 6 SCI. REP. 37825 (2016); Amy Mitchell et al., *Political Polarization & Media Habits*, PEW RSCH. CTR. (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/>.

78. Deepfake refers to the use of machine learning to fabricate convincing images.

preferred candidate. This is not always so.<sup>79</sup> No doubt, one objective of the supposed 2016 disinformation campaign was to support Donald Trump's candidacy and harm Clinton's electability.<sup>80</sup> Yet, it remains inconclusive as to whether these efforts played a significant role in skewing the electoral college. The campaign's cumulative nature can partly explain this ambivalence. Because disinformation efforts operated as "background noise" and did not manifest in an obvious discrete event, it is difficult to assess through polling how Americans responded to them.<sup>81</sup> Some have also pointed out that the disinformation campaign probably did more to confirm existing biases than to change minds in a highly partisan political milieu.<sup>82</sup> By contrast, there were other objectives the disinformation campaign strived to achieve, and arguably did.

As the ODNI Report concludes, the disinformation campaign undermined the legitimacy of US democratic processes and discredited the image of a liberal State on the international plane.<sup>83</sup> The Russian-based IRA appears to have conceived of its "translator project" as early as April 2014, even before Trump had announced his candidacy or emerged as a viable competitor for the Oval Office.<sup>84</sup> At that point, the IRA's original goal was reportedly to "spread distrust towards the candidates and the political system in general".<sup>85</sup> To this end, disinformation efforts did not myopically focus on promoting Trump, but were also directed towards sowing division between both sides of the left-right spectrum.<sup>86</sup> Tellingly, perpetrators of the disinformation campaign sought to instigate a series of simultaneous protests and counter-protests on provocative issues, such as those pitting Islamophobic groups against Islam-tolerant groups.<sup>87</sup> By undermining the legitimacy of democratic elections, perpetrating States could also use democratic regimes as foils to buttress perceptions of their own systems of governance.<sup>88</sup>

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79. See Katie Starbird et al., *Disinformation as Collaborative Work: Surfacing the Participatory Nature of Strategic Information Operations*, 109 DISINFORMATION 127 (2019).

80. ODNI REPORT, *supra* note 60, at ii, 1.

81. Nate Silver, *How Much Did Russian Interference Affect The 2016 Election?*, FIVETHIRTYEIGHT (Feb. 16, 2018), <https://fivethirtyeight.com/features/how-much-did-russian-interference-affect-the-2016-election/>.

82. Brendan Nyhan, *Fake News and Bots May Be Worrisome, but Their Political Power Is Overblown*, N.Y. TIMES (Feb. 13, 2018), <https://nyti.ms/2BUTshD>. Cf. Sinan Aral & Dean Eckles, *Protecting Elections from Social Media Manipulation*, 365 SCI. 858 (2019).

83. ODNI REPORT, *supra* note 60, at ii, 1.

84. Indictment at 6, U.S. v. Internet Rsch. Agency L.L.C. (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF).

85. *Id.* at ¶ 10(e).

86. Criminal Complaint at ¶¶ 37–71, U.S. v. Khusyaynova, (E.D. Va. Sept. 28, 2018) (No. 1:18-MJ-464); see generally HOWARD ET AL., *supra* note 6.

87. Indictment at ¶ 57, U.S. v. Internet Rsch. Agency L.L.C. (D.D.C. Feb. 16, 2018) (No. 1:18-cr-00032-DLF); Natasha Bertrand, *Russia Organized 2 Sides of a Texas Protest and Encouraged 'Both Sides to Battle in the Streets'*, BUSINESS INSIDER (Nov. 1, 2017), <https://www.businessinsider.com/russia-trolls-senate-intelligence-committee-hearing-2017-11>.

88. ODNI REPORT, *supra* note 60, at 7.

On this note, there is a clear instance of electoral disinformation which strongly suggests assaulting the legitimacy of democratic processes can be the broader goal for perpetrators. One need not look further than the messaging of RT America<sup>89</sup> in the 2012 US presidential elections, which has received less attention. There is little evidence that the disinformation tactics used there attempted to prop up either the Democratic candidate, Barack Obama, or the Republican candidate, Mitt Romney. Instead, it seems amply established that RT America endeavored to impair the legitimacy of the electoral process by running false reports alleging election fraud and voting machine vulnerabilities.<sup>90</sup> Indeed, it is the damage done to the legitimacy of the electoral process that appears to be most threatening.<sup>91</sup> Whichever candidate emerged victorious, their mandate could have faced serious misgivings in the aftermath of a fractious and “rigged” electoral process.<sup>92</sup>

Cybersecurity researchers Herbert Lin and Jaclyn Kerr have pointed out that some disinformation campaigns are alternatively exercises in political distraction, or “chaos-producing” operations.<sup>93</sup> Instead of seeking to influence the audience’s behavior, these operations distract the target State’s policy makers so perpetrators can gain space to pursue their own foreign policy goals.<sup>94</sup> Notably, not all disinformation campaigns seek to promote a particular message or idea. Sometimes, the tactical goal is to flood the cyber battleground with a “multitude of contradictory messages,” leaving the audience in a “befuddled stasis,” unable to choose what to believe.<sup>95</sup> A real-life example of disinformation as distraction is the Chinese government’s alleged practice of inundating domestic social media with “50¢ party” posts, masquerading as the views of ordinary people.<sup>96</sup> In a revealing study of 43,000 “50¢ party” posts, researchers demonstrated that those posts were primarily devoted to cheerleading the government, and engaged in almost no counter-arguments with domestic criticism. In other words, “50¢ party”

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89. RT America is a television network of Russia Today.

90. ODNI REPORT, *supra* note 60, at 6.

91. Herbert Lin, *On the Organization of the U.S. Government for Responding to Adversarial Information Warfare and Influence Operations*, 15 *I/S: A J. L. & POL’Y FOR THE INFO. SOC’Y* 1, 39 (2019).

92. Prior to election day, late October polling already indicated more than half of Republicans believed Clinton could only win because of illegal voting. Even if she won, her mandate would have been doubted. The same could be said of Trump. See Maurice Tamman, *Half of Republicans Would Reject ‘Rigged’ Election Result if Hillary Clinton Wins*, REUTERS (Oct. 21, 2016), <https://www.reuters.com/article/us-usa-election-poll-rigging-idUSKCN12L2O2>.

93. Lin & Kerr, *supra* note 71, at 6, 10.

94. Clint Watts, *Why Russia Wants the U.S. to Believe the Election Was Hacked*, PBS (Oct. 27, 2016), <https://www.pbs.org/wgbh/nova/article/election-cybersecurity/>.

95. Keith Scott, *Dissuasion, Disinformation, Dissonance: Complexity and Autocritique as Tools of Information Warfare*, 14 *J. INFO. WARFARE* 257, 261 (2016).

96. Gary King et al., *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 *AM. POL. SCI. REV.* 484, 484–85, 497 (2017). The “50¢ party” posts are so called because they are rumored to be churned out by Chinese citizens who are paid 0.50RMB per post. The authors of the study conclude that these posts are likely to be the work of government employees.

impersonators partake in a Brobdingnagian exercise to divert attention away from domestic controversies, not refute them.<sup>97</sup>

The very act of mounting a disinformation campaign, then, could help an interposing State achieve its legitimacy-undermining goals without having to bank on the victory of a preferred candidate. As one commentator writes, altering the results of an election is not easy, but “merely raising doubts about it would give [the interposing State] a strategic victory.”<sup>98</sup>

It is these characteristics of electoral disinformation campaigns which make them ill-fitted for the coercion framework. No doubt, electoral processes, being inextricable from the political systems of democratic States, fall squarely within the *domaine réservé*.<sup>99</sup> It is the other elements of coercion which invite apprehension.

At the outset, disinformation campaigns operate by affecting the choices of voters, not the government. Problematically, only the latter is assumed to represent the “sovereign will” under *Nicaragua*.<sup>100</sup> This challenge is compounded when an incumbent party in government acquiesces to foreign disinformation campaigns. The lead up to the 2018 parliamentary elections in Hungary is instructive. According to Polygraph.info,<sup>101</sup> during those elections, public broadcasters reproduced false Russian narratives in support of the government’s Eurosceptic, antimigrant posture.<sup>102</sup> The government was also accused of turning a blind eye to a hundred Russia-linked disinformation sites operating locally.<sup>103</sup> It is difficult to see how a government can be described as “coerced” if the foreign disinformation campaign buttresses its existing policy choices.

Perhaps one could argue that disinformation campaigns, by distorting votes, indirectly bear on the “sovereign will” of the future government.<sup>104</sup> Even so, disinformation campaigns are not coercive, but merely persuasive. They do not factually compel the target to voluntarily abandon preferred choices, and only

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97. *Id.* at 485.

98. Watts, *supra* note 94.

99. Michael N. Schmitt, *Virtual Disenfranchisement: Cyber Election Meddling in the Grey Zones of International Law*, 19 CHI. J. INTL L. 30, 49 (2018); TALLINN MANUAL 2.0, *supra* note 3, at 315.

100. Jens David Ohlin, *Did Russian Cyber Interference in the 2016 Election Violate International Law*, 95 TEX. L. REV. 1579, 1592 (2017).

101. Polygraph.info is a US funded fact-checking website produced by Voice of America and Radio Free Europe/Radio Liberty.

102. See *Disinfo News: Media Consolidation and ‘Fake News’ Plague Hungary in Orban Era*, POLGYGRAPH.INFO (Apr. 26, 2018), <https://www.polygraph.info/a/fake-news-in-hungary/29194591.html>.

103. LÓRÁNT GYŐRI ET AL., *Does Russia Interfere in Czech, Austrian and Hungarian Elections?*, POL. CAPITAL 12–13 (Oct. 12, 2017), [https://politicalcapital.hu/news.php?article\\_read=1&article\\_id=2199](https://politicalcapital.hu/news.php?article_read=1&article_id=2199).

104. See Manuel Rodriguez, *Disinformation Operations Aimed at (Democratic) Elections in the Context of Public International Law: The Conduct of the Internet Research Agency During the 2016 US Presidential Election*, 47 INT’L J. L. INFO. 149, 169–70 (2019).

mislead the target to believe those choices are no longer preferable.<sup>105</sup> The Tallinn Manual 2.0 reaches a similar conclusion on the analogous situation of propaganda,<sup>106</sup> which can be defined as coordinated communication, often relying on falsehoods and aiming to influence the behavior of peoples.<sup>107</sup>

Moreover, electoral disinformation campaigns do not always bear upon the target State's choices. Disinformation campaigns that swing election results arguably do so by predetermining the future government and its expected policies.<sup>108</sup> Coercion would, however, be inapplicable if the object of the campaign is to undermine the legitimacy of elections, despite that being a serious affront on a democratic State's fundamental institutions and processes. More broadly, disinformation can and has been used to propagate perceptions of electoral subterfuge, aggravate animosity along cultural and ideological lines, disenfranchise citizens from political participation, contribute to voter suppression, and distract policymakers; all to the erosion of democratic governance. Yet, such conduct, which "seek[s] no action on the part of the target State at all,"<sup>109</sup> is not coercive under *Nicaragua*.

Coercion, as envisioned by the *Nicaragua* Court, thus presents considerable hurdles for finding a prohibition on electoral disinformation campaigns. Curiously, the textual history demonstrates that States never defined intervention as coercion to begin with.

## II.

### DECONSTRUCTING NON-INTERVENTION AND NON-INTERFERENCE: A TEXTUAL HISTORY

Since *Nicaragua*, the coercion definition has been taken for granted as settled law. This definition has faced increasing normative criticisms from international lawyers, ardently arguing that coercion fails to reckon with twenty-first century threats. What has not been attempted is an empirical analysis of whether, contrary to *Nicaragua*, the *lex lata* already says something about non-coercive forms of intervention and interference. A careful examination of the textual history suggests *Nicaragua*'s statement on the principle is incomplete.

This Article's textual methodology—relying heavily on UNGA Resolutions, bilateral and regional treaties, and official statements—mirrors the Court's in

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105. Hollis, *supra* note 3, at 41.

106. TALLINN MANUAL 2.0, *supra* note 3, at 318–19.

107. See Eric De Brabandere, *Propaganda*, OXFORD PUB. INT'L L. at ¶ 1, <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e978> (last updated Aug. 2019).

108. See Nicholas Tsagourias, *Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace*, EJIL:TALK! (Aug. 26, 2019), <https://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/>.

109. TALLINN MANUAL 2.0, *supra* note 3, at 319.

*Nicaragua*.<sup>110</sup> The underlying supposition is that words are equally, if not more, important than deeds as evidence of customary international law (“CIL”). Over the past decades, States, tribunals, and legal experts have gradually accorded more primacy to text-based materials.<sup>111</sup> The ICJ is quick to treat some non-binding UNGA Resolutions as highly persuasive evidence of CIL,<sup>112</sup> and multilateral instruments play a leading role in shaping contemporary international law.<sup>113</sup> This reformation has occurred to the chagrin of traditionalists, who insist that actions speak louder than words. Notably, Anthony D’Amato has trenchantly condemned *Nicaragua* for “thrashing” CIL.<sup>114</sup>

Critics of contemporary approaches to CIL sometimes make the case that text-based sources are often politically motivated, rather than reflective of “good faith efforts” to develop international law.<sup>115</sup> It is asserted that States often vote for UNGA Resolutions to embellish their image or for reasons of peer pressure.<sup>116</sup> These attempts to color the legal force of a rule by reference to a State’s motives are largely misguided. While the motives of States and their actors are not irrelevant to the study of international law, they do not form a basis for challenging the empirical validity of international law’s existing rules.<sup>117</sup> Indeed, whereas much of international law’s development has been commandeered by “national interests and political pressures,” this “obvious fact” has never precluded “States from regarding certain decisions as having the ‘force of law.’”<sup>118</sup> At any rate, it is unclear how questioning the motives of States resolves the words versus acts debate, since States also frequently act for political reasons.

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110. *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 186, 188.

111. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT’L L. 757, 758–59 (2001).

112. David P. Fidler, *Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law*, 39 GER. Y.B. INT’L L. 198, 203 (1996). *See, e.g.*, Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 95, ¶¶ 142, 150–160 (Feb. 25); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. Rep. 168, ¶¶ 146, 162, 244 (Dec. 19); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, ¶¶ 70–73 (July 8) [hereinafter *Nuclear Weapons Advisory Opinion*].

113. Jonathan Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 543 (1993); Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 89–90 (1988).

114. Anthony D’Amato, *Thrashing Customary International Law*, 81 AM. J. INT’L L. 101, 102–103 (1987).

115. JOSÉ ALVAREZ, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 162 (2006).

116. Michael P. Scharf, *Seizing the Grotian Moment: Accelerated Formation of Customary International Law in Times of Fundamental Change*, 43 CORNELL INT’L L.J. 439, 447 (2010).

117. Rosalyn Higgins, *The Development of International Law by the Political Organs of the United Nations*, 59 AM. SOC’Y INT’L L. PROC. 116, 117 (1965).

118. Oscar Schachter, *Book Review*, 59 AM. J. INT’L L. 168, 168 (1965) (reviewing ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963)). *See also* OBED Y. ASAMOAH, *THE LEGAL SIGNIFICANCE OF THE DECLARATIONS OF THE GENERAL ASSEMBLY OF THE UNITED NATIONS* 10 (1966).

Alternatively, it is rebutted that there is an inherent contradiction in ascribing legal effect to non-binding texts, particularly UNGA Resolutions.<sup>119</sup> As with the earlier argument, this account passes over the debate, since physical acts are not binding either. In any case, the contradiction is resolved by the straightforward explanation that UNGA Resolutions do not make *binding* CIL but are *evidence* thereto. Even though the UNGA has no mandate to create binding law, it has always had a role in “encouraging the progressive development of international law and its codification” pursuant to the UN Charter.<sup>120</sup> States themselves acknowledge this, as is made clear in the “widespread approval” of Conclusion 12(2) of the International Law Commission’s 2018 Draft Conclusions on the Identification of Customary International Law.<sup>121</sup> States are keenly sensitive toward how words create or modify legal meaning in UNGA Resolutions.<sup>122</sup> A shortsighted preoccupation with binding-ness is all the more misplaced when one considers that ICJ jurisprudence, which most States treat as having significant legal import, is strictly speaking only binding between disputants.<sup>123</sup>

A more persuasive argument asserts that words, as opposed to physical acts, are poor predictors of how States will actually behave.<sup>124</sup> In marginalizing acts, contemporary approaches foster a compliance gap between text-based international law and actual State behavior. This is said to inspire less confidence in the international legal system.<sup>125</sup> The words versus acts debate, so framed, is reflective of two divergent responses to the fundamental question of what justifies the lawmaking force of customs. Traditionalists would argue that customs are law because they reflect how States are presently behaving. For contemporary scholars, international law is not about *predicting* how States will behave, but creating expectations of how States are *supposed* to behave.

Traditionalist approaches run up against a quandary akin to Hume’s guillotine—just because nearly all States *are* doing something is no justification for why all States *ought* to be doing the same. More problematically, in reducing

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119. H. C. M. Charlesworth, *Customary International Law and the Nicaragua Case*, 11 AUSTL. Y.B. INT’L L. 1, 28 (1984–1987).

120. U.N. Charter Art. 13, ¶ 1(a). *See also* G.A. Res. 174 (II), at 105 (Nov. 17, 1947); Ivan S. Kerno, *International Law and International Organization: Prospects for the Future*, 46 AM. SOC’Y INT’L L. PROC. 12, 13–16 (1952).

121. Conclusion 12(2) provides that resolutions of international organizations may “provide evidence for determining establishing the existence and content of a rule of customary international law.” *See Int’l Law Comm’n, Rep. on the Work of Its Seventieth Session*, U.N. Doc. A/73/10, at 121 (2018). Draft Conclusion 12(2), which was made available to States for comment, was received with widespread approval, with some States even suggesting that the relevance of UNGA resolutions be emphasized. *See* Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Fifth Rep. on Identification of Customary Int’l L.*, ¶¶ 90–92, U.N. Doc. A/CN.4/717 (Mar. 14, 2018).

122. Charney, *supra* note 113, at 548.

123. U.N. Charter art. 94, ¶ 1.

124. ANTHONY D’AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* 89–90 (1971).

125. Charlesworth, *supra* note 119, at 28; Roberts, *supra* note 111, at 769–770.

CIL into what States are already doing rather than treating it as a factor which affects how States behave,<sup>126</sup> traditionalist approaches beg the question of what purpose CIL serves. One possible response here is that CIL ensures States do not betray implied promises or reasonable expectations cultivated through long-standing practice. Yet, this response remains unsatisfactory because it suggests CIL's *raison d'être* is to affirm normative values, such as protecting one's reasonable expectations. Consequently, any examination of what States actually do ought not to be treated as determinative of CIL's content, but merely as one method of identifying what reasonable expectations to protect.

The contemporary approach does not treat CIL as a purely retrospective account of State behavior, but recognizes that it stands uneasily between description and normativity.<sup>127</sup> This places a premium on words, which are capable of conveying clear normative instruction.<sup>128</sup> By contrast, deeds alone often say little about a State's normative impetus.<sup>129</sup> Furthermore, any compliance gap between the normative standard prescribed by text-based CIL and actual State behavior is seen as preferable to a highly descriptive acts-based CIL. If anything, the latter is more likely to give rise to an emaciated *lex*, wherein the concept of compliance is made illusory by the fact that what States are supposed to be doing is already being done.<sup>130</sup> On this note, concerns that the prioritization of texts will culminate in over-idealized international law are probably unfounded. In practice, the usual complaint is that multilateral instruments, such as UNGA Resolutions, typically contain negotiated language that reflects the lowest common denominator.<sup>131</sup> Surely, a focus on words will discourage States from making fanciful proclamations they have zero intention of fulfilling, a prospect which will reinforce perspectives that multilateral processes are farcical.<sup>132</sup>

Other reasons for valuing words abound. First, critical legal scholars and Third World Approaches to International Law (TWAIL) proponents have long

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126. See Michael Byers, *Custom, Power, and the Power of Rules - Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT'L L. 109, 126-127 (1995).

127. Martti Koskenniemi, *The Normative Force of Habit: International Custom and Social Theory*, 1 FIN. Y.B. INT'L L. 77, 83 (1990).

128. See Andrew T. Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 148-49 (2005).

129. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 INDIAN J. INT'L L. 23, 36-37 (1965).

130. Stephen Donaghue, *Normative Habits, Genuine Beliefs and Evolving Law: Nicaragua and the Theory of Customary International Law*, 16 AUSTL. Y.B. INT'L L. 327, 329 (1995).

131. U.N. Secretary-General, *In Larger Freedom: Towards Development, Security and Human Rights for All*, ¶ 159, U.N. Doc. A/59/2005 (Mar. 21, 2005). See also THEODOR MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 43-44 (1991); Oisín Tansey, *Lowest Common Denominator Norm Institutionalization: The Anti-coup Norm at the United Nations*, 24 GLOBAL GOVERNANCE 287 (2018).

132. James D. Fry, *Formation of Customary International Law through Consensus in International Organizations*, 17 AUSTRIAN REV. INT'L & EUR. L. 49, 60 (2012).

recognized the role of power in CIL-making.<sup>133</sup> An acts-based CIL would reinforce existing power disparities, giving preference to States with the relative capacity to take action.<sup>134</sup> Even though power disparities would persist in words-based CIL, it remains that “words” are generally less costly than acts and can be available to even the weakest States.<sup>135</sup> UNGA Resolutions, in particular, are thought to promise relative universality and egalitarianism.<sup>136</sup> Second, and relatedly, a CIL based on States doing as they please is more likely to produce arbitrariness, which is antithetic to the rule of law. Words, by contrast, encourage States to offer reasons for their behavior.<sup>137</sup> Third, if one accepts that States are their own lawmakers, it is unclear why the reality of States relying on non-binding UNGA Resolutions as evidence of law ought to be contradicted.<sup>138</sup> Fourth, in practice, States rarely have the opportunity to act on most questions of international law.<sup>139</sup> An acts-based customary international space law, for instance, would exclude the perspectives of the supermajority of non-spacefaring States, never mind their interests in outer space. Fifth, words are typically less open to interpretation than acts, thus offering stronger evidence of *opinio juris*.<sup>140</sup> A State may appear to abstain from a particular course of action not because it accepts some rule as law, but because it is unable to do so.<sup>141</sup> By contrast, words can serve a clarificatory function, putting States on notice of legal developments in multilateral fora and affording them the opportunity to respond unambiguously and with due deliberation.<sup>142</sup> Sixth, recognizing the value of words resolves one

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133. See generally B. S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT’L L. 1 (2018). See also Georges M. Abi-Saab, *The Newly Independent States and the Rules of International Law: An Outline*, 8 HOWARD L.J. 95, 106 (1962); Byers, *supra* note 126, at 112–135.

134. Patrick Kelly, *The Twilight of Customary International Law*, 40 VA. J. INT’L L. 449, 505 (2000); Chimni, *supra* note 133, at 20–28; Byers, *supra* note 126, at 116–117.

135. Charney, *supra* note 113, at 548. Cf. Chimni, *supra* note 133, at 35–43.

136. EDWARD McWHINNEY, UNITED NATIONS LAW MAKING: CULTURAL AND IDEOLOGICAL RELATIVISM AND INTERNATIONAL LAW MAKING FOR AN ERA OF TRANSITION 214–215 (1984); Roy Lee, *Rule-Making in the United Nations: Opinio Communis*, 27 N.Y.U. J. INT’L L. & POL. 571, 572 (1995).

137. See MARCUS TULLIUS CICERO, ON THE COMMONWEALTH AND ON THE LAWS 113 (James E. G. Zetzel ed. & trans., Cambridge Univ. Press 1999) (c. 54–51 B.C.E.) (“What is there, not just in humans, but in all heaven and earth, more divine than reason?”); J. L. BRIERLY, LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE 66–68 (Humphrey Waldock ed., 6th ed. 1963).

138. See Lee, *supra* note 136, at 575–576; Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 262 (1980).

139. See Ernest A. Young, *Sorting Out the Debate over Customary International Law* 42 VA. J. INT’L L. 365, 386 (2002).

140. ROSALYN HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2 (1963).

141. Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 3 (1974–1975).

142. ANTONIO CASSESE, INTERNATIONAL LAW IN A DIVIDED WORLD 193 (1986); Fry, *supra* note 132, at 73–74; ALVAREZ, *supra* note 115, at 594–595.

of the traditional approach's greatest paradoxes. In traditional CIL, rules may only be changed through a series of long-standing violations.<sup>143</sup> Contemporary CIL allows words to play the catalyzing function.

The growing import of UNGA Resolutions, in particular, has been driven by practical considerations too. Apart from the promise of universality, UNGA Resolutions sidestep laborious treaty processes to permit accelerated international law formation.<sup>144</sup> An acts-based examination is unlikely to be methodologically feasible or cost-effective either. In the context of PNIVIF, a duty that can manifest in a "superabundance of situations,"<sup>145</sup> it is near impossible to catalogue the physical acts of close to two hundred States. The alternative, a case-study approach, poses a risk of selection bias, simply because evidence of States interfering in the affairs of others is more obvious, while evidence of States deciding against interference is likely scant.<sup>146</sup> The negative nature of the duty also invites ambivalence over whether inaction ought to be construed as acquiescence, lack of capability, or plain disinterest.

I do not mean to suggest physical acts are therefore legally irrelevant. Additionally, it cannot be denied that the present practice of referring to textual documents bucks the traditional ideation of "custom" as socially observable and repeated communal behavior.<sup>147</sup> In light of this, there is an ongoing debate (which lies outside the scope of this Article) on whether the textual methodology ought to be treated as an expansion of CIL,<sup>148</sup> or as a new source of international law altogether.<sup>149</sup>

Not all UNGA Resolutions and other text instruments have legal effect. Most probably do not. This calls for a case-specific inquiry that looks at, *inter alia*, the Resolution's content, how States understand its effect, and the context of its adoption.<sup>150</sup> *Sans* widespread consensus, it will be difficult to accept that a UNGA

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143. Akehurst, *supra* note 141, at 8.

144. Jutaro Higashi, *The Role of Resolutions of the United Nations General Assembly in the Formative Process of International Customary Law*, 25 JAPANESE ANN. INT'L L. 11, 16 (1982); Scharf, *supra* note 116, at 450.

145. John Linarelli, *An Examination of the Proposed Crime of Intervention in the Draft Code of Crimes against the Peace and Security of Mankind*, 18 SUFFOLK TRANSNAT'L L. REV. 1, 2 (1995).

146. *Cf.* Kelly, *supra* note 134, at 470.

147. Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 94–96 (1991).

148. *See, e.g.*, Richard B. Lillich, *The Growing Importance of Customary International Human Rights Law*, 25 GA. J. INT'L & COMP. L. 1, 8–10 (1995–1996).

149. *See, e.g.*, Charney, *supra* note 113, at 546–547 (describing the contemporary international lawmaking process as reflective of "general international law" rather than CIL *stricto sensu*).

150. Nuclear Weapons Advisory Opinion, *supra* note 112, ¶¶ 70–73; *Nicar. v. U.S.*, 1986 I.C.J. ¶¶ 106–107. *See also* Michael Wood (Special Rapporteur on the Formation and Evidence of Customary International Law), *Third Rep. on Identification of Customary International Law*, ¶¶ 45–54, U.N. Doc. A/CN.4/682 (Mar. 27, 2015).

Resolution reflects international law.<sup>151</sup> Strong majority support, while potentially hinting at emerging rules of international law, is usually inadequate.<sup>152</sup>

Contrary to *Nicaragua*, this Part illustrates how States never agreed to restrictively define PNIVIF as coercion. In particular, States accept a prohibition on certain types of interpositions that are persuasive, and a majority of States have converged on treating them as illegal interpositions that are destabilizing but not coercive. The question of who represents the “sovereign will” has also been steadily reoriented.

Remarkably, States never succeeded in defining PNIVIF to begin with, even as they sometimes concurred that specific acts constituted violations of the principle, in identification of some of the principle’s manifestations. If anything, PNIVIF has functioned as an empty container, evolving to meet new methods of interposition. Defining intervention as coercion gives short shrift to the principle’s evolutionary character.

#### A. *From Intervention to Interference*

The textual history of PNIVIF brims with dynamism and evolution. Scholars have sometimes described non-intervention and non-interference as a shrinking principle, not least because globalization appears to erode the outer limits of a State’s *domaine réservé*.<sup>153</sup> The historical narrative this Article tells qualifies this description. Instead, increasing interdependence among States over the twentieth century rendered national interests vulnerable to the foibles of international politics. As new and subtler forms of foreign interposition emerged, States were constantly made to assess which legal position, prohibition, or permission was more advantageous.

A retelling of this textual history begins with the oft-neglected distinction between “intervention” and “interference.” Some scholars use these terms interchangeably.<sup>154</sup> A close reading suggests there used to be a meaningful distinction between both terms.

“Interference” first appeared on the text of a UNGA Resolution in 1965. Resolution 2131 reads:

No State has the right to intervene, directly or indirectly, for any reason

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151. HENRY G. SCHERMERS & NIELS M. BLOKKER, INTERNATIONAL LEGAL ORDER § 1226 (6th ed. 2018). *See also* Nuclear Weapons Advisory Opinion, *supra* note 112, ¶ 73.

152. Karl Zemanek, *Majority Rule and Consensus Technique in Law-Making Diplomacy*, in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW 857, 867 (R. St. J. Macdonald & Douglas M. Johnston eds., 1983). *Cf.* Charney, *supra* note 113, at 544 (writing that “unanimous support is not required” for a Resolution to reflect international law).

153. *See, e.g.*, Jyoti Rattan, *Changing Dimensions of Intervention Under International Law: A Critical Analysis*, 9 SAGE OPEN 1, 1 (2019), <https://doi.org/10.1177/2158244019840911>; Hitoshu Nasu, *Revisiting the Principle of Non-Intervention: A Structural Principle of International Law or a Political Obstacle to Regional Security in Asia?*, 3 ASIAN J. INT’L L. 25, 28 (2013).

154. *See, e.g.*, Niki Aloupi, *The Right to Non-intervention and Non-interference*, 4 CAMBRIDGE J. INT’L & COMP. L. 566 (2015).

whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are condemned.<sup>155</sup>

This paragraph is practically identical to the 1948 Charter of the Organization of American States (Bogotá Charter), Article 15.<sup>156</sup> Until 1965, prior UNGA Resolutions had strictly limited themselves to the word “intervention.”<sup>157</sup> The addition of the word “interference” under Resolution 2131 cannot be chalked up to careless drafting.

It is well-established that prior to Resolution 2131, the law of intervention only dealt with forcible types.<sup>158</sup> States much took this for granted. When the word “intervention” appeared in previous UNGA Resolutions, it was used to describe the use of force and armed hostilities.<sup>159</sup> Indeed, eminent jurists of the early twentieth century who wrote on the law of intervention were discussing what we know today to be the doctrine on the use of force.<sup>160</sup>

A limited law of intervention was nonetheless unacceptable to some States. First, these States were wary of *indirect* intervention. The typical example is for a State to provide material support to an insurgent group. Second, non-forcible methods of interposition were also recognized as increasingly menacing. “Interference” would emerge as a terminology that captured the principle’s expansion.

The legal turning point traces to the jurisprudence of the American States.<sup>161</sup> Latin American States have long been disconcerted with what they perceived to be US regional imperialism.<sup>162</sup> In the inter-war years, the Roosevelt Administration eventually renounced all rights of armed intervention under its Good Neighbor Policy.<sup>163</sup> This propitiative climate begot the 1933 Montevideo

155. G.A. Res. 2131 (XX), ¶ 1 (Dec. 21, 1965).

156. Charter of the Organization of American States art. 15, Apr. 30, 1948, 2 U.S.T. 2394, 119 U.N.T.S. 3.

157. *See, e.g.*, G.A. Res. 1236 (XII) (Dec. 14, 1957).

158. Kunig, *supra* note 3, ¶¶ 6, 18.

159. *See* G.A. Res. 380 (V), pmbl. (Nov. 17, 1950) (condemning “[I]ntervention ... by the threat or use of force”); G.A. Res. 498 (V) (Feb. 1, 1951) (describing the People’s Republic of China’s armed intervention in the Korean War); G.A. Res. 1004–1006 (ES-II) (Nov. 4, 1956) (describing Soviet armed intervention in the Hungarian Uprising).

160. Hans Kelsen, Thomas Lawrence, and Ian Brownlie (in one of his first works) all defined intervention as “force, or the threat of force.” *See* HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW 63-64 (1952); LAWRENCE, *supra* note 30, at 124; IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 44 (1963).

161. ANN VAN WYNEN THOMAS & A. J. THOMAS, JR., NON-INTERVENTION: THE LAW AND ITS IMPORT IN THE AMERICAS 4 (1956).

162. James B. Scott, *The Seventh International Conference of American States*, 28 AM. J. INT’L L. 219, 224–226 (1934).

163. L. S. Rowe, *The Significance of the Seventh International Conference of American States*, 28 AM. SOC’Y INT’L L. PROC. 34, 38 (1934).

Convention, which codified a prohibition on “the right to intervene.”<sup>164</sup> As the *travaux préparatoires* indicate, intervention therein was understood to mean “violence.”<sup>165</sup>

In the next two decades, Latin American States would champion a more expansive prohibition, and their persistence paid off in the Bogotá Charter. By proscribing “*not only* armed force *but also* any other form of interference” (emphasis added), the Charter made clear that the previously limited prohibition on forcible intervention was expanded to other non-forcible categories. The US delegation’s own notes in the Ninth Inter-American Conference confirms the distinction between the Montevideo Convention and the Bogotá Charter.<sup>166</sup>

In hindsight, it is perhaps not surprising that the danger of non-forcible and indirect interpositions were first recognized in the Americas. US regional imperialism was unique in that, unlike the empires of Asia or Europe, the United States generally did not seek conquest or colonization.<sup>167</sup> The words of the Bogotá Charter would have also appeared acceptable to the United States in the immediate post-War period. None of the continent’s States were openly communist, and an expanded PNIVIF proscription could serve as justification to stave off foreign Communist activities.<sup>168</sup> This idyll was short-lived, and the Central Intelligence Agency would facilitate a coup to oust the Guatemalan President Jacobo Árbenz on assertions of “Red penetration” just a few years later.<sup>169</sup>

A similar legal development took place in international law at the onset of the Cold War, beginning with individual States decrying foreign “interference” before the UN. The substance of their complaints hints at why “interference” was the word of choice—these States were complaining about non-forcible interpositions. In 1953, Czechoslovakia and the Soviet Union proposed UNGA Resolutions to condemn alleged US financial support for subversive elements in interference of the sovereign affairs of Communist States.<sup>170</sup> Before the Security Council in 1958, Jordan accused the newly-formed United Arab Republic of

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164. Convention on Rights and Duties of States, art. 8, Dec. 26, 1933, U.S.T. 881, 165 L.N.T.S. 19.

165. Seventh International Conference of American States, First, Second and Eight Committees: Minutes and Antecedents, at 113 (Arg.), 118 (El Sal.) (May 31, 1933).

166. William Sanders, *The Organization of American States: Summary of the Conclusions of the Ninth International Conference of American States, Bogota, Colombia, March 30-May 2, 1948*, 26 INT’L CONCILIATION 383, 392 (1948) (writing that the Charter “expanded” the non-intervention principle and “condemn[ed] subtle forms of Communist intervention in which subversive activities are instigated and directed by a foreign government to achieve political and other objectives”).

167. THOMAS & THOMAS, *supra* note 161, at 52.

168. Chia-Yi Liu, *Permissibility of Intervention under Current International Law*, 1 ANNALS CHINESE SOC’Y INT’L L. 46, 48 (1964). *See also* Sanders, *supra* note 166, at 392.

169. WILLIAM BLUM, *KILLING HOPE: U.S. MILITARY AND C.I.A. INTERVENTIONS SINCE WORLD WAR II* 78 (2d ed. 2003).

170. U.N. GAOR, 7th Sess., 1st Comm., 582d mtg. ¶ 6, U.N. Doc. A/C.1/SR.582 (Mar. 23, 1953).

smuggling saboteurs, clandestinely supplying arms, and spreading broadcasts to overthrow King Hussein.<sup>171</sup> For both Congo-Leopoldville and Iraq, even a foreign State's diplomatic attempt to put before the Security Council questions that fell within their jurisdictions were considered "flagrant" interferences.<sup>172</sup>

On the topic of elections, it is remarkable that as early as 1947, there were already signs that States believed election-meddling to be a form of illegitimate interference. In the lead up to UN-supervised elections scheduled for a newly independent Korean Peninsula, the UNGA called upon its Members to "refrain from interfering in the affairs of the Korean people."<sup>173</sup>

At the forefront of the quest to expand PNIVIF stood non-aligned and developing States. The former were deathly wary of being caught in the Cold War cross-fire.<sup>174</sup> It was not beyond either superpower to non-forcibly and indirectly seek to expand their spheres of influence.<sup>175</sup> Non-aligned concerns of aid leverage, proxy armed groups, subversive propaganda, sabotage, and arms smuggling were incessantly raised at UN meetings.<sup>176</sup> Condemning "interference," "openly, or insidiously, or by means of subversion and the various forms of political, economic and military pressure,"<sup>177</sup> was ergo a priority for the Non-Aligned Movement. On the other hand, neo-colonialism, primarily through economic pressures, was the seed of worry for developing States. For the Third World, it was the "manipulation of the international economic environment" by developed States, such as through foreign mining concessions, that embodied illegitimate interference.<sup>178</sup>

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171. Letter from the Permanent Rep. of Jordan to the President of the Security Council, U.N. Doc. S/4053 (July 17, 1958).

172. Letter from the Acting Chargé D'Affaires of the Congo (Leopoldville) to the President of the Security Council, U.N. Doc. S/5254 (Mar. 7, 1963); Letter from the Permanent Representative of Iraq to the President of the Security Council, U.N. Doc. S/5346 (July 10, 1963).

173. G.A. Res. 112 (II) B, ¶ 5 (Nov. 14, 1947).

174. See Edward McWhinney, *Introductory Note, DECLARATION ON THE INADMISSIBILITY OF INTERVENTION IN THE DOMESTIC AFFAIRS OF STATES AND THE PROTECTION OF THEIR INDEPENDENCE AND SOVEREIGNTY*, U.N. AUDIOVISUAL LIBR. INT'L L. (Jun. 2009), [https://legal.un.org/avl/ha/ga\\_2131-xx/ga\\_2131-xx.html](https://legal.un.org/avl/ha/ga_2131-xx/ga_2131-xx.html).

175. See Harry Rositzke, *America's Secret Operations: A Perspective*, 53 FOREIGN AFF. 334, 342 (Jan. 1975); CHRISTOPHER ANDREW & OLEG GORDIEVSKY, *KGB: THE INSIDE STORY OF ITS FOREIGN OPERATIONS FROM LENIN TO GORBACHEV* 341–543 (1990).

176. See, e.g., U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶ 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1400th mtg. ¶¶ 7 (Guinea), 13 (Braz.), 28 (Hond.), U.N. Doc. A/C.1/SR.1400 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. ¶ 17 (Alg.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. ¶ 3 (Jordan), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965).

177. Second Summit Conference of Heads of State or Government of the Non-Aligned Movement, Declaration on the Programme for Peace and International Co-operation, at 15, Doc. NAC-II/HEADS/5 (Oct. 10, 1964).

178. U.N. Secretary-General, Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States, at 9 (Jan.), U.N. Doc.

Efforts to prohibit non-forcible interpositions faced initial resistance, most prominently from the United States. As the Cold War dove into full gear, the United States witnessed its southern neighbors rely on the Bogotá Charter to criticize its clandestine efforts against allegedly leftist governments. One might speculate that the United States was wary not to allow the same to repeat on a global scale. Up until 1964, the United States insisted non-intervention was coterminous with UN Charter Article 2(4).<sup>179</sup>

The United States would make a *volte-face* only a year later. During First Committee negotiations over Resolution 2131, it was the US delegate who proposed prohibiting “indirect” and “covert” interventions.<sup>180</sup> Plainly, the United States realized a widened proscription could be used to condemn Soviet “encouragement of guerilla warfare” and “secret training of armed bands.”<sup>181</sup> A general consensus therefore emerged against support for subversion and terrorist activities, interference in civil strife, and coercion through “economic, political or any other type of measures.”<sup>182</sup>

The word “interference” was thus used to modify the previously limited principle of intervention. At the Plenary Meeting, the Brazilian delegation described Resolution 2131 as a “revision of many concepts and principles to reflect the realities of our times.”<sup>183</sup> Similar statements were made by other delegates.<sup>184</sup>

Resolution 2131’s legal persuasiveness is doubtful, primarily because some States then envisioned it to be mere political statement.<sup>185</sup> Regardless, the substance of its provisions must now be treated as CIL in light of the 1970 Friendly Relations Declaration.<sup>186</sup> The latter Declaration, rehashing Resolution 2131, expressly states that its provisions reflect “basic principles of international law” and warrant “strict observance.”<sup>187</sup> Whereas Resolution 2131 merely condemned intervention and interference, the Declaration describes these acts as

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A/34/192 (Oct. 4, 1979). *See also* U.N. GAOR, 20th Sess., 1st Comm., 1401st mtg. ¶ 35 (Uru.), U.N. Doc. A/C.1/SR.1401 (Dec. 8, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1405th mtg. ¶ 27 (Mong.), U.N. Doc. A/C.1/SR.1405 (Dec. 9, 1965); U.N. GAOR, 25th Sess., 6th Comm., 1183d mtg. ¶ 37 (Ecuador), U.N. Doc. A/C.6/SR.1183 (Sept. 28, 1970).

179. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶¶ 205, 207, 252.

180. U.N. GAOR, 20th Sess., 1st Comm., 1396th mtg. ¶ 8, U.N. Doc. A/C.1/SR.1396 (Dec. 3, 1965).

181. *Id.*

182. G.A. Res. 2131 (XX), *supra* note 155, ¶¶ 1–2.

183. U.N. GAOR, 20th Sess., 1408th plen. mtg. ¶ 116, U.N. Doc. A/PV.1408 (Dec. 21, 1965).

184. *See, e.g., id.* ¶ 149 (US delegate noting the Resolution “establishes a new injunction against intervention by one State in the affairs of another”); Rep. of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 303, U.N. Doc. A/6230 (June 27, 1966) [hereinafter 1966 SPECIAL COMMITTEE REPORT].

185. 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶¶ 342 (Fr.), 344 (Japan), 351 (Austl.).

186. G.A. Res. 2625 (XXV), annex, Friendly Relations Declaration (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

187. *Id.* at annex pmb1.

“violation[s] of international law.”<sup>188</sup> The Declaration’s preeminent legal significance is confirmed by the context of its negotiation. When it was introduced to the Sixth Committee, the acting Chairperson extolled it to be “as important as the [UN] Charter” itself.<sup>189</sup> The Declaration’s customary status was subsequently confirmed in *Nicaragua*.<sup>190</sup>

In the coming years, the original distinction between intervention (forcible) and interference (indirect or non-forcible) would blur as States used those words less consistently. The word “interference” would nonetheless occupy another function in the lexicon of multilateral fora—for States advocating for a further expansion of PNIVIF’s prohibition, “interference” was the preferred vocabulary. States have expressly juxtaposed “interference” against “intervention” to argue against, *inter alia*, the foreign funding of political parties and the acts of diplomats in host countries.<sup>191</sup> “Interference” was also the word choice of States lobbying to outlaw non-coercive acts such as subversive propaganda,<sup>192</sup> bribery,<sup>193</sup> the exploitation of ethnic differences,<sup>194</sup> and foreign regulation of foreign investments.<sup>195</sup> At any rate, the transition from “intervention” to “interference” from 1948 to 1970 foreshadows the principle’s continued evolution.

### B. Destabilizing Interferences

In expanding the principle of non-intervention, the Friendly Relations Declaration made a key innovation in banning “the use of economic, political or any other types of measures to coerce another State.”<sup>196</sup> This provision formed the basis for *Nicaragua*’s definition of PNIVIF. Yet, it is premature to therefrom assert that the principle is entirely encapsulated by coercion.

Six years after the Friendly Relations Declaration, the UNGA identified a category of condemnable interpositions—destabilizing interferences. By Resolution 31/91, the Assembly condemned interferences aimed at “disrupting the political, social or economic order of other States or destabilizing the

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188. *Id.* at 123.

189. U.N. GAOR, 25th Sess., 6th Comm., 1178th mtg. ¶ 1, U.N. Doc. A/C.6/SR.1178 (Sept. 23, 1970).

190. *Nicar. v. US*, 1986 I.C.J. ¶ 118.

191. *See, e.g.*, Rep. of the Special Committee on Principles of International Law concerning Friendly Relations and Co-operation among States, ¶ 360, U.N. Doc. A/6799 (Sept. 26, 1967) [hereinafter 1967 SPECIAL COMMITTEE REPORT].

192. 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶ 311.

193. U.N. GAOR, 20th Sess., 1st Comm., 1406th mtg. ¶ 24 (Burundi), U.N. Doc. A/C.1/SR.1406 (Dec. 10, 1965).

194. *Id.*

195. *See also* U.N. GAOR, 34th Sess., 1st Comm., agenda item 46(a) ¶ 1(b)(v), U.N. Doc. A/C.1/34/L.56 (Dec. 3, 1979).

196. *Friendly Relations Declaration*, *supra* note 186.

Governments seeking to free their economies from external control or manipulation.”<sup>197</sup>

True to form, non-aligned states tabled and strongly advocated for Resolution 31/91.<sup>198</sup> In context, these States were fearful that their nascent economies and governments were vulnerable to external pressures and the whims of the global market.<sup>199</sup> More broadly speaking, non-aligned States approached the issue from a starkly different perspective. Whereas coercion is chiefly concerned with the *conduct* of the interposing State, destabilization focuses on the *consequences* suffered by the State being interposed on. Unlike coercion, the destabilization perspective is less concerned with whether a foreign act was taken to compel choices, and instead looks at whether the act has the effect of undermining sovereign rights or institutions.

The victim-oriented perspective is laid bare in the textual instruments. States such as Ghana, Philippines, Qatar, Suriname, and Yugoslavia began to explicitly draw a link between the acts of foreign States and the threat posed to their “political stability” and economic security.<sup>200</sup> The Sri Lankan delegate to the UNGA First Committee, on introducing Resolution 31/91, made an expressly strong statement on the subject:

The most unfortunate feature of this practice of interference is that it tends to destabilize the economies of countries. The erratic meanderings of the international money market in recent years have amply demonstrated the extent to which economic disequilibrium can effect [sic] even the most highly developed countries in the world. How much worse could be the impact of economic destabilization on developing countries whose resources are scarcer . . . and whose economic survival is already beset with problems over which they have little or no control.<sup>201</sup>

Attempts to progressively develop a prohibition on destabilizing interferences continued beyond Resolution 31/91. In successive meetings, the

197. G.A. Res. 31/91, Non-interference in the internal affairs of States (Dec. 14, 1976), <https://digitallibrary.un.org/record/188903?ln=en>.

198. Resolution 31/91 was introduced by Algeria, Bangladesh, Egypt, Guyana, India, Sri Lanka, Yugoslavia and Zambia, and co-sponsored by Bhutan, Botswana, Burundi, Chad, Cuba, Ghana, Grenada, Jamaica, Jordan, Kuwait, Madagascar, Mali, Mauritius, Morocco, Nepal, Rwanda, Sudan, the Syrian Arab Republic, Uganda, Cameroon, and Tanzania.

199. See Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 209 (1985); Daniel D. Bradlow, *Development Decision-Making and the Content of International Development Law*, 27 B.C. INT'L & COMP. L. REV. 195, 205 (2005).

200. U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 27 (Ghana), U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976); U.N. GAOR, 31st Sess., 1st Comm., 56th mtg. at 27 (Yugoslavia), U.N. Doc. A/C.1/31/PV.56 (Dec. 10, 1976); U.N. Secretary-General, *Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States*, at 8 (Phil.), 9 (Surin.), U.N. Doc. A/32/164 (Sept. 2, 1977) [hereinafter 1977 SECRETARY GENERAL REPORT]; U.N. Secretary-General, *Implementation of the Declaration on the Strengthening of International Security: Non-interference in the Internal Affairs of States*, at 30 (Qatar), U.N. Doc. A/33/216 (Sept. 21, 1978) [hereinafter 1978 SECRETARY GENERAL REPORT].

201. U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 18–21, U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976).

Non-Aligned Movement prioritized proscribing measures “calculated to cause disruption and destabilization.”<sup>202</sup> Before the UN, non-aligned States took aim at the foreign use of “multinational corporations” and “media of mass information” to destabilize host governments.<sup>203</sup> The consequentialist perspective eventually found expression in UNGA Resolution 36/103 (1981), Declaration on Intervention and Interference.<sup>204</sup> This significant milestone identified the duty of States to refrain from “any action or attempt . . . to destabilize or to undermine the stability of another State or any of its institutions.”<sup>205</sup>

The obvious wrinkle is that neither Resolution 31/91 nor the Declaration on Intervention and Interference represents settled law. Only ninety-nine out of 146 States supported Resolution 31/91.<sup>206</sup> The only objector—the US delegate—subsequently corrected its vote to reflect an abstention.<sup>207</sup> More problematically, the Resolution used exhortatory language and was treated as non-codifying by some States.<sup>208</sup> By contrast, the Declaration on Intervention and Interference adopted the language of States’ rights and duties.<sup>209</sup> That said, the Declaration was only adopted by a vote of 120-22. Objectors, including Austria, Finland, and the United States, argued it created new obligations falling outside UN Charter principles.<sup>210</sup>

The Declaration must now be read with Resolution 44/147 (1989), which deals squarely with interference in electoral processes.<sup>211</sup> Resolution 44/147 characterizes interferences with the “free development of national electoral processes” and activities designed to sway election results as violations of PNIVIF.<sup>212</sup> It also strongly appeals to States to abstain from undermining foreign

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202. See, e.g., Fifth Summit Conference of Heads of State or Government of the Non-Aligned Movement, Political Declaration, ¶ 144, Doc. NAC/CONF.5/S.2 (Aug. 21, 1976); Fifth Conference of Ministers for Foreign Affairs of Non-Aligned Countries, *Declaration of the Conference of Ministers for Foreign Affairs of Non-Aligned Countries*, ¶ 25, Doc. NAC/CONF.5/FM/ (July 30, 1978).

203. 1977 SECRETARY GENERAL REPORT, *supra* note 200, at 9 (Surin.), 12 (Yugoslavia); 1978 SECRETARY GENERAL REPORT, *supra* note 200, at 10 (India).

204. G.A. Res. 36/103, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, A/RES/36/103 annex (Dec. 9, 1981), <https://digitallibrary.un.org/record/270666?ln=en> [hereinafter *Declaration on Intervention and Interference*].

205. *Id.* at annex ¶ 2(II)(c).

206. Of the other States, eleven abstained and thirty-five did not vote. See U.N. GAOR, 31st Sess., 98th plen. mtg. ¶ 23, U.N. Doc. A/31/PV.91 (Dec. 14, 1976).

207. *Id.* ¶ 28.

208. See, e.g., 1977 SECRETARY GENERAL REPORT, *supra* note 200, at 3 (Barb.); 1978 SECRETARY GENERAL REPORT, *supra* note 200, at 8 (Ghana), 11 (Pan.), 30 (Qatar), 36 (Yugoslavia).

209. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 3.

210. U.N. GAOR, 36th Sess., 1st Comm., 51st mtg. at 58 (U.S.), 58 (Fin.), 59–60 (Austria), U.N. Doc. A/C.1/36/PV.51 (Dec. 3, 1981).

211. G.A. Res. 44/147, *Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States*, A/RES/36/103 (Dec. 15, 1989), <https://digitallibrary.un.org/record/270666?ln=enG.A.%20Res.%2044/147>.

212. *Id.* ¶ 3.

electoral processes. Such interpositions could be classified as destabilizing but not necessarily coercive. Context is salient. Resolution 44/147 was introduced as a counterweight to Resolution 44/146, which implicitly acknowledged the international community could “assist” States to achieve “genuine” elections.<sup>213</sup> The former was therefore a pre-emptive strike by States suspicious of election-meddling under the pretext of electoral assistance.<sup>214</sup>

Troublesomely, subsequent iterations of Resolution 44/147, or the “electoral interference” Resolutions, were decidedly unpopular.<sup>215</sup> The silver lining is that objecting States did not find fault with the “election interference” Resolutions’ reproof of efforts to sway votes or undermine electoral processes. In fact, some objecting and abstaining States supported these provisions.<sup>216</sup> Rather, the bone of contention appears to lie in the perception that the Resolutions sabotaged international efforts to enhance democratic participation.<sup>217</sup>

In any case, the aforementioned account suggests, prior to and after *Nicaragua*, a majority of States held to the view that certain destabilizing interpositions, including those carried out during elections, are violations of the principle of non-interference. These legal opinions, *de minimis*, point to an emerging position on PNIVIF.

Thus far, I have examined how the claimed norm on destabilizing interferences developed *after* the 1970 Friendly Relations Declaration. There are nonetheless arguments to be made that the law, as reflected in that Declaration itself, did not merely contemplate coercive types of interference.

This is made bare by a textual examination of the Friendly Relations Declaration. The Declaration’s section on PNIVIF begins with a prefatory paragraph which authoritatively prohibits “armed intervention and all other forms of interference” against States.<sup>218</sup> The second, third, and fourth paragraphs prohibit (1) coercive measures; (2) support of subversive or terrorist activities; (3) interference in civil strife; (4) use of force against peoples; and (5) interference with a State’s choice of political, economic, social, and cultural systems.<sup>219</sup> One method of interpretation is to construe these paragraphs conjunctively. The Declaration’s limb on coercive measures would inform PNIVIF as a whole. The alternative method is to treat the prefatory paragraph as the crux of the principle, the other paragraphs its exemplifications. Coercive measures would therefore

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213. G.A. Res. 44/146 (Dec. 15, 1989).

214. GUY S. GOODWIN-GILL, *FREE AND FAIR ELECTIONS* 24 (2006).

215. *See id.* at 24–27.

216. *See, e.g.*, U.N. GAOR, 44th Sess., 82d plen. mtg. at 24 (Costa Rica), U.N. Doc. A/44/PV.82 (Dec. 29, 1989).

217. *See id.*; U.N. GAOR, 44th Sess., 3d Comm., 56th mtg. at 8 (Fr.), U.N. Doc. A/C.3/44/SR.56 (Nov. 27, 1989); U.N. GAOR, 46th Sess., 75th plen. mtg. at 46 (Arg.), U.N. Doc. A/46/PV.75 (Jan. 3, 1992); U.N. GAOR, 50th Sess., 3d Comm., 55th mtg. ¶ 12 (U.S.), U.N. Doc. A/C.3/50/SR.55 (Dec. 13, 1995).

218. *Friendly Relations Declaration*, *supra* note 186.

219. *Id.*

constitute a mere manifestation of PNIVIF. The structure of the Declaration confirms this second interpretation. The Declaration refers to six other general principles of international law. Each section on those principles begins with a prefatory paragraph capturing the relevant principle's essence, followed by a series of elaborative paragraphs.

Indeed, there is no evidence that States agreed to restrictively define PNIVIF as coercion in the discussions leading up to Resolution 2131 and the 1970 Friendly Relations Declaration. As I will explain later, States never even managed to agree on a definition of PNIVIF in the first place.<sup>220</sup>

A return to PNIVIF's regional origins also suggests some kinds of destabilizing interferences were thought to be illegal as early as in 1948. In the *Asylum Case*, a military *coup d'état* in Peru impelled the founder of the American Popular Revolutionary Alliance, Víctor Raúl Haya de la Torre, to seek asylum with the Colombian embassy in Lima.<sup>221</sup> At issue was the interpretation of Article 2 of the 1928 Havana Convention on Asylum, which provided that asylum "may not be granted except in urgent cases."<sup>222</sup> The ICJ concluded that the threat of regular prosecution, even for "political" offences, was not an "urgent" case that would permit the grant of asylum.<sup>223</sup> Notably, part of its reasoning averred that to hold otherwise would be inconsistent with the "established tradition" of PNIVIF in Latin America.<sup>224</sup> Parties to the Asylum Convention are unlikely to have consented to "foreign interference in the administration of domestic justice," which the Court castigated as "intervention in its least acceptable form."<sup>225</sup>

It may be noted that the Court did not actually make a pronouncement on PNIVIF as a substantive rule of law but relied on it as a principle in support of its restrictive interpretation of the Asylum Convention. Regardless, this does not detract from the point I wish to make, which is that even before the 1970 Friendly Relations Declaration, the ICJ had recognized that an interposition that undermines the justice system—a core institution of the State—was inconsistent with PNIVIF. The Inter-American Juridical Committee would reach the same conclusion years later.<sup>226</sup> Bearing in mind the Friendly Relations Declaration's regional origins, one might conclude that the document treated the destabilization of another State's system of justice as illegal.

Recognizing that PNIVIF applies not just to coercion, but also to *some* destabilizing interferences, would bear implications for electoral disinformation

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220. *See infra* Part II.D.

221. *Asylum (Colom. v. Peru)*, Judgment, 1950 I.C.J. Rep. 266 (Nov. 20).

222. Convention Fixing the Rules to Be Observed for the Granting of Asylum, art. 2, Feb. 20, 1928, 132 L.N.T.S. 323.

223. *Colom. v. Peru*, 1950 I.C.J. at 284.

224. *Id.* at 285.

225. *Id.* at 285–286.

226. Inter-American Juridical Committee, *Instrument Relating to Violations of the Principle of Non-Intervention*, Doc. CIJ-51, 10 (1959).

campaigns. It is arguably a sovereign prerogative of democratic States to design and direct the very process that determines how their government is constituted. When the campaign distorts electoral results, it commits a fraud on the process itself.<sup>227</sup> A disinformation campaign that undermines the legitimacy of electoral processes is equally destabilizing, since the democratic social contract is premised on public perception that its leaders are proper representatives. Thus, any electoral disinformation campaign will generally abrogate a sovereign prerogative of democratic States, whatever the pretext.

### C. *Persuasive Interferences*

A plain meaning construction of “coercion” would, according to the majority view in the Tallinn Manual 2.0, exclude merely persuasive interpositions. There is nonetheless evidence that affirms some persuasive interpositions are prohibited by *lex lata*. The issue of subversive propaganda, or propaganda that foments or incites insurgency against the government, is instructive.

Not all forms of propaganda are outlawed by international law.<sup>228</sup> However, subversive propaganda was recognized as unlawful even before World War II.<sup>229</sup> Historically, the prohibition against subversive propaganda was not rooted in PNIVIF but in response to its being seen as an act of indirect aggression.<sup>230</sup> Eventually, as PNIVIF expanded, it became another justification for prohibiting subversive propaganda.<sup>231</sup> Hints of this could be first gleaned in 1933, when President Roosevelt and Maxim Litvinov exchanged a series of letters that committed the United States and the Soviet Union to a mutual policy of non-interference and renounced any “agitation or propaganda” that sought to bring about forcible changes in the other’s socio-political order.<sup>232</sup> France and the Soviet Union reached a similar agreement in 1932.<sup>233</sup> In 1948, Resolution XXXII of the Ninth Inter-American Conference also called upon American States to adopt measures against, *inter alia*, “subversive propaganda” in the name of countering “interference by any foreign power.”<sup>234</sup>

Unsurprisingly, making subversive propaganda illegal was an idea with which many governments could get on board. In the 1960s, a scattered cluster of

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227. Gary Corn & Eric Jensen, *The Technicolor Zone of Cyber Space – Part I*, JUST SECURITY (May 30, 2018), <https://www.justsecurity.org/57217/technicolor-zone-cyberspace-part/>.

228. Brabandere, *supra* note 107, ¶¶ 4, 9.

229. F. de Martens, *Traité de Droit International* § 74 (1883).

230. *See, e.g.*, G.A. Res. 380 (V), *supra* note 159. *See also* Quincy Wright, *Subversive Intervention*, 54 AM. J. INT’L L. 521, 524 (1960).

231. Brabandere, *supra* note 107, ¶¶ 10, 14.

232. Letter from Maxim Litvinov to Franklin D. Roosevelt (Nov. 16, 1933), FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 805-806 (U.S. Dep’t of State ed., 1933).

233. Treaty of Non-Aggression, Fr.-U.S.S.R., art. V, Nov. 29, 1932, 157 L.N.T.S. 411.

234. Ninth International Conference of American States, *Resolution XXXII: The Preservation and Defense of Democracy in America*, 1 Annals of the O.A.S. 133, 133–134 (1949).

States advanced the position that PNIVIF realizes a prohibition on subversive propaganda.<sup>235</sup> This view eventually prevailed in the Friendly Relations Declaration. Its text reads, “[N]o State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities” directed at violent regime ouster. Considering that propaganda was a key weapon States used to “foment” or “incite” subversion, surely States must have contemplated propaganda under this provision. Besides, the provision’s reference to “tolerate” should *a fortiori* justify a prohibition against subversive propaganda. In light of the plain text of the Friendly Relations Declaration, it is unclear how one can conclude all persuasive interferences fall outside PNIVIF’s prohibition.

Electoral disinformation campaigns are by no means subversive. Notwithstanding, the aforementioned account of subversive propaganda does disprove the theory that merely persuasive interferences are never captured under PNIVIF. More to the point, the Declaration on Intervention and Interference actually affirms that the dissemination of “false or distorted news” can be interpreted as interference in internal affairs.<sup>236</sup> This leaves open the possibility that electoral disinformation campaigns may be treated as violations of PNIVIF even if they are not subversive.

#### D. Sovereign Will and an Empty Container

Traditional formulations of PNIVIF situate the government at the center of a State’s “sovereign will.” The textual history nonetheless suggests that the “sovereign will” may also vest in “the people.” The starting point is Resolution 2131, which recognized that peoples enjoy “the right of self-determination . . . without any foreign pressure.”<sup>237</sup> This provision arguably reformulated PNIVIF into a principle that protects the people’s political independence.

Notably, Resolution 2131 and the Friendly Relations Declaration describe the use of force to “deprive people of their national identity” as a violation of *both* “their inalienable rights and of the principle of non-intervention.”<sup>238</sup> By the conjunctive, the use of force against peoples is not only rendered illegal on account of the self-determination right but is also *per se* a prohibited intervention. The UNGA’s 1970 Declaration on the Strengthening of International Security also affirmed the “right of peoples to determine their own destinies, free of

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235. See, e.g., 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶¶ 271, 273; 1966 SPECIAL COMMITTEE REPORT, *supra* note 184, ¶ 310; 1967 SPECIAL COMMITTEE REPORT, *supra* note 191, ¶ 364; U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶¶ 11 (Austl.), 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1400th mtg. ¶¶ 7 (Guinea), 16 (Braz.), 40 (Dem. Rep. Congo), U.N. Doc. A/C.1/SR.1400 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1404th mtg. ¶ 23 (Isr.), U.N. Doc. A/C.1/SR.1404 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1406th mtg. ¶ 27 (Saudi Arabia), U.N. Doc. A/C.1/SR.1406 (Dec. 10, 1965).

236. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 2(III)(d).

237. G.A. Res. 2131 (XX), *supra* note 155, ¶ 6.

238. *Id.* ¶ 3.

external intervention, coercion or constraint.”<sup>239</sup> The less authoritative Declaration on Intervention and Interference went beyond self-determination to affirm the “right of States and peoples . . . to develop fully, without interference, their system of information and mass media.”<sup>240</sup>

The principle of self-determination was folded into PNIVIF in response to the protest of newly independent States, who were aghast that colonial governments relied on PNIVIF to stave off foreign support for peoples fighting for independence.<sup>241</sup> Shifting conceptions of “sovereign will” are best exemplified in the literature on civil strife, a more encompassing situation than civil war. The crystallizing standpoint is that a request for military assistance from either side to a civil strife no longer permits armed intervention.<sup>242</sup> Civil strife is the process by which the State, encompassing government and dissidents, navigates its choice of political system. Military assistance on behalf of either side hijacks that choice.

Louise Doswald-Beck’s study on State responses to Cold War interventions is persuasive. Her study led her to conclude that CIL prohibits armed intervention by consent on behalf of either side.<sup>243</sup> The doctrine of consent was initially a self-serving rule designed by governments to handicap revolutionary movements.<sup>244</sup> As the self-determination right gained salience, intervening States faced greater difficulty justifying armed support for incumbents on the basis of the latter’s request. The doctrine of consent was steadily abandoned and a new strategy was formulated—incumbent patrons shifted to argue their intervention was a permissible response to counter another State’s prior intervention in support of rebels.<sup>245</sup> In practice, this new justification of counter-intervention was also vexed. States could simply rely on “they did it first” polemics to threaten intervention.

This account brings into doubt the persuasiveness of *Nicaragua*’s pronouncement on the doctrine of consent. More broadly, it suggests that the choices of a people can represent the sovereign will. A related question concerns the nature of the protected choices. The choice of government form is obviously a strong contender. Under the Declaration on Intervention and Interference, another possibility is the people’s freedom to develop their system of information. Arguably, so too, are electoral choices, which are prey to disinformation

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239. G.A. Res. 2734 (XXV), ¶ 4 (1970).

240. *Declaration on Intervention and Interference*, *supra* note 204, at annex ¶ 2(I)(c).

241. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 258. *See also* First Summit Conference of Heads of State or Government of the Non-Aligned Movement, *Declaration of the Heads of States or Government of Non-Aligned Countries*, ¶ 14 (1961).

242. *See, e.g.*, Oscar Schachter, *The Right of States to Use Armed Force*, 82 MICH. L. REV. 1620, 1641 (1984); John Norton Moore, *Legal Standards for Intervention in Internal Conflicts*, 13 GA. J. INT’L & COMP. L. 191, 196 (1983).

243. Doswald-Beck, *supra* note 199, at 213-252.

244. *See* Friedmann, *supra* note 28, at 210.

245. *See generally* Doswald-Beck, *supra* note 199. *See also* Olivier Corten, *LAW AGAINST WAR*, 288-310 (2010).

campaigns designed to sway votes. It is granted that the right of self-determination, or the right of peoples to choose *whatever* form of government, is not the same as the freedom to vote in a democratic system.<sup>246</sup> Still, insofar as an interference with either bears on fundamental political choices affecting the constitution of governments, they are analogizable.

On the whole, the textual history plainly suggests some non-coercive interpositions are unlawful. Yet, the ambits of this category of non-coercive interpositions remain ill-defined. Subversive propaganda, which is not coercive, is an illegal interposition. It is nonetheless incorrect to extrapolate therefrom a rule against all forms of persuasive interferences. Whereas the *Asylum Case* may have recognized a rule against interferences with a State's administration of justice, a broader prohibition against destabilizing interferences at large can only be considered nascent. While armed intervention against peoples fighting for self-determination is illegal, it remains unclear how far this reconceptualization of a State's "sovereign will" applies to other situations. It understates the case to say that PNIVIF is an unruly corpus.

What is striking in this recounting is that States never succeeded in defining PNIVIF, let alone restrictively defining it as coercion. There is nothing in the textual history, let alone UNGA Resolutions, that points to a settled definition of PNIVIF. The most that can be said is that States only managed to agree, or come close to agreement, on some *manifestations* of the principle.

In this regard, the textual history reveals that States did debate the antecedent question of whether intervention or interference ought to be defined. Some States had the prescience to recognize that any attempt at defining PNIVIF would have been "unwise and unprofitable."<sup>247</sup> For them, it was preferable that the principle could be flexibly applied to new circumstances, and nothing would be gained from turning a useful principle into formula.<sup>248</sup> Others pointed out that the task of defining PNIVIF would be akin to herding cats.<sup>249</sup> Among the States that held out hope for a "new formulation" of PNIVIF that would take into account new methods of foreign interposition,<sup>250</sup> none proposed a definition that was accepted by other States. Considering that States never even settled the debate on whether intervention or interference ought to be defined in the first place, it is astounding that the present consensus has simply assumed to the principle a *lex lata* definition.

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246. Doswald-Beck, *supra* note 199, at 203.

247. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 231.

248. *See, e.g., id.*

249. *See, e.g., id.* ¶ 232. *See also* U.N. Secretary-General, *Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Comments Received from Governments*, U.N. Doc. A/5725, at 11 (Bulg.) (July 22, 1964) [hereinafter *Comments on Principles of International Law*].

250. 1964 SPECIAL COMMITTEE REPORT, *supra* note 28, ¶ 230.

In reality, PNIVIF has functioned as an empty container. Because the concept of intervention and interference is gargantuanly broad, States rely on it to contest, reject, and occasionally accept new rules on how they, as sovereign entities, are expected to relate to one another. This is made bare by the principle's rapid evolution,<sup>251</sup> which witnesses States jostling to outlaw forcible, political, economic, and other interpositions by which they are threatened. The result is that the principle's content is constantly on the move. Indeed, as will be seen, it is the evolutionary and amorphous quality of PNIVIF that brings about the central conundrum of this Article—how can concrete rules be created to give effect to a principle on the lam?

A final point to address is the distinction between “intervention” and “interference.” The textual history suggests “intervention” and “interference” did not begin as interchangeable terms. Notably, the latter was used to emphasize PNIVIF's expansion to prohibit non-forcible and indirect types of intervention and interference. This distinction eroded over time. Because States treated PNIVIF as an empty container, there was no reason for them to define the principle, let alone attempt to fastidiously distinguish “intervention” and “interference.” The word “interference” nonetheless retained some rhetorical uses, insofar as it was the preferred word when States sought to further expand the principle. In any case, it is incorrect to assert that interferences are legal under international law, since they are expressly declared illegal under the Friendly Relations Declaration.

All said, the superficial distinction between “intervention” and “interference” may present a way for the ICJ to restate the principle without contradicting its own judgment. It will be observed that the *Nicaragua* judgment primarily made reference to “intervention.” By contrast, the word “interference” was barely mentioned. Of the word's eleven appearances, four were quotes of external sources,<sup>252</sup> three were related to the law of sea encumbrances;<sup>253</sup> and three were used to describe the factual matrix.<sup>254</sup> In its single appearance vis-à-vis the principle, the word “interference” was simply used to define “intervention”, a situation where it would have been problematic for the Court to tautologically use “intervention.”<sup>255</sup> A future bench may therefore hold that *Nicaragua* had only defined “intervention” as coercion, but not “interference.” This, of course, requires some measure of creative interpretation.

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251. Moore, *supra* note 242, at 194.

252. *Nicar. v. US*, 1986 I.C.J. ¶¶ 55, 140, 192, 204.

253. *Id.* ¶¶ 214, 253, 279.

254. *Id.* ¶¶ 93, 241, 291.

255. *Id.* ¶ 202 (“The principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference”).

## III.

## RECONSTRUCTING NON-INTERVENTION AND NON-INTERFERENCE: GRASPING A PRINCIPLE ON THE LAM

PNIVIF is an empty container principle which has never stopped evolving. The principle's frustrating fluidity has long been recognized by various eminent jurists.<sup>256</sup> There are two underlying reasons for the principle's nebulosity. First, the principle molds to the mutative ambits of sovereignty.<sup>257</sup> The absorption of the self-determination right into the "sovereign will" question is an obvious example of such a mutation. As a result, PNIVIF invites conceptual discussions on the scope of a State's sovereignty but offers few clear answers.<sup>258</sup>

Second, the principle evolves as States constantly reevaluate and modulate the ways in which they interact with one another.<sup>259</sup> As States became more economically and politically intertwined over the twentieth century, they had to contend with subtler forms of foreign interpositions and could no longer abide by a thin law of armed intervention. The perceived threat of neo-colonialism was a grave concern for newly independent States. Non-aligned States, seeking to guard their nascent economies and political institutions from the vagaries of international politics, pressed strongly against destabilizing interferences. Subversive propaganda was also perceived as a powerful threat in the Cold War milieu.

It is no surprise, then, that the *lex lata* on PNIVIF is an unruly corpus. The difficulty with *Nicaragua*, or at least the way in which it has been construed, is that it froze the principle's evolution. The development of the International Law Commission's ("ILC") Draft Code of Offences Against the Peace and Security of Mankind attests to this. A year before the *Nicaragua* judgment, the ILC Special Rapporteur recognized two limbs to a proposed international crime of interference:

The following, *inter alia*, constitute interference in the internal or external affairs of a State:

- (a) Fomenting or tolerating, in the territory of a State, the fomenting of civil strife or any other form of internal disturbance or unrest in another State;
- (b) Exerting pressure, taking or threatening to take coercive measures of an economic or political nature against another State in order to obtain advantages of any kind.<sup>260</sup>

Evidently, coercion was only treated as a subset of PNIVIF. More significantly, the first limb of the proposed crime spoke precisely to a prohibition

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256. See *supra* text accompanying notes 30-31.

257. Kunig, *supra* note 33, ¶ 1.

258. See John Norton Moore, *Low-Intensity Conflict and The International Legal System*, 67 INT'L L. STUD. 25, 25 (1995).

259. Friedmann, *supra* note 28, at 207.

260. Doudou Thiam (Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind), *Third Rep. on the Draft Code of Offences Against the Peace and Security of Mankind*, at 40, U.N. Doc. A/CN.4/387 (Apr. 8, 1985).

on certain types of destabilizing and persuasive interferences. The use of the phrase “*inter alia*” is also significant. As the Special Rapporteur’s report notes, limbs (a) and (b) were not meant to be exhaustive but envisaged only two situations “in particular.”<sup>261</sup> The same Special Rapporteur would switch course two years after *Nicaragua* to treat coercion as “the dividing line.”<sup>262</sup> Subsequent Draft Codes confined intervention to coercion.<sup>263</sup>

It is ironic that the bright-line definition of coercion froze in place an inherently evolutionary principle. This freezing effect is even more problematic in light of the provenance of the coercion rule. The coercion definition was formulated by eminent jurists at a time when international law was only thought to prohibit armed interventions. Why else would States forcibly intervene, if not as a threat, then to compel the government’s choices or overthrow it altogether? As PNIVIF has since extended beyond armed interventions, it is worth questioning whether the coercion definition remains equally applicable.

In this regard, coercion is an under-inclusive definition that fails to confront the threats posed by twenty-first century methods of foreign interpositions. Its poor application to electoral disinformation campaigns, for which there are good reasons to prohibit, is demonstrative. By contrast, there are good reasons to proscribe some of the non-coercive interferences canvassed in this Article.

Foremost, the logic of defining intervention as coercion is that certain non-coercive acts, threatening the same sovereign prerogatives protected by PNIVIF, would be permissible even if they caused “comparable or even greater damage.”<sup>264</sup> This is evident in electoral disinformation campaigns, which sabotage the sovereign prerogative of democratic States to design and direct their own elections. If PNIVIF was to be enunciated as a principle *protective* of sovereignty, it is only prudent to consider prohibiting certain forms of destabilizing interference.

A further inadequacy that arises from the requirement of a coercive intent is that States do not always have in mind the compellation of policy changes when they set out to seriously interpose on a target State. In practice, States may also set out to discredit or distract their target, or simply seek to throw a wrench in the broader political environment. These kinds of potentially injurious State

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261. *Id.* ¶ 111.

262. Doudou Thiam (Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind), *Sixth Rep. on the Draft Code of Offences Against the Peace and Security of Mankind*, ¶¶ 12–33, U.N. Doc. A/CN.4/411 (Feb. 19, 1988).

263. Linarelli, *supra* note 145, at 26–43. The proposed crime of intervention was eventually removed from the Draft Code because, among other things, (1) it was considered to be too vague for a criminal provision; (2) it was thought that the Code should only cover serious offences like crimes against humanity; (3) it was thought that PNIVIF was not entirely relevant for a Code that is meant to deal with offences against the peace and security of mankind; and (4) there were concerns that a vague offense of interference would criminalize ordinary modes of diplomacy. *See id.* at 27–29.

264. Corn & Jensen, *supra* note 227; Kilovaty, *supra* note 14, at 172.

behaviors fall outside the coercion framework, even though they could qualify as destabilizing interferences.

The inability of the coercion framework to capture disinformation campaigns, as persuasive interferences, is also objectionable. As military thinkers have emphasized, disinformation campaigns, and more broadly IOs, are effective precisely because they consist of a flood of smaller, subtle acts that aggregate into larger “synergistic strategic effects.”<sup>265</sup> Separating “coercive” acts from “persuasive” ones obscures this actuality. The effectiveness of disinformation campaigns lies in how they produce a bevy of content, ranging from patently false information to memes or emotive messaging.<sup>266</sup> The injurious impact of such persuasive interference is exacerbated because some States have pursued influence capabilities as a science, folding them in with hybrid tactics. Of particular concern is the adoption of emerging technologies, including photograph manipulation and artificial intelligence-powered fake news bots.<sup>267</sup> It is naïve to assume merely persuasive methods, employed in concert, are always less effective.<sup>268</sup>

Moreover, *Nicaragua*’s proclivity for government prerogatives exemplifies an outmoded conception of sovereign will.<sup>269</sup> It is an artificial view of States as “black boxes that are properly represented by whatever faction can maintain itself in power.”<sup>270</sup> Plainly, not all choices that are fundamental to *governance* are held by *governments*. Elections are obvious examples. On this note, the ongoing conundrum for scholars is how to reconceptualize a vision of sovereign will that accurately realizes the government-people relationship.<sup>271</sup> It remains unclear what sphere of sovereign choices belongs to the government, and what sphere belongs to the people. The conundrum is further complicated by questions of how a people-centric “sovereign will” ought to reckon with different forms of governance, democratic or undemocratic. Thankfully, these challenges do not feature in electoral disinformation campaigns. This is because democratic States,

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265. Timothy B. McCulloh, *The Inadequacy of Definition and the Utility of a Theory of Hybrid Conflict: Is the “Hybrid Threat” New?*, in 141 TERRORISM: COMMENTARY ON SECURITY DOCUMENTS 57, 57–58 (Douglas C. Lovelace Jr. ed., 2016). See also Jovana Marović, *Wars of Ideas: Hybrid Warfare, Political Interference, and Disinformation*, in NEW PERSPECTIVES ON SHARED SECURITY: NATO’S NEXT 70 YEARS 27, 27–28 (Tomáš Valášek ed., 2019).

266. Björnstjern Baade, *Fake News and International Law*, 29 EUR. J. INT’L L. 1357, 1358–1361 (2018).

267. See SAMANTHA BRADSHAW & PHILIP N. HOWARD, TROOPS, TROLLS AND TROUBLEMAKERS: A GLOBAL INVENTORY OF ORGANIZED SOCIAL MEDIA MANIPULATION, at 9–12 (2017), accessible at <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/89/2017/07/Troops-Trolls-and-Troublemakers.pdf>.

268. See Kilovaty, *supra* note 49, at 88.

269. Elizabeth A. Wilson, *People Power and the Problem of Sovereignty in International Law*, 26 DUKE J. COMP. & INT’L L. 551, 569–570 (2016).

270. Gregory H. Fox, *Intervention by Invitation*, in THE OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW 816, 839 (Marc Weller ed., 2015).

271. See Wilson, *supra* note 269, at 570–586; see also Damrosch, *supra* note 50, at 42–43.

by their nature, relegate electoral choices to the people, not the government. Disinformation campaigns which seek to sway votes, in turn, always interpose on the electoral choices of a significant subset of the people. Neither should government consent to the foreign disinformation campaign vitiate the illegality of the interference.

Beyond disinformation campaigns, there is a palpable sense of discontent with *Nicaragua* among practitioners working in the field of IOs, cyber-ops, and other hybrid threats.<sup>272</sup> Steven Barela calls for the norm to be strengthened in light of the “rapidly growing capacity for all States to engage in meddling through cyberspace.”<sup>273</sup> A most forceful opinion has been put forth by Kilovaty, writing that coercion “excludes a variety of harmful cyber operations” that would “significantly jeopardize the internal and external affairs of a [S]tate, including election integrity, territorial and political sovereignty, self-determination, and many other values that international law has long recognized and defended from undue external influence.”<sup>274</sup>

From this perspective, it is evident that the characterization of PNIVIF as an “empty container” ought not to be construed as pure criticism. As stated, the principle serves a crucial function for States, relying on it to ceaselessly negotiate and lay the boundaries of acceptable inter-State behavior. Indeed, States themselves emphasized it was crucial that the principle be allowed to evolve to meet new circumstances.<sup>275</sup> The need to maintain PNIVIF’s evolutionary character remains pressing today.

Lamentably, the fluidity of the principle comes at a price. Almost two hundred years ago, Charles-Maurice de Talleyrand-Périgord was asked what exactly non-intervention meant. The artful diplomat smiled and replied that non-intervention meant roughly the same thing as intervention.<sup>276</sup> A chronic problem for PNIVIF is its ambiguity. At best, this makes it difficult for the principle to guide State behavior and leads to arbitrary outcomes. At worst, the principle’s

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272. See, e.g., Corn & Jensen, *supra* note 227.

273. Steven J. Barela, *Zero Shades of Grey: Russian-Ops Violate International Law*, JUST SECURITY (Mar. 29, 2018), <https://www.justsecurity.org/54340/shades-grey-russian-ops-violate-international-law/>.

274. Kilovaty, *supra* note 49, at 87–88.

275. See, e.g., 1964 Special Committee Report, *supra* note 28, ¶¶ 216–217, 230–231; U.N. GAOR, 20th Sess., 1st Comm., 1395th mtg. ¶¶ 23–25, 28 (Colom.), U.N. Doc. A/C.1/SR.1395 (Dec. 3, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1396th mtg. ¶¶ 6–8 (U.S.), U.N. Doc. A/C.1/SR.1396 (Dec. 3, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1399th mtg. ¶ 38 (Rwanda), U.N. Doc. A/C.1/SR.1399 (Dec. 7, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1403d mtg. ¶¶ 15 (Malay.), 20 (El Sal.), U.N. Doc. A/C.1/SR.1403 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1st Comm., 1404th mtg. ¶ 38 (Iran), U.N. Doc. A/C.1/SR.1404 (Dec. 9, 1965); U.N. GAOR, 20th Sess., 1408th plen. mtg. ¶¶ 116 (Braz.), 125 (Guat.), 149 (U.S.), U.N. Doc. A/PV.1408 (Dec. 21, 1965); U.N. GAOR, 31st Sess., 1st Comm., 55th mtg. at 26 (Ghana), 38–40 (Zam.), U.N. Doc. A/C.1/31/PV.55 (Dec. 9, 1976); 1977 Secretary General Report, *supra* note 200, at 12 (Yugoslavia); U.N. GAOR, 36th Sess., 1st Comm., 50th mtg. at 11 (Rom.), U.N. Doc. A/C.1/36/PV.50 (Dec. 3, 1981).

276. See Emmanuel de Waresquiel, TALLEYRAND: LE PRINCE IMMOBILE pt. 4 ch. 20 (2015).

ambiguity risks rendering it near toothless and manipulatable to State whims.<sup>277</sup> In *Nicaragua*'s defense, this was possibly the Court's concern when it laid down a bright-line coercion definition. To note, even *Nicaragua*'s attempt at defining the principle with clear ambits was not foolproof. The realpolitik view continues to have some salience today and it is not uncommon to find State actors exploiting the principle's "grey zone" to call out or deny interference where expedient.<sup>278</sup>

The legally trained mind would, at this juncture, recognize the all-too-familiar quandary between flexibility and certainty. Is it then possible to create concrete rules that give effect to a fluid and evolutionary general principle?

The nihilistic response would dismiss the possibility altogether. PNIVIF lacks at least two of Lon Fuller's eight requirements of legality, being neither clear nor constant. Can it then be considered law? Notably, D'Amato has, albeit for different reasons, proclaimed that there is "no norm of intervention or non-intervention in international law."<sup>279</sup> It is an outré hypothesis to renounce a cardinal principle which traces back to the Peace of Westphalia itself. As the historian Wang Gungwu has noted, the Peace of Westphalia was essentially about establishing a compact of non-interference as a solution to the cycle of war.<sup>280</sup> Notwithstanding PNIVIF's ambiguity, it is equally possible to identify specific manifestations of the principle that take the form of concrete rules, the most obvious being the prohibition on the use of force.<sup>281</sup> The dearth of clarity or constancy has not prevented PNIVIF from playing a very "law-like" function either—guiding the behavior of States. The principle possesses argumentative force in the lexicon of inter-State relations, and States often justify or eschew particular courses of action in view of non-intervention and non-interference. In this regard, PNIVIF is not dissimilar from other amorphous, general concepts such as sovereign equality—despite eluding abstract theories about the nature of the law, they are historically and presently inextricable from international relations and international law.

By contrast, most scholars who write on the problem of PNIVIF have tended to advocate for a new definition that would encapsulate the more dangerous non-coercive interpositions of today. In the context of cyber operations, Ido Kilovaty proposed a test of "disruption" that would prohibit cyber-attacks that have significantly disruptive effects.<sup>282</sup> As to the "sovereign will" question, Lori

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277. Oppenheim cynically noted that States have always found it easy to "find or pretend some legal justification for intervention." See OPPENHEIM, *supra* note 39, at 195.

278. See Schmitt, *supra* note 99, at 66–67.

279. See generally Anthony D'Amato, *There Is No Norm of Intervention or Non-Intervention in International Law*, 7 INT'L LEGAL THEORY 33 (2001).

280. Wang Gungwu, *What if the Nation-State is No Longer the Key Organisational Unit of the International Community?*, in INSIGHTS ON SINGAPORE'S POLITICS AND GOVERNANCE FROM LEADING THINKERS 151, 152–153 (Jiang Yulin ed., 2019). See also Colin Flint & Peter J. Taylor, POLITICAL GEOGRAPHY: WORLD-ECONOMY, NATION-STATE AND LOCALITY 135 (7th ed. 2018).

281. See *supra* text accompanying notes 150–152.

282. See KILOVATY, *supra* note 14, at 172–173.

Damrosch argues that the norm should be redefined to protect “the political freedoms of the target [S]tate’s people.”<sup>283</sup>

Elsewhere, other scholars have attempted to squeeze new interpositions within *Nicaragua* itself. For example, Sean Watts’s test of consequentiality would treat merely persuasive interpositions as coercive if their effects occur on a significant enough scale.<sup>284</sup> Other writers have also used the language of “rising to the level of coercion” to describe acts that would not normally qualify as such under *Nicaragua*.<sup>285</sup> For all that, these proposals are essentially attempts to redefine PNIVIF. As Kilovaty notes, they ignore the “elephant” in the room, which is that the substance of the coercion test simply does not translate well to modern forms of interpositions.<sup>286</sup>

These attempts at redefinition are unlikely to be satisfactory. Because intervention and interference exist in infinite categories of situations, ranging from economic sanctions to IOs, generalized rules tend to verge on over-inclusivity or under-inclusivity. The coercion framework is illustrative. Coercion, as stated, was formulated by reference to a time when only forcible interventions were contemplated. Yet, coercion does not transpose neatly to IOs, which by its namesake is entirely persuasive. Similarly, coercion is not easily applicable to cyber operations, which tend to be “non-forceful, non-dictatorial, and secretive.”<sup>287</sup>

On the flip side, new generalized rules also risk over-inclusivity. While the textual history may recognize some kinds of destabilizing or persuasive interpositions as possibly illegal, a claim that all such interferences are unlawful is a stretch. Nor is it ideal to write off all destabilizing, disruptive, or persuasive interpositions as problematic. The prohibition on persuasive interferences may, in a subset of contexts, be defensible in IOs and cyber-ops. Yet, it would be highly problematic to prohibit merely persuasive interferences in the context of diplomatic interactions, where persuasion is the norm.

A main cause for PNIVIF’s ambiguity lies in the expansiveness of its possible application. The problem with new generalized definitions, proposing to prohibit “disruptive” acts or sufficiently persuasive interpositions, is that they compound the obfuscation.<sup>288</sup> For instance, a prohibition on destabilizing interferences will become a dead letter so long as States can auto-interpret what would constitute a serious undermining of sovereign rights or institutions. Similar challenges would confront the tests of disruption or consequentiality proposed by other authors. One may wonder what this would mean for State compliance with

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283. Damrosch, *supra* note 50, at 48. *See also* TSAGOURIAS, *supra* note 108.

284. *See* Watts, *supra* note 15, at 257.

285. TALLINN MANUAL 2.0, *supra* note 3, at 319; Jamnejad & Wood, *supra* note 34, at 368.

286. *See* Kilovaty, *supra* note 14, at 171.

287. *Id.* at 172.

288. Linarelli, *supra* note 145, at 43.

the principle.<sup>289</sup> Rather than fulfilling the basic function of guiding State behavior, new generalized definitions merely restate the confusion, introducing indeterminacy and arbitrariness.

One may also worry about how attempts to expand PNIVIF by redefining the principle may bear on humanist interests. When words such as “intervention” and “interference” are spread too thinly, as in the test of consequentiality, they can easily become veneers for the abrogation of individual rights and interests through *ad hominem* attacks on individuals based on their nationalities, national origins, ethnicities, or place of residence. Governments have been known to invalidate dissent, thus, caricaturing dissenters as puppets of foreign cabals rather than agents of their own thoughts, notwithstanding the stoking of xenophobic sentiments. Further, a sweeping expansion of the principle may give legitimacy to draconian countermeasures which are taken in response to “benign” interpositions.

In any case, the chances of States accepting a new generalized definition of PNIVIF are slim. It is not a coincidence that States never succeeded in defining PNIVIF. On reflection, the vagaries of PNIVIF attest to a chicken-or-egg problem. The difficulty States have had in defining the principle rests, in part, on a lack of “a clear perspective on where [...] national interests lie” with respect to the norm.<sup>290</sup> Virtually all States, including so-called weak ones, are at any one time influencing and influenced by other States. States, based on their unique capabilities, employ and are threatened by different tools of influence. As a result, generalized rules are double-edged swords, simultaneously capable of fettering States’ tools of influence while cushioning them from foreign influence.<sup>291</sup> This breeds ambivalence. The United States’ pirouettes on non-forcible interpositions are a case in point.<sup>292</sup> A closer re-examination of destabilizing interferences also shows that non-aligned States did not fully agree on its ambit when they pushed for Resolution 44/147.<sup>293</sup> Whereas some States would prefer to prohibit foreign funding of political parties, others made reservations in that respect.<sup>294</sup> A broad definition of PNIVIF is unlikely to gain traction with States, and even if it does, States will probably apply the test thereto inconsistently. Even though a prohibition on disruptive or destabilizing interferences may lend the United States a stronger legal basis for criticizing electoral disinformation campaigns, it may also expose United States’ own cyber-ops, such as its alleged creation of Stuxnet, to legal criticism. That a test of destabilization, disruption, or consequentiality

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289. See Farer, *supra* note 53, at 525–526.

290. Damrosch, *supra* note 50, at 13.

291. See Barrie Sander, *Democracy Under The Influence: Paradigms of State Responsibility for Cyber Influence Operations on Elections*, 18 CHINESE J. INT’L L. 1, 53–54 (2019).

292. For further discussion, see *supra* Part II.A.

293. G.A. Res. 44/147 (Dec. 15, 1989).

294. Compare U.N. GAOR, 44th Sess., 3d Comm., 50th mtg. at 11 (Pan.), U.N. Doc. A/C.3/44/SR.50 (Dec. 4, 1989), with U.N. GAOR, 44th Sess., 82d plen. mtg. at 26, U.N. Doc. A/44/PV.82 (Dec. 29, 1989).

may apply to an unknown number of United States' influencing activities would urge the United States to either apply said test inconsistently or reject it altogether.

The daring proposal that is put forth by this Article is that to properly reinvigorate PNIVIF, the focus ought to be shifted away from defining the principle and on to the *process* by which the principle may be progressively clarified.

#### A. *International Law as Process*

Before describing the Quilt-work approach, it is apropos to discuss its fundamental premise—international law is not just a body of *static products* commonly called “rules,” but a *dynamic process* of competition and cooperation, a public (dis)order of State actors, governments, and other actors making claims and counterclaims, accepting compromises, and coming to tentative truces on expectations of State behavior. At any one time, the picture of international law is but a snapshot of the momentary consensus, emerging practices, and the distribution of power.

This vision of international law as process was, perhaps, most famously propounded by the policy-oriented school and its founder, Myres S. McDougal.<sup>295</sup> The holistic view of international law goes beyond the identification of rules and extends to an understanding of how international law is influenced, and itself influences, State decisions in practice.<sup>296</sup> In other words, international law as process attempts to empirically demonstrate how the law operates in reality, while refuting political-realist denial of international law as parochial theory.<sup>297</sup> The textual history of PNIVIF covered in Part II presents a vivid illustration of international law as process.

There are four characteristics of international law as process that merit emphasis. First, law is a living, growing body; an “institution which grows in response to felt necessities and within the limits set by historical conditions and human attitudes.”<sup>298</sup>

Second, international law is perceived as a platform for the continuation of politics by other means. This observation should come as no surprise to critical legal scholars, legal realists, and lawfare practitioners. In particular, international law is often a site for political compromise and contestation.<sup>299</sup> States instrumentally rely on arguments and processes to lobby for new expectations for,

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295. Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 AM. J. INT'L L. 356, 357 (1955).

296. Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 144–145 (1953).

297. McDougal & Reisman, *supra* note 138, at 258–259.

298. Oscar Schachter, *Dag Hammarskjold and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1, 7 (1962).

299. *See, e.g.*, Paul R. Williams, *Lawfare: A War Worth Fighting*, 43 CASE W. RES. J. INT'L L. 145, 145 (2010).

or even constraints on, the behavior of other States. The salience of the *rule of law* is hoped for, even as the *rules* of law are treated as contestable.

Third, international law as process recognizes that “pre-law”—that is, non-binding claims, counterclaims, declarations, and statements—can have *legal effect* even before they are positively identified as “law.”<sup>300</sup> In practice, it is not uncommon for States to rely on unestablished claims or non-binding instruments, such as UNGA Resolutions, to justify their behavior, create new expectations for legitimate conduct, or influence other States to adopt a certain position.<sup>301</sup> Unlike domestic legal systems, wherein private persons are generally not harried into complying with draft legislation, States sometimes face pressures to observe not only strict positivist law, but what others *claim* to be the law. An obvious explanation for this state of affairs lies in the relatively horizontal structure of the international legal system. Since States cannot enact laws in a decentralized “interpretive community,” they seek to convince their sovereign counterparts to treat their claims as law.<sup>302</sup>

Indeed, it is arguable most of international law-creation is driven by this “interactive process” of States appealing to other States.<sup>303</sup> It is no wonder “pre-law” fulfils some very law-like functions outside their argumentative force, chief of all the creation of common expectations in guidance of State behavior.<sup>304</sup> Such expectations can in turn form base points for further negotiations, consent, and the eventual formation of “hard” law. The processes of multilateral institutions, such as the UNGA, stand out in demonstrating this.<sup>305</sup> Christopher Joyner, for one, has pointed out that UNGA Resolutions can operate as “catalytic agents for norm-creation”.<sup>306</sup> An obvious example is the genesis of the constitutional principles on outer space law.<sup>307</sup> Separately, Schachter has noted that various ILC drafts have been used as bases for the negotiation and conclusion of multilateral conventions.<sup>308</sup>

Fourth, multilateral fora are hotbeds for process activities. It is not uncommon for new norms of international law to be proposed through reports,

300. Nigel D. White, *Lawmaking*, in THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 559, 571 (Jacob Katz Cogan et al. eds., 2016).

301. See Obed Asamoah, *The Legal Effect of Resolutions of the General Assembly*, 3 COLUM. J. TRANSNAT'L L. 210, 227–228 (1964); Christopher C. Joyner, *U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation*, 11 CAL. W. INT'L L.J. 445, 466–468 (1981); Ian Johnstone, *Security Council Deliberations: The Power of the Better Argument*, 14 EUR. J. INT'L L. 437 (2003).

302. Johnstone, *supra* note 301, at 449–450.

303. *Id.*

304. See generally Asamoah, *supra* note 301.

305. Higashi, *supra* note 144, at 24; Oscar Schachter, *Recent Trends in International Law Making*, 12 AUSTL. Y.B. INT'L L. 1, 14 (1988–1989).

306. Joyner, *supra* note 301, at 463.

307. See generally Myres S. McDougal, *Emerging Customary Law of Space*, 58 NW. U. L. REV. 618 (1963–1964).

308. Schachter, *supra* note 305, at 3.

resolutions, or draft treaties of multilateral fora. Processes of multilateral fora facilitate deliberation, legal argumentation, negotiations, compromise, articulation, and diffusion of the proposed norm.<sup>309</sup> In particular, the UN is thought to offer familiar and stable platforms for States to engage in lawmaking.<sup>310</sup> Not surprisingly, the UN has played a key role in clarifying various aspects of international law, ranging from human rights obligations to the definition of aggression.<sup>311</sup>

This view of international law as process removes a mental roadblock that frequently besets scholars tasked to offer legal prescriptions—there is no longer a need to ask what the ideal “test” for PNIVIF should be. An alternative response is to simply elucidate the steps that can be taken to progressively develop and clarify the ambits of impermissible interpositions. In other words, the focus is shifted away from an evaluation of the desirability of international rules and toward the anterior question of how the lawmaking process can be augmented.<sup>312</sup> Prescriptions to strengthen the international legal system can then be about “nurturing an organic growth, not designing an ideal pattern.”<sup>313</sup> It is on this premise that I introduce the Quilt-work approach.

### B. *The Quilt-work Approach*

In brief, the Quilt-work approach proposes that States work toward identifying, discussing, and prohibiting *specific manifestations* of prohibited interference in an incremental manner. It eschews any attempt to reformulate or define a generalized norm or principle, however broad or ambiguous. Nor does it attempt to enunciate an all-inclusive definitional test that can be used to exhaustively identify breaches of that norm or principle. By identifying specific manifestations, or “sub-norms,” of the general principle, the Quilt-work approach can progressively clarify the general principle in a practical manner.

By way of illustration, a loose coalition of States may come to the view that electoral disinformation campaigns are, or ought to be, prohibited under PNIVIF. Having identified the claimed sub-norm, these States may rely on the complex of international legal processes and multilateral fora to advance their case and persuade other States. If the sub-norm receives widespread support, it may eventually find expression in a multilateral instrument. The question of a workable definitional test that perfectly encapsulates the general principle of non-intervention and non-interference is entirely sidestepped.

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309. Ian Johnstone, *Law-Making through the Operational Activities of International Organizations*, 40 GEO. WASH. INT’L L. REV. 87, 88 (2008); Charney, *supra* note 113, at 543–546.

310. *See generally* Sufyan Droubi, *Institutionalisation of Emerging Norms of Customary International Law through Resolutions and Operational Activities of the Political and Subsidiary Organs of the United Nations*, 14 INT’L ORG. L. REV. 254 (2017).

311. Joyner, *supra* note 301, at 465–468.

312. McDougal & Reisman, *supra* note 138, at 272.

313. Schachter, *supra* note 298, at 7.

The Quilt-work approach consists of a two-step cycle. In the first stage, international actors are encouraged to identify sub-norms with which they are concerned, bearing in mind the purpose of the general principle and expectations of permissible behavior. In the context of PNIVIF, the extent to which the specific behavior in question is destabilizing or inimical to the “sovereign will” of the people can all be relevant considerations. Claimed sub-norms may also be identified by analogy to other sub-norms that are clear violations of the general principle. Ideally, identified sub-norms ought to be sufficiently specific, responsive, and anticipatory. They ought to be specific enough to guide State behavior and hold States to account. Sub-norms should be responsive enough to bear relevance to ongoing events. Alternatively, they may lay down rules of the road in anticipation of future developments. This ensures that those sub-norms that are timely, forward-looking, and most relevant to States are prioritized.

In the second stage of the Quilt-work approach, States ought to rely on the variety of international legal processes to advocate for, negotiate, and come to agreement on proposed sub-norms. Here, States would have many options in an increasingly decentralized international legal complex containing a proliferation of inter-State organizations, tribunals, and treaty regimes.<sup>314</sup> Again, the role of the UNGA is worth highlighting. Savvier States may even recognize the importance of working with lobbyists, the private sector, ordinary citizens, and NGOs to capitalize on “bottom-up international lawmaking.”<sup>315</sup>

Thus, the Quilt-work approach is not concerned with furnishing an ideal rule that draws a line between permissible and impermissible interpositions. Rather, it is a prescription that seeks to enhance the process through which States arrive at concord on the content of PNIVIF. The Quilt-work approach will eventually produce a picture of PNIVIF that comes close to a Pointillist artwork. Each dot on the canvas is a clear sub-rule on whether a specific interposition is permissible. On further reflection, this approach to international law is not entirely novel. In the context of transnational terrorism, States have managed to create a piecemeal patchwork to handle different categories of terrorist acts, even as a definition of terrorism remains elusive.<sup>316</sup>

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314. JOSEPH NYE JR., *SOFT POWER: THE MEANS TO SUCCESS IN WORLD POLITICS* 90 (2004); Luis Eslava & Sundhya Pahuja, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 *TRADE L. DEV.* 103, 106–108 (2011). *Cf.* Int’l Law Comm’n, Rep. of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ¶¶ 5–20, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006).

315. Janet Koven Levit, *Bottom-up International Lawmaking: Reflections on the New Haven School of International Law*, 32 *YALE J. INT’L L.* 393, 395 (2007).

316. *See* Rep. of the High-level Panel on Threats, Challenges and Change, transmitted by Letter Dated 1 December 2004 from the Chair of the High-level Panel on Threats, Challenges and Change Addressed to the Secretary-General, ¶¶ 157–62, U.N. Doc. A/59/565 (Dec. 2, 2004). *See also* Andrea Bianchi, *Enforcing International Law Norms Against Terrorism: Achievements and Prospects*, in *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 491, 498–99 (Andrea Bianchi ed., 2004).

There are a number of justifications for why the Quilt-work approach is an ideal response to PNIVIF. Its chief attraction is its ability to navigate the demands of flexibility and evolution the principle calls for, alongside the specificity required to effectively guide State behavior. It does so by deconstructing an expansive concept into manageable threads. States may, for instance, agree to prohibit electoral disinformation campaigns as a *manifestation* of destabilizing interference without outlawing all destabilizing interpositions. By clarifying the specific manifestations of illegal interferences, the Quilt-work approach creates tangible benchmarks against which State conduct can be measured. At the same time, it avoids the risks of under-inclusivity, over-inclusivity, auto-interpretation, and arbitrariness associated with attempts to redefine PNIVIF at large.

Consider the application of the Quilt-work approach to one of hybrid conflict's "single greatest challenge[s]"—attribution.<sup>317</sup> There are two obstacles in the particular field of cyber operations. The first is technical. Sophisticated cyber-attacks are often conducted through intermediate computer systems that have been hijacked and may span different jurisdictions.<sup>318</sup> Perpetrators may also mask their identities using IP spoofing.<sup>319</sup> All said, the technical difficulties ought not to be overstated, since States have also developed more potent traceback capabilities.<sup>320</sup>

The second obstacle is legal. Even if States are able to technically identify the perpetrators of malicious cyber operations, establishing State responsibility under the present secondary rules of international law can prove difficult.<sup>321</sup> Shrewd States conveniently employ non-State actors ("NSA") to fudge State responsibility and maintain a veneer of plausible deniability.<sup>322</sup> The ODNI Report,

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317. Todd C. Huntley, *Controlling the Use of Force in Cyberspace: The Application of the Law of Armed Conflict During a Time of Fundamental Change in the Nature of Warfare*, 60 NAVAL L. REV. 1, 34 (2010).

318. Daniel B. Garrie, *Cyber Warfare, What Are the Rules?*, 1 J. L. & CYBER WARFARE 1, 4 (2012); Matthew J. Skelrov, *Solving the Dilemma of State Responses to Cyberattacks: A Justification for the Use of Active Defenses Against States Who Neglect Their Duty to Prevent*, 201 MIL. L. REV. 1, 77–78 (2009).

319. Erik M. Mudrinich, *Cyber 3.0: The Department of Defense Strategy for Operating in Cyberspace and the Attribution Problem*, 68 A.F. L. REV. 167, 195 (2012).

320. See PANAYOTIS A. YANNAKOGEORGOS, STRATEGIES FOR RESOLVING THE CYBER ATTRIBUTION CHALLENGE 9 (2013); RICHARD A. CLARKE & ROBERT K. KNAKE, CYBER WAR 214 (2010); Kubo Mačák, *Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors*, 21 J. CONFLICT & SEC. L. 405, 410 (2016); William C. Banks, *The Bumpy Road to a Meaningful International Law of Cyber Attribution*, 113 AM. J. INT'L L. UNBOUND 191, 192 (2019).

321. Michael N. Schmitt & Liis Vihul, *Proxy Wars in Cyberspace: The Evolving International Law of Attribution*, 1 FLETCHER SEC. REV. 53, 71 (2014).

322. U.S. Dep't of Defense, *The Department of Defense Cyber Strategy*, at 9 (Apr. 2015), [https://archive.defense.gov/home/features/2015/0415\\_cyber-strategy/Final\\_2015\\_DoD\\_CYBER\\_STRATEGY\\_for\\_web.pdf](https://archive.defense.gov/home/features/2015/0415_cyber-strategy/Final_2015_DoD_CYBER_STRATEGY_for_web.pdf) ("state and non-state threats often also blend together; patriotic entities often act as cyber surrogates for states, and non-state entities can provide cover for state-based operators."). See also David E. Graham, *Cyber Threats and the Law of War*, (2010) 4 J. NAT'L SEC. L. & POL'Y 87, 93.

for instance, states that disinformation during the 2016 US presidential elections was promulgated by a mix of “State-funded media, third-party intermediaries, and paid social media users or ‘trolls.’”<sup>323</sup> Yet, the traditional rules for imputing NSA activities to States set standards that are arguably too onerous. Under Article 8 of the Draft Articles on the Responsibility of States, attribution is made out when NSAs act “on the instructions” or “under the direction” of a State.<sup>324</sup> This seems theoretically sound, but is difficult to apply in practice because of the basic problem of information asymmetry. Any evidence of “instruction” or “direction” usually rests in the hands of the perpetrator State.<sup>325</sup>

Alternatively, the Draft Articles also impute State responsibility when NSAs act under the “control” of the perpetrating State.<sup>326</sup> The ICJ has interpreted this to mean that a State must have effective control over the illegal NSA acts in question for attribution to be established (the “effective control” test). Proving that the perpetrator State exercised control with respect to the overall actions taken by the NSAs is not enough.<sup>327</sup> This is an unrealistic standard in the context of cyber acts. In electoral disinformation and hybrid conflict, which derive their effectiveness from a series of synchronized acts, is it then necessary to prove the perpetrator State’s “effective control” over *each and every* single act? Surely such an expectation is fanciful. These legal challenges are compounded by the double-bind problem—when victim States are expected to furnish evidence to prove each and every act can be traced back to the perpetrator State, the risk of revealing the victim State’s cyber-defense capabilities to the perpetrator is increased. This has the ironic effect of strengthening the perpetrator’s future offensive efforts.<sup>328</sup>

Palpable discontent with the current situation has led many commentators to propose revisions to the law of State responsibility. Some have advocated for attribution to be based on a State’s overall control of NSAs, even though this standard was rejected by the ICJ in *Bosnian Genocide*.<sup>329</sup> Others have argued for territorial-based imputation, which would attribute State responsibility for cyber operations emanating from a State’s territory.<sup>330</sup> This raises practical concerns when one considers how this test would apply to situations like the 2016 US presidential elections, where some of the disinformation emerged from persons

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323. ODNI REPORT, *supra* note 60, at 2.

324. G.A. Res. 56/83, annex art. 8 (Jan. 28, 2002) [hereinafter Draft Articles on State Responsibility].

325. Hans-Georg Dederer & Tassilo Singer, *Adverse Cyber Operations: Causality, Attribution, Evidence, and Due Diligence*, 95 INT’L L. STUD. 430, 436–37 (2019).

326. Draft Articles on State Responsibility, *supra* note 324, at annex art. 8.

327. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 400 (Feb. 26); Nicar. v. US, 1986 I.C.J. ¶ 115.

328. Schmitt, *supra* note 99, at 58.

329. See, e.g., YANNAKOGEORGOS, *supra* note 320, at 56.

330. See, e.g., Mudrinich, *supra* note 319, at 193–94.

and computer systems operating in the United States itself.<sup>331</sup> Constantine Antonopoulos proposes relying on presumptions to shift the burden of evidence.<sup>332</sup> Similarly, Peter Margulies suggests a test of virtual control that would call upon a state to prove that it did not fund a cyber-attack that emanated from its territory.<sup>333</sup>

There are nonetheless reasons to be cautious about proposed revisions to the law of State responsibility. Because cyber operations exist on a wide spectrum, it is not clear that a revision to State responsibility rules would be equally applicable to all cyber operations.<sup>334</sup> Consider the employment of non-Internet cyber-attacks, such as the physical smuggling of an infected thumb-drive into an “air-gapped” network. In such an instance, the operation is not so different from a kinetic act and “can be addressed through real world forensics, investigation, and intelligence.”<sup>335</sup> While an “effective control” test may have little resonance with composite operations, it may still bear relevance for one-off cyber-attacks.

More broadly, this speaks to the risk of modifying State responsibility as a general system of secondary rules. Not only do such modifications set a precedent for laxer attribution standards outside the context of cyber, they also discourage the take-up of new international law obligations—since States must be wary that primary obligations they once agreed to may now be expanded by modifications to the secondary rules. Moreover, laxer attribution rules may have the opposite effect of giving States that cry wolf more excuses to pursue drastic countermeasures.

The Quilt-work approach cuts across these difficulties by introducing a possible solution that meets the requirements of flexibility and specificity. Instead of making *lex generalis* modifications to the regime of secondary rules, States can modify the primary rules, *lex specialis*, to respond to the attribution difficulties that attend to particular sub-norms.

In the context of electoral disinformation campaigns, States may specifically prescribe that an “extensive and long-running pattern of conduct” can suffice as evidence of wrongdoing. It may be further clarified that such a pattern of conduct is established even if a State organizes the disinformation campaign through persons or entities affiliated with the State. As with most hybrid operations,

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331. See, e.g., Indictment at para. 5, U.S. v. Internet Rsch. Agency L.L.C., No. 1:18-cr-00032-DLF, (D.D.C. Feb. 16, 2018).

332. Constantine Antonopoulos, *State Responsibility in Cyberspace*, in RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CYBERSPACE 55, 63–65 (Nicholas Tsagourias & Russell Buchan eds., 2015).

333. Peter Margulies, *Sovereignty and Cyber Attacks: Technology's Challenge to the Law of State Responsibility*, 14 MELB. J. INT'L L. 496, 514–16 (2013).

334. See Jason Healy, *Beyond Attribution: Seeking National Responsibility for Cyber Attacks*, ATLANTIC COUNCIL (Feb. 22, 2012), <https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/beyond-attribution-seeking-national-responsibility-in-cyberspace/>.

335. Planning for the Future of Cyber Attack Attribution: Hearing Before the Subcomm. on Tech. & Innovation of the H. Comm. on Sci. & Tech., 111th Cong. 91 (2010) (statement of Robert Knake, International Affairs Fellow, Council on Foreign Relations).

electoral disinformation campaigns derive their strength from the synchronization of multiple sub-acts, aggregating to create a larger effect.<sup>336</sup> As stated, this makes the “effective control” test ill-fitting. A “pattern of conduct” evidentiary standard allows victim-States to rely on indirect evidence on the implicit condition that the quantity of evidence and relationship among the factual postulates may compensate for the lesser quality of evidence. The timing of the acts at issue and evidence of coordination among various actors may be taken into account. Composite acts, such as electoral disinformation campaigns, may even work to the perpetrator’s disadvantage since there are more opportunities for the perpetrator State to leave evidence of its involvement. A “pattern of conduct” standard also partially addresses the double-bind problem, since victim-States are no longer expected to demonstrate technical attribution for each and every act.

A “pattern of conduct” standard gets around the secondary rules of attribution by modifying the evidentiary yardstick for the particular sub-norm of electoral disinformation campaigns. At the same time, it does not impose itself on other cyber or hybrid operations. Clearly, the “pattern of conduct” standard cuts no ice with one-off cyber-attacks. Neither does it seem applicable to the specific case of State-sponsored economic cyber espionage, which may benefit more from an obligation on States to criminalize and prevent such espionage. The point to emphasize is that, by employing the Quilt-work approach to progressively clarify which types of cyber or hybrid operations are unlawful as interventions or interferences, States may also seize the opportunity to apply *lex specialis* frameworks that circumvent attribution difficulties, all while maintaining the integrity of the secondary rules of State responsibility.

Additionally, the Quilt-work approach is well-suited to PNIVIF’s evolutionary character. As alluded to earlier, defining intervention as coercion stymied PNIVIF’s development and precipitated inattention toward various emerging and extant rules on non-coercive interferences. Contrastingly, the Quilt-work approach permits gaps to be filled as the principle evolves.

In this regard, the approach has particular relevance to the field of hybrid conflict. Because hybrid acts come in all shapes and sizes, the Quilt-work approach avoids the difficulty of having to pronounce on a single legal test which is capable of accommodating all hybrid acts. Additionally, it permits the law on PNIVIF to grow as States develop new offensive and defensive hybrid capabilities. In entailing specific clarification of the rules of engagement in hybrid conflicts, the Quilt-work approach holds out the promise of shedding light on an area of international concern that languishes in a legal grey zone.<sup>337</sup>

Furthermore, the Quilt-work approach presents a feasible way for clarifying and reinvigorating a fluid principle by operating alongside, rather than against, the interests of States. Attempts to redefine PNIVIF naturally involve fashioning

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336. See *supra* text accompanying notes 67–69.

337. See James Dever & Jack Dever, *Cyber Realpolitik*, 25 B.U. J. SCI. & TECH. L. 597, 599 (2019).

a generalized rule about the nature of a State's duty of non-intervention and non-interference. As discussed, the practical problem with generalized rules is that they can be double-edged swords—they may simultaneously curtail a State's ability to influence others while affording them legal protection against foreign influence. It becomes difficult for States to assess where their interests lie vis-à-vis the generalized rule, and this breeds ambivalence to generalized PNIVIF rules.<sup>338</sup> The Quilt-work approach circumvents this difficulty by deconstructing PNIVIF into manageable sub-norms, thus allowing States to clarify their positions with a greater awareness as to where their interests lie vis-à-vis the specific sub-norm. Technical expertise may even be included to assist in standard-setting over particular sub-norms, an option that is probably unavailable where the principle is discussed in general terms. States would therefore be in a better position to lobby for specific sub-norms that meet their concerns.

This, of course, does not imply that any one State has *carte blanche* to shape PNIVIF in its national interest. Ideally, the international law of non-intervention and non-interference will reflect the claimed sub-norms of many States, and the strongest of them will be backed by consensus or a supermajority. Sub-norms backed by State practice and *opinio juris* may even ascend into “hard” law or develop into their own niche regimes. The resulting image is a quilt-work that is woven incrementally from State concurrence with the disaggregated sub-norms, without alarming States with sweeping generalized rules on their PNIVIF obligation. In this regard, the Quilt-work approach is simple to put into effect. It is sufficient that States are encouraged to do so by appealing to their self-interest.

The incremental aspect of the Quilt-work approach also distinguishes it from attempts to introduce a comprehensive list of specific acts prohibited under PNIVIF. In retrospect, the need to identify specific manifestations of the principle was long ago recognized by some States, especially non-aligned ones. As early as 1964, Bulgaria noted that although “no definition of the principle... can be expected to embrace all the possible forms of intervention,” “an enumeration of these forces of intervention might be appended for purposes of example and illustration.”<sup>339</sup> The Declaration on Intervention and Interference should be seen as a partial attempt to “elaborate” on specific manifestations of prohibited interpositions. For instance, the prohibition on armed intervention was expounded into no less than six paragraphs, dealing specifically with matters such as mercenaries.<sup>340</sup> As one may recall, twenty-two States objected to the Declaration. It is suggested this opposition had more to do with, first, the Resolution's attempt

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338. See *supra* text accompanying notes 290-294.

339. See Comments on Principles of International Law, *supra* note 249 at 11 (Bulg.), U.N. Doc. A/5725 (July 22, 1964); see also U.N. Secretary General, *Consideration of Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations: Comments Received from Governments: Addendum*, at 2 (Phil.), U.N. Doc. A/5725/Add.7 (Dec. 11, 1964).

340. See Declaration on Intervention and Interference, *supra* note 204, at annex ¶¶ 2(II)(c)–(d), 2(II)(f)–(g), 2(II)(m)–(n).

to prohibit a variety of new interpositions, including the broad concept of destabilizing interference; and second, the desire of non-aligned States to be as comprehensive as possible. Rather than coalesce stronger support through an incremental piecemeal approach, the non-aligned States alarmed other States who may have supported the Resolution if not for their disagreements with one or two of its provisions.

In context, the Quilt-work approach may find expression in a UNGA declaration that asserts that a State that engages in a disinformation campaign in the domestic elections of another State violates PNIVIF. The word “disinformation,” as opposed to “misinformation,” stresses the specific intent of spreading false information. The word “campaign” limits the prohibition to concerted and organized disinformation efforts taking place over a sufficiently long period of time. A “pattern of conduct” evidentiary standard, finding State responsibility even where the disinformation campaign was conducted through the organization of affiliated persons and entities, could round up the sub-norm regime.

Such a sub-norm would also be a legitimate manifestation of PNIVIF. Not only do electoral disinformation campaigns destabilize a fundamental process of democratic States; their concerted and prolonged nature emphasizes their potential for fraudulent persuasion. When employed to sway votes, they distort peoples’ choices. The defensibility of outlawing electoral disinformation campaigns is strengthened by other factors. A great majority of States have condemned and taken steps to combat disinformation campaigns, with some State actors characterizing them as violations of PNIVIF.<sup>341</sup> Two States that the United States has accused of electoral disinformation have themselves sponsored a Draft Code of Conduct for Information Security, condemning the use information technologies “to interfere in the internal affairs of other States or with the aim of undermining their political, economic and social stability”<sup>342</sup>—signifying that they stand opposed to electoral disinformation campaigns. Russia’s response to allegations of interposition with the 2016 US presidential elections has been to deny “State-level” involvement.<sup>343</sup> Such denial proves, rather than negates, the opprobrium of electoral disinformation campaigns.<sup>344</sup> One may also speculate that a proposed sub-norm against electoral disinformation campaigns is likely to receive widespread support.<sup>345</sup>

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341. *See, e.g.,* Egan, *supra* note 12 at 175.

342. Permanent Reps. of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan & Uzbekistan to the U.N., Letter dated Jan. 9, 2015 from the Permanent Representatives of China, Kazakhstan, Kyrgyzstan, the Russian Federation, Tajikistan and Uzbekistan to the United Nations addressed to the Secretary-General, at annex ¶ 2(3), U.N. Doc. A/69/723 (Jan. 13, 2015).

343. *See* ODNI REPORT, *supra* note 60 at 3.

344. *See* *Nicar. v. US*, 1986 I.C.J. ¶ 186.

345. The Oxford Internet Institute Computational Propaganda Research Project suggests that, as of 2019, there are seven States suspected of engaging in computational propaganda as part of foreign

It is noteworthy that the Quilt-work approach does not risk a sweeping expansion of PNIVIF. The proposed sub-norm is narrowly tailored to disinformation campaigns. This ensures States cannot rely on a broad redefinition of PNIVIF to justify the abrogation of speech rights or drastic countermeasures. A foreign media article critical of an incumbent government, for instance, would not qualify as unlawful interference since it is an isolated incident. Similarly, incumbents cannot disparage domestic dissidents as agents of foreign influence if there is no evidence of foreign coordination.

The Quilt-work approach does not see the failure of a particular sub-norm to receive general recognition by States as a failure of the process. Indeed, this is to be expected of certain sub-norms. Strong opposition to a particular sub-norm may be taken as evidence that the sub-norm is not an acceptable manifestation of PNIVIF. From the perspective of international law as a process, even sub-norms that receive tenuous acceptance have value insofar as they minimally promote discussion on specific manifestations of PNIVIF rather than platitudes on the principle at large. The Quilt-work approach, breaking down PNIVIF into the parts of its sum, presents a credible path for reconstructing PNIVIF.

#### CONCLUSION

In 1984, Rosalyn Higgins wrote on intervention and interference:

[T]he task of the international lawyer over the next few years is surely not to go on repeating the rhetoric of dead events which no longer accord with reality, but to try to assist the political leaders to identify what is the new consensus about acceptable and unacceptable levels of intrusion.<sup>346</sup>

This Article responds to Higgins's call with an unprecedented viewpoint. Not only does it challenge the definition of PNIVIF as coercion; it argues that all attempts at defining the principle are likely to be counterproductive and proposes the Quilt-work approach as an alternative. In so doing, it works with, rather than against, the chaotic enterprise of international law to reinvigorate a principle that has too often languished in a conceptual fog.

On a micro-level, this Article complements existing efforts to address disinformation. A prohibition on State-led electoral disinformation campaigns as a manifestation of PNIVIF is narrowly tailored toward one of the most disruptive forms of IOs. A "pattern of conduct" evidentiary standard circumvents the thorny problems of attribution. Yet, the prohibition does not attempt to regulate all kinds of disinformation or misinformation. By targeting State behavior, it avoids

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influence operations. See SAMANTHA BRADSHAW & PHILIP N. HOWARD, *THE GLOBAL DISINFORMATION ORDER 2019: GLOBAL INVENTORY OF ORGANISED SOCIAL MEDIA MANIPULATION 2* (2019), <https://comprop.oii.ox.ac.uk/wp-content/uploads/sites/93/2019/09/CyberTroop-Report19.pdf>.

346. Higgins, *supra* note 29, at 42.

excessive intrusions into individual speech freedoms. Of course, international law is never a panacea. A prohibition on electoral disinformation campaigns may disincentivize would-be perpetrators but rules can be broken. States would therefore do well to strengthen hybrid-deterrence policies and build citizen resilience, such as through media literacy programs.

On the macro-level, the Quilt-work approach sketches a way forward for PNIVIF to be seriously capitalized on as a practical response to regulate other dangerous forms of interstate interpositions. PNIVIF may be relied on as a starting point to lay down sub-norms against specific manifestations of hybrid, cyber, and other tactics gaining prevalence in interstate conflicts.<sup>347</sup> These sub-norms may eventually develop into their own niche doctrines, holding out the promise of helping States construct specific rules of engagement and deescalate tense situations.

In this regard, it may be too idealistic to expect an absolute prohibition on all methods of hybrid tactics. As Michael Glennon noted in the field of cyber ops, State reliance on these new capabilities may optimistically be regarded as “merely the most recent in a long history of efforts by States to fight at a greater distance, to afford greater protection to non-combatants (and combatants), to enhance proportionality-in effect, to pursue many of the ends of humanitarian law.”<sup>348</sup> The goal, therefore, is to develop new legal frameworks that can be used to realistically manage such non-force conflicts.

Another far-reaching implication of this Article is that it invites a rethinking of how other international legal concepts can be similarly revitalized. The due regard obligation and general duty to cooperate are boilerplate clauses in most international agreements and declarations.<sup>349</sup> Sovereign equality is a precept of international law. Yet, the contours of these concepts are not always well sketched out. A Quilt-work approach may pave the way for an incremental clarification of these principles. Earlier, it was suggested that the Quilt-work approach can circumvent attribution difficulties by *lex specialis* modification of the evidentiary standard required to prove a specific manifestation of intervention or interference. One may see how a similar approach could be applied to introduce granularity in State responsibility in other fields of international law, thereby establishing an attribution framework “malleable enough to provide a legal basis when needed, technological certainty when required, and reliable evidence when warranted.”<sup>350</sup>

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347. See Tomáš Čížik, *Baltic States - How to React to “New Warfare” in the Context of the Article V?*, 17 SLOVAK J. POL. SCI. 184, 184 (2017); Charles Bartles, *Getting Gerasimov Right*, 96 MIL. REV. 30, 34 (2016); Sascha Dov Bachmann & Hhkan Gunneriusson, *Russia's Hybrid Warfare in the East: The Integral Nature of the Information Sphere*, 16 GEO. J. INT'L L. 198, 200 (2012).

348. Michael J. Glennon, *The Road Ahead: Gaps, Leaks and Drips*, 89 INT'L L. STUD. 362, 384–385 (2013).

349. See, e.g., Convention on the Law of the Sea arts. 87(2), 197, Dec. 10, 1982, 1833 U.N.T.S. 397.

350. Mudrinich, *supra* note 319 at 204.

Seeking definitions and creating workable tests are persisting preoccupations of the legal mind and not without reason. They afford States certainty and predictability in the conduct of their international relations and set clear standards to guide State behavior. Yet, it seems equally clear that definitional tests are incapable of grasping principles that are inherently expansive and fluid. It is my hope that this Article, pioneering a Quilt-work approach premised on international law as process, carves a future direction for rejuvenating a cardinal principle of international law.

# MOBILIZING UNIVERSALISM: THE ORIGINS OF HUMAN RIGHTS

Catherine Baylin Duryea\*

## ABSTRACT

*Human rights law claims to be universal, setting rights apart from paradigms based on shared religion, culture, or nationality. This claim of universality was a significant factor in the proliferation of human rights NGOs in the 1970s and remains an important source of legitimacy. The universality of human rights has been challenged and contested since they were first discussed at the United Nations (UN). Today, much of the debate centers around the origins of human rights—particularly whether they arose out of Western traditions or whether they have more global roots. For too long, discussions about universality have ignored the practice of human rights in the Global South, particularly in Arab countries. Instead of searching for evidence of universality in the halls of the UN, this Article looks at how activists mobilized and produced universality through their work. Archival sources and interviews show that the turn to human rights in the Arab world was rooted in the politics of the 1970s but relied on the concept of universality as embodied in the foundational human rights documents of the 1940s and 1960s. Activists used these documents to advance conceptions of human rights that were compatible with several distinct political visions. Their work supports the claim that human rights can be universal, not because rights exist outside of politics or have diverse origins, but because they were constantly reinvented to support a range of different, sometimes contradictory, political goals.*

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## INTRODUCTION

Human rights law claims to be universal, setting it apart from paradigms based on shared religion, culture, or nationality. This claim of universality was a significant factor in the proliferation of human rights NGOs in the 1970s and remains an important source of legitimacy for human rights activists. Universality has been challenged and contested since human rights were first debated at the United Nations.<sup>1</sup> Today, much of the debate centers around the origins of human rights—particularly whether they arose out of Western traditions or whether they have global roots. Discussions about the universality of human rights often focus

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1. Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* ix (2000).

on textual compatibility and purity of origins, rather than the social practice of human rights, particularly outside of the United States and Europe.<sup>2</sup> Instead of searching for evidence of universality in the halls of the UN, this Article looks to the role of universalism in the work of activists in several Arab countries. The universal claims of international law were central to why they chose human rights alongside other forms of political and civic engagement. By turning texts into practice, activists demonstrated that the universal claim of human rights law may be located in everyday practices rather than achieved at the moment of drafting. Archival sources from Palestine, Morocco, Egypt, and Kuwait and interviews with more than a dozen NGO founders and early members illustrate why Arab activists chose human rights work in the late 1970s and 1980s and how they mobilized universalism to advance different political goals.<sup>3</sup>

The turn to human rights in the Arab world was rooted in the politics of the 1970s but relied on the concept of universality as embodied in the foundational human rights documents of the 1940s and 1960s. To early activists, human rights were fundamentally laws, but they were also ideas, systems, practices, and networks.<sup>4</sup> While they self-consciously used other types of language and practice, from labor organizing to anti-colonialism, their reliance on international law set them apart from other political actors. Drawing on international law invoked a commitment to transnationalism that was not necessarily part of other organizing principles that engaged with some of the content of human rights law. Human rights activists did not just work to protect freedom of association or end torture;

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2. Reza Afshari, *Relativity in Universality: Jack Donnelly's Grand Theory in Need of Specific Illustrations*, 37 Hum. Rts. Q., 858 (2015) ("The debates about the 'ownership' of the human rights discourse . . . often ignore[] the actual praxis in recent decades that have turned human rights hegemonic in the minds of many in the global South." Afshari was referring to States, but his point is relevant for non-state actors as well).

3. Documentary records include internal memoranda, correspondence, reports, news coverage, and photographs from institutional archives, libraries, and personal collections in Kuwait, Palestine, Morocco, and the United States. I conducted nineteen semi-structured interviews with seventeen human rights leaders in offices, private homes, coffee shops, and over video. To identify interview subjects, I first reached out through personal connections or publicly available contact information. I then used snowball sampling to identify other founders and early members based on recommendations from my initial contacts. Members who were younger in the late 1970s were more likely to be alive and available for interviews. I was more successful in contacting those who remained in human rights activism in one form or another, rather than leaving the field entirely or going into government service. I spoke with five women and twelve men. Two of my female interlocutors were members of Kuwaiti women's organizations, with the remaining women working at general human rights NGOs. Women were significantly underrepresented or entirely absent from the early leadership of all of these organizations.

4. See Philip Alston, *Does the Past Matter – On the Origins of Human Rights*, 126 Harv. L. Rev. 2043, 2078 (2013) (positing that "as a starting point," human rights could be defined as "an idea," "an elaborated discourse," "a social movement," "a practice or institution," "a legal regime, either at the national or international level, or both," and "a system"); Johannes Morsink, *The Universal Declaration of Human Rights and the Holocaust: An Endangered Connection* 17 (2019) (disaggregating human rights into the separate, if overlapping, categories of "the historical idea," "the legal human rights system," and "the huge human rights movement we find operating today on all continents and in all countries").

they sought to legitimize a system in which national governments were held accountable to international commitments. Though few activists put great faith in the United Nations itself, their work relied on the standards it set. They used the Universal Declaration of Human Rights (UDHR) and early treaties to advance conceptions of human rights that were compatible with several distinct political visions: national liberation, socialism, democracy, and constitutional monarchy. They reinvented and defined human rights *within* political systems to support a range of different, sometimes contradictory, goals.

Several features of international law were particularly attractive during the social and intellectual reconfigurations of the 1970s. First, universal legal protections made human rights accessible to everyone on an equal basis (formally, at least). Domestically, access to the protections of human rights did not depend on citizenship, political orientation, religious belief, or wealth. Internationally, human rights provided a platform for activists to claim the humanity denied to Arabs, Muslims, and formerly colonized peoples in terms that resonated with imperial powers. Second, human rights could support new NGOs outside of established political parties at a time when many of these parties were fracturing or unsatisfactory to a new generation. Third, using legal documentation strategies brought unique advantages to NGOs. Affidavits and fact-finding reports changed the way social movements mobilized and exploited individual experiences of State oppression. They became aggregated into binders, stored in libraries, and eventually made available on servers.<sup>5</sup> The power of these testimonies changed the very logic of political opposition. Finally, regional and international networks provided expertise, solidarity, moral authority, and material support. These features of international law led Arab activists with different goals and priorities to choose human rights. All rested on the claim of universality.

This Article has important implications for our understanding of how human rights law works. First, it shows continuities between post-WW2 legal developments and social practice in the 1970s.<sup>6</sup> Second, the compatibility between human rights and various worldviews—religious, political, cultural—is not demonstrated in a moment, but over time. The practice of human rights activists, on the front lines of navigating overlapping systems of laws and expectations, is fertile ground for understanding how human rights intersects with Islam, anti-colonialism, and socialism. Arab NGOs navigated debates over the compatibility of international law and Islam on a daily basis. They mobilized international law in favor of both human rights and national liberation in ways that challenged conceptions of rights as uniquely Western. Their position in a region battered by colonialism, foreign exploitation, and domestic autocracy makes their experience valuable as an entry point for re-thinking universality.<sup>7</sup>

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5. Joost Hiltermann, *Human Rights and the Politics of Computer Software*, 150 MERIP Middle East Rep. 8-9 (1988).

6. Cf. SAMUEL MOYN, *The Last Utopia* 3 (2010).

7. See Anthony Tirado Chase, *Human Rights, Revolution, and Reform in the Muslim World* 43 (2012).

The Article proceeds in three parts. Part I shows the connection between the origins of human rights and conclusions about their universality. Part II argues that the 1970s and 1980s constituted an inflection point—but not a rupture—as Arab activists began to wield human rights’ claim to universalism as a bulwark against State repression. Their diverse practices demonstrate that human rights provided a relevant framework across a range of political, religious, and social contexts. Finally, Part III analyzes the contributions of these histories for the study and practice of human rights.

### I. ORIGIN STORIES

Debates over the universality of human rights often look to history for supporting or contradictory evidence, making the origins of human rights central to the discussion. Ideas about equity and liberty date back millennia but contemporary human rights law rests on the Universal Declaration of Human Rights (UDHR) adopted by the United Nations General Assembly in 1948. Until recently, it was accepted wisdom that the UDHR was the culmination of decades, if not centuries, of legal, social, and philosophical development at both the intellectual and institutional level.<sup>8</sup> A wave of revisionist scholarship, led by Samuel Moyn, argues that the connection between the UDHR and these developments is far more tenuous and that human rights as we know it today began only in the 1970s.<sup>9</sup> Moyn overstates the discontinuities between the growth of NGOs and earlier developments, but there was a significant shift in the 1970s away from the United Nations towards non-governmental actors.<sup>10</sup> The subsequent controversy in the literature over when human rights began—in the 1970s or sometime earlier—has significant implications for universality.

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8. See ROBIN BLACKBURN, *The American Crucible: Slavery, Emancipation and Human Rights* 478-488 (2013) (tracing the connections between abolition, empire, and human rights); MICHELINE ISHAY, *The History of Human Rights: From Ancient Times to the Globalization Era* 4-5 (2004) (arguing that there have been several human rights projects at particular moments that have built upon the failures of previous ones, including the French Revolution, early 20th century socialism, and the establishment of the UN); PAUL GORDON LAUREN, *The Evolution of International Human Rights: Visions Seen* 43-78 (3d ed. 2011) (describing 19th century movements for abolition, racial equality, religious freedom, women’s rights, and wounded soldiers as early human rights activism); JENNY MARTINEZ, *The Slave Trade and the Origins of International Human Rights Law* 13-14 (2012) (arguing that the abolition movement of the 19th century “was the first successful international human rights campaign”).

9. Moyn, *supra* note 6. See also Stephen Hopgood, *The Endtimes of Human Rights* (2003); Barbara Keys, *Reclaiming American Virtue: The Human Rights Revolution of the 1970s* 15-31 (2014).

10. Mark Mazower, *Governing the World: The History of an Idea* 322-31 (2012); see generally William Korey, *NGOs and the Universal Declaration of Human Rights: A Curious Grapevine* (1998).

### A. Debating Universality

Throughout the twentieth century, debates over the universality of human rights mirrored power struggles on the international stage. During the Cold War, Eastern and Western bloc countries clashed over which rights were more essential: civil and political or economic, cultural, and social. At the same time, both the Soviet Union and Third World activists leveraged the universalist claims of human rights as an anti-imperial force.<sup>11</sup> With the increased power of independent States and realignment of regional politics in the 1980s and 1990s, universalism came to be more strongly associated *with* imperialism, namely the imposition of human rights by the West on the rest of the world. Objections to universality based on “Asian values”<sup>12</sup> and Islam gained traction.<sup>13</sup> Debates over cultural relativism flourished.<sup>14</sup>

As scholars and activists reckoned with the neocolonialism of universalism and the inadequacies of cultural relativism, they developed theoretical frameworks incorporating elements of both.<sup>15</sup> Legal scholars Abdullahi An-Na'im<sup>16</sup> and Boaventura de Sousa Santos<sup>17</sup> reimagined universalism with respect for all cultures and openness towards revising legal standards. Though their approaches differed, they exemplified the struggle to recognize a common humanity without imposing hegemonic legal standards. “It is precisely in the field of human rights,” de Sousa Santos argued, “that Western culture must learn from the South if the false universality that is attributed to human rights in the imperial context is to be converted into the new universality of cosmopolitanism in a cross-cultural dialogue.”<sup>18</sup> In other words, universalism was possible, but the exclusionary and colonial history of human rights law had doomed it to parochialism.

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11. Mazower, *Governing the World: The History of an Idea*, at 318-319.

12. Michael Barr, *Lee Kuan Yew and the “Asian Values” Debate*, 24 *Asian Studies R.* 309, 309 (2000); *see generally* *The East Asian Challenge for Human Rights* (Joanne R. Bauer & Daniel A. Bell, eds., 1999), Amartya Sen, *Human Rights and Asian Values*, *New Republic*, July 14, 1997, at 33.

13. *See* Michael Ignatieff, *Human Rights as Politics and Idolatry* 58-63 (2001).

14. *See* *Human Rights: Cultural and Ideological Perspectives* (A. Pollis & P. Schwab, eds. 1979); Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 *Hum. Rts Q.* (1984), 400; *Religious Fundamentalisms and the Human Rights of Women* (Courtney W. Howland, ed. 1999); Thomas M. Franck, *Are Human Rights Universal?* 80 *Foreign Aff.*, 191, 193 (2001).

15. *See* Jack Donnelly, *The Relative Universality of Human Rights*, 29 *Hum. Rts. Q.* 281, 283 (2007) (charting a middle course, where rights possess “functional, international, legal, and overlapping consensus universality” but “leave considerable space for national, regional, cultural particularity and other forms of diversity and relativity”).

16. Abdullahi An-Na'im, *Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment, in Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (Abdullahi An-Na'im ed. 1995).

17. Boaventura de Sousa Santos, *Toward a Multicultural Conception of Human Rights, in Moral Imperialism. A Critical Anthology* 39 (Berta Hernández-Truyol, ed. 2002).

18. *Id.* at 54.

Historians took a different approach, documenting the role of less powerful States in drafting human rights treaties to demonstrate that they were not merely products of the West.<sup>19</sup> For example, though an early narrative credited René Cassin of France with primary authorship of the UDHR, later scholarship showed the influence of Charles Malik of Lebanon, P.C. Chang of China, Hernan Santa Cruz of Chile, and Hansa Mehta of India.<sup>20</sup> Moyn dismisses the significance of their involvement,<sup>21</sup> but the UDHR can no longer be credibly described as a purely Western document.<sup>22</sup> Historian Susan Waltz characterized the “myth” that the Great Powers led the call for human rights as “partially fact and partially fiction.”<sup>23</sup> Waltz notes that, “contrary to popular suppositions, at mid-century it was small States and non-governmental organizations rather than the great powers who were the most ardent and outspoken champions of human rights.”<sup>24</sup> Their influence continued throughout the twentieth century. This is not to say that powerful countries did not exert significant influence over human rights treaties,<sup>25</sup> but drafting was nevertheless a contested process often driven by less powerful nations that could meaningfully shape the final text.<sup>26</sup>

Recovering the roles of Chinese, Lebanese, Chilean, and Indian diplomats in drafting the UDHR and documenting the role of less dominant States in subsequent treaty drafting speaks to whether the origins of international laws were sufficiently diverse to support a claim to universality. Authorship, however, is just

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19. Morsink, *supra* note 1; KATHRYN SIKKINK, EVIDENCE FOR HOPE: MAKING HUMAN RIGHTS WORK IN THE 21ST CENTURY 59-93 (2017); OSIRE GLACIER, UNIVERSAL RIGHTS, SYSTEMIC VIOLATIONS, AND CULTURAL RELATIVISM IN MOROCCO (2013); DANIEL J. WHELAN, INDIVISIBLE HUMAN RIGHTS: A HISTORY (2010).

20. See MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 65 (2001); Lauren, *supra* note 8, at 216-219; Morsink, *id.* at 29-30; Susan Waltz, *Reclaiming and Rebuilding the History of the Universal Declaration of Human Rights*, 23 *Third World Q.* 437, 441 (2002).

21. Moyn, *supra* note 6, at 66 (“It is easy to overstate the global and multicultural origins of the Universal Declaration in light of more contemporary pressures and desires . . . Far from demonstrating the multicultural origins of the document, however, these facts mainly show the existence of a global diplomatic elite, often schooled in Western locales, who helped tinker with the declaration at a moment of symbolic unity.”).

22. See Sikkink, *supra* note 19, at 58 (2017) (referencing Morsink’s thorough account of the involvement of small States in the drafting of the UDHR, published in 1999: “I’m not sure why we still are arguing about these issues in 2017; however, current debates in the field suggest that people have not yet paid attention to this historical scholarship, or perhaps prefer to read only the archives in the countries of the Global North.”).

23. Waltz, *supra* note 20, at 440.

24. *Id.* at 441.

25. See TIMOTHY LOVELACE, THE WORLD IS ON OUR SIDE: THE U.S. AND THE U.N. RACE CONVENTION (forthcoming) (discussing the influence of U.S. civil rights politics on the International Covenant on the Elimination of All Forms of Racial Discrimination).

26. See, e.g., Glacier, *supra* note 19 (detailing the important role of Morocco in negotiating and drafting the Convention Against Torture). See also Ben Saul, *Introduction: The Drafting of the International Covenant on Economic, Social and Cultural Rights, 1948-1966*, in *The International Covenant on Economic, Social and Cultural Rights: Travaux Préparatoires* (Ben Saul ed. 2016) (giving an overview of the role of various State and non-state actors in drafting the UDHR and ICESCR).

one piece of the puzzle. Complicated, even problematic, origin stories do not negate the emancipatory possibilities of human rights practice, just as a more representative group of treaty drafters would not insulate human rights from being oppressive. Though smaller and non-Western nations influenced the content of human rights documents, they were nevertheless constrained by power imbalances that reflected unequal economic and geopolitical relationships. Moreover, diplomats hardly reflected the diversity of viewpoints within their borders. Finally, U.N. membership was so limited in the 1940s that even equal participation among all member States would have neglected much of Africa, Asia and the Middle East.<sup>27</sup> Representation alone will neither support nor refute claims to universality.

A textual approach, more common in law and religion, seeks universality in the content of human rights law itself, irrespective of who wrote it. A great deal of scholarship has been devoted to whether specific provisions of human rights law are compatible with Islamic law, for example, and how Islam has protected the substantive rights of individuals.<sup>28</sup> One of the earliest examples came from Majid Khadduri, a professor who advised the Iraqi delegation to the founding meetings of the United Nations in San Francisco and presented an analysis of substantive human rights in Islam and the impact of “Western concepts of rights” at the American Academy of Political and Social Science in 1946.<sup>29</sup> Since then, scholars have continued to interrogate the compatibility of Islamic law and human rights.<sup>30</sup>

Studies of the origins of human rights and analyses of substantive points of agreement and disagreement with other value systems should be part of any conversation about the universality of international law. However, these approaches do not account for the dynamic nature of human rights practice. Legal texts may be static, but the practice of law is not.

### B. Beginnings

Different conceptions of rights—as either products of political negotiation or abstract ideas—make it difficult to develop a cohesive origin story or draw hard

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27. *Founding Member States*, Dag Hammarskjöld Library, <https://perma.cc/AU4W-JCYA> (listing the 51 States that were founding members of the U.N. in 1945).

28. See, e.g., ABDULLAHI AN-NA’IM, *TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW* (1990); MASHOOD BADERIN, *INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW* (2005); ABDULAZIZ SACHEDINA, *ISLAM AND THE CHALLENGE OF HUMAN RIGHTS* (2009); ABDULLAH SAEED, *HUMAN RIGHTS AND ISLAM: AN INTRODUCTION TO KEY DEBATES BETWEEN ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW* (2018).

29. Majid Khadduri, *Human Rights in Islam*, 243 *Annals* 77, 81 (1946).

30. See, e.g., PAUL McDONOUGH, *HUMAN RIGHTS COMMITMENTS OF ISLAMIC STATES: SHARIA, TREATIES AND CONSENSUS* (2000); ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW: SEARCHING FOR COMMON GROUND? (Anver M. Emon, Mark Ellis, & Benjamin Glahn eds. 2012); Khaled Abou El Fadl, *Cultivating Human Rights: Islamic Law and the Humanist Imperative*, in *Law and Tradition in Classical Islamic Thought* 167, 168 (Michael Cook et al. eds. 2013).

conclusions about universality.<sup>31</sup> Human rights as free floating ideas, unbound by history, can be found in any number of traditions. They have the potential to transcend any single moment. Human rights treaties, however, originated in particular times and places, intertwined with contemporaneous politics and prejudice.

The adoption of the UDHR in 1948 offers an obvious beginning to the human rights timeline, which was soon populated with more declarations, treaties, and institutions. Some scholars, however, trace the ideas behind the modern human rights regime to the American and French revolutions,<sup>32</sup> while others find them even earlier.<sup>33</sup> Even among scholars who largely agree on the 1940s as a pivotal moment, there is debate over the significance of specific moments and the precise role of the Holocaust.<sup>34</sup>

Moyn reshaped the debate with his argument that human rights originated in the 1970s, not the 1940s or earlier. Moyn claimed that rights “emerged in the 1970s seemingly from nowhere.”<sup>35</sup> Human rights, according to Moyn, became “a genuine social movement” only in the 1970s; he argued they were disconnected from older intellectual traditions, nineteenth century concepts of natural rights and rights of man, the Holocaust, or the legal developments of the post-war era.<sup>36</sup> Moyn argued that the rapid growth of NGOs in the 1970s could be explained by the collapse of other utopian visions for the future: international socialism and anti-colonialism.<sup>37</sup> Human rights served as an alternative, holistic vision for society—one that, as Moyn argued later in *Not Enough*, backed away from broader claims of economic justice in favor of neoliberalism.<sup>38</sup>

Moyn was responding to a tendency in some human rights scholarship to depict a triumphant march through history, with Eleanor Roosevelt and Charles Malik standing on the shoulders of the ancient Greeks, early Christians, or French and American revolutionaries.<sup>39</sup> But in positing a complete disruption between the growth of NGOs in the 1970s and all that came before it, Moyn disregarded the social, personal, institutional, and intellectual connections between the NGOs,

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31. See Alston, *supra* note 4, at 2071.

32. LYNN HUNT, *INVENTING HUMAN RIGHTS* (2008) (using novels from the 18<sup>th</sup> century to understand how American and French elites came to think in terms of universal rights. Hunt takes the American Declaration of Independence and the French Declaration of the Rights of Man and the Citizen as the initial formulation of the human rights that culminated in the UDHR).

33. Lauren, *supra* note 8, at 6-24 (tracing some of the underlying concepts of human rights from several major world religions through European, Chinese, and Islamic philosophy through the Enlightenment to the American Revolution).

34. Morsink, *supra* note 4, at 9 (arguing that, when recounting the history of human rights, too many scholars fail to see the central role of the horrors of the Second World War).

35. Moyn, *supra* note 6, at 3.

36. *Id.* at 7-8.

37. *Id.*

38. SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* 60 (2018).

39. See Hunt, *supra* note 32 and Lauren, *supra* note 8.

international law, and their intellectual predecessors.<sup>40</sup> Part of Moyn's inability to see the continuities between earlier conceptions of rights and their growth in the 1970s lies in his understanding of contemporary human rights as a retreat from emancipatory claims of socialism and anti-colonialism. Moyn divests human rights of both their substantive content and their social practice.<sup>41</sup> Human rights were not, in themselves, a single vision for how to order society. In the Arab world, rights sometimes served as a blueprint for an anti-colonial, nationalist agenda—as in Palestine—but they also served as an organizing principle for Marxists in Morocco.<sup>42</sup> While it is true that some advocates saw human rights advocacy as safer than more partisan activity, this is not because the content of human rights work was less threatening to regimes, but because the new NGOs took pains to institutionally separate themselves from political parties with contentious, sometimes violent, relationships with the State.<sup>43</sup>

### C. Implications for Universality

Scholars and human rights advocates have pointed to both the content of rights treaties and the process by which they were written as evidence of universality, but product of Cold War politics.<sup>44</sup> Much of the world remained under colonial rule. The struggle between superpowers shaped the division of rights into two separate treaties—one including civil and political rights and one including economic, cultural, and social rights—that reflected the East/West divide. In this and many other substantive areas, the content of rights depended on historical specificities that belie claims to universalism.<sup>45</sup> Uncovering the role of less powerful nations in the drafting process only goes so far in reclaiming the

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40. See Martinez, *supra* note , at 139 (demonstrating that antislavery courts in the 19th century were the antecedent of the post-WW2 human rights regime); WILLIAM KOREY, NGOs AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 1 (1998) (connecting the Holocaust, post-war developments in the United Nations, and the growth of NGOs in the 1970s); Morsink, *supra* note 4, at 9 (showing a causal link between pre-war ideas about human rights, the Holocaust, post-war legal architecture, and the contemporary human rights movement). Even among scholars who agree that there was a rupture in the 1970s, Moyn's explanation is far from definitive. See STEPHEN HOPGOOD, THE ENDTIMES OF HUMAN RIGHTS 98-103 (1st ed. 2013) (arguing that the change was due to the sudden relevance of rights to American foreign policy, which led to the creation of a marketplace for human rights).

41. See Aryeh Neier, *The International Human Rights Movement: A History* 4 (1st ed. 2012) (arguing that human rights do not contain "a vision for the organization of society"); Cheah Pheng, *Human Rights and the Material Making of Humanity: A Response to Samuel Moyn's The Last Utopia*, 22 *Qui Parle: Critical Human. and Soc. Sci.* 56 (2013) (criticizing Moyn's narrow definition of rights, which requires emptying "them of almost all normative philosophical content.").

42. See *infra* Part II.

43. See *infra* Part II.

44. Mazower, *supra* note 10, at 318.

45. For example, the conception of the freedom of religion in the UDHR owes much to Malik's experience as a Christian in majority-Muslim Lebanon. See W. Kathy Tannous and Alicia Gaffney, *Charles H. Malik and Religious Freedom: The Influence of Biography on Malik's Contributions to the Drafting of the Universal Declaration of Human Rights*, 42 *Hum. Rts. Q.* 817 (2020).

multicultural roots of the laws. Indeed, some authors counter that the involvement of non-Western nations in the drafting processes was irrelevant or minor, and universal rights are Western and/or Christian concepts.<sup>46</sup> Even Moyn's argument about human rights in the 1970s, which at first appear to be grounded in a truly global social movement, ultimately rests on Eurocentric conceptions of what rights are and how they function politically.

It is difficult, and perhaps not very useful, to try to establish definitive origins for human rights. Doing so risks overemphasizing both continuities and discontinuities in a quest to mobilize the single most important rupture in support of, or against, the universality of human rights. Instead, a more helpful approach examines how universalist claims influenced the adoption and practice of human rights in specific times and places. Understanding when and why Arab activists embraced human rights, for example, gives greater insight into how international law was deployed to advance regional goals of self-determination, anti-colonialism, Arab unity, and economic transformation.

## II.

### THE HUMAN RIGHTS TURN

In 1980, a young Palestinian lawyer named Raja Shehadeh boarded a plane in Tel Aviv bound for Geneva. He was carrying contraband that could have landed him in jail—a report detailing Israeli violations of international law in the West Bank.<sup>47</sup> Just a few months earlier, Shehadeh and two colleagues had formed Al Haq, the first human rights NGO in Palestine. Around the same time, a group of Moroccans started a human rights NGO that would go on to attract thousands of members. The Moroccan Association for Human Rights (AMDH) and Al Haq were among a handful of rights NGOs in the Arab world; over the next decade, dozens more national and regional organizations would join them.

The growth of Arab human rights NGOs can be explained by several factors.<sup>48</sup> The most important was the utility of international law, particularly its claim to universality and non-partisanship, to the political goals of Arab

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46. See MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* 155 (1st ed. 2002); Abdullahi An-Na'im, *Introduction to Human Rights in Cross-Cultural Perspective: A Quest for Consensus* 4 (Abdullahi An-Na'im ed. 1995); Moyn, *supra* note 6, at 66-67.

47. Interview with Jonathan Kuttub, Co-Founder, Al Haq, Skype (Jan. 25, 2016).

48 The coming into force in 1976 of the two central human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Cultural and Social Rights, did not play a large role in activists' decisions. The growing endorsement of human rights treaties was a precondition for human rights work but treaty ratification did not spark the formation of NGOs, perhaps because enforcement mechanisms for the treaties were minimal. The moral import of human rights law—which had been growing since at least 1966, when the treaties opened for signature, if not since 1948—was just as important as the legal obligation. Iraq, Jordan, Lebanon, Libya, and Syria, and Tunisia ratified both treaties before they came into force. Morocco followed soon after, acceding to both treaties in May 1979. Other countries followed: Egypt (1982), Sudan (1986), Yemen (1987), Algeria (1989), Israel (1991), Kuwait (1996), Bahrain (2006). See generally Azzam, *infra* note 125, at 266.

opposition movements after the 1967 war with Israel. The aftermath of the war prompted a regional crisis that sparked significant political reorganization. Several States responded violently to growing dissention within their populations. Many members of the political opposition, as well as non-political individuals who were victims of State violence, embraced human rights to challenge increasingly autocratic State power. Rights became a set of practices carried out by a new civic actor—the human rights activist—with access to a particular type of domestic and international leverage. These practices were linked to both the content of the law itself and its claims of universality.

The NGOs studied here were all respected both domestically and internationally.<sup>49</sup> Al Haq, AMDH, the less confrontational (but similarly-named) Moroccan Organization for Human Rights (OMDH), and the Arab Organization for Human Rights (AOHR) and its Kuwaiti chapter illustrate the range of forms that human rights work took across the Arab world in the late 1970s and 1980s. Al Haq was a highly professionalized organization staffed by lawyers and legal specialists. Al Haq advocated a liberal vision of Palestinian nationalism. The Moroccan NGOs were mass organizations that enrolled thousands of members and established chapters throughout the country. Many members and leaders were not lawyers. AMDH was a radical Marxist organization, while OMDH took a less confrontation approach and worked with the monarchy. The Arab Organization for Human Rights was a regional umbrella group with both individual and institutional members. With chapters and affiliates throughout the region, it offered yet another model of what a human rights organization could look like. Finally, the Kuwait Society for Human Rights (KSHR), originally a chapter of AOHR, was a membership-based group that relied on a charismatic founder, as was typical of many smaller organizations.<sup>50</sup> AOHR and its chapters used human rights to further Arab intellectual and cultural unity.

Each NGO had distinct characteristics, but the Moroccan organizations, as well as AOHR and its Kuwaiti branch, are best understood in relation to each other. In Morocco, the organizations were both rivals and partners. They often worked in unity against the State while competing with one another for supporters and international legitimacy. Their strategic choices were influenced by those of the other. In Kuwait, it was impossible to disentangle KSHR from its parent organization. It did not formally separate from AOHR until 1993, and afterwards leaders moved back and forth between the organizations. In addition to the

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49. The reputation of KSHR declined significantly after the period studied in this Article due to changes in internal governance that compromised its independence from the State.

50. Since the 1990s, there have been a growing number of organizations that exist on paper only, or perhaps consist of a single person. These entities may be connected to government officials, who pepper the human rights landscape with more and more organizations to create the appearance of a vibrant civil society. Others might exist primarily to receive international grant money. *See, e.g.*, Lori Allen, *The Rise and Fall of Human Rights: Cynicism and Politics in Occupied Palestine* 15 (2013) (discussing this phenomenon in Palestine). None of the organizations studied here fall into these categories.

institutional ties, both organizations were rooted in a particular ideological approach towards Arab nationalism and democracy.

These organizations created, adapted, and implemented what were becoming hallmarks of human rights advocacy: fact-finding and documentation, education, litigation, public shaming, and international networking. The diversity of practices among these organizations illustrates that universality did not require homogeneity. The human rights “tent” extended far enough to include both a professional, centralized organization like Al Haq and a sprawling, radical one like AMDH.<sup>51</sup> Human rights law supported a wide array of social practices that showed how rights can be relevant in vastly dissimilar political and social environments.

Human rights were, of course, not the only option available for framing activism. Political Islam rose in popularity around the same time.<sup>52</sup> Even among groups unlikely to embrace Islamism, such as Marxists and Arab nationalists, the development of human rights activism at the societal and organizational level was not inevitable. In fact, despite the proliferation of human rights NGOs in the 1980s, several countries, particularly those in the Gulf region, did not see a legitimate human rights organization form until much later.<sup>53</sup> Even human rights activists often pursued multiple forms of opposition at the same time, including partisan, religious, and commercial enterprises. But human rights offered something unique—a non-partisan, universal framework that served multiple political visions.

#### A. *The Politics of the 1970s*

Arab human rights activists were part of a global growth of human rights NGOs, but they were also embedded within specific regional political movements: Palestinian nationalism, revolutionary Marxism, and Arab nationalism. Arab nationalism—the belief that “those who speak Arabic form a ‘nation’ and that this nation should be independent and united”—manifested in two major political movements: Nasserism in Egypt and Ba’athism in Syria and Iraq.<sup>54</sup> Egyptian President Gamal Abdel Nasser’s (1956-1970) blend of charismatic leadership, anti-colonialism, and Arab nationalism reached its zenith

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51. International law scholar Hurst Hannum argued that “universality is not uniformity” in relation to the substance of human rights around the world; his claim extends to the practice of human rights as well. Hurst Hannum, *Rescuing Human Rights: A Radically Moderate Approach* 97 (2019).

52. See CARRIE ROSEFSKY WICKHAM, *MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT 2* (1st ed. 2002).

53. For instance, the Bahrain Center for Human Rights and the Human Rights First Society in Saudi Arabia were not founded until 2002.

54. ALBERT HOURANI, *ARABIC THOUGHT IN THE LIBERAL AGE, 1798-1939* 260 (1983).

of political power in the 1960s.<sup>55</sup> These ideologies were revolutionary, utopian political projects.<sup>56</sup> Arab nationalism in general and Nasserism in particular suffered a significant setback with Egypt and Syria's military loss to Israel in 1967. The military defeat, Nasser's death in 1970, and several failed unification projects signified the increasing unavailability of this vision of Arab nationalism.<sup>57</sup>

In the wake of the 1967 war, the region reckoned with the apparent failure of Arab nationalism to bring about desired political goals: the defeat of Israel or political unification. Intellectuals looked for explanations within Arab societies, ushering in a time of self-criticism that found fault within Arab culture, thought, and religion.<sup>58</sup> Students and activists who were adrift from the loss of the war, disillusioned with older Communist parties, and inspired by the worldwide student protests of 1968 formed new movements that fused Marxism with nationalism. From Morocco to Lebanon to Yemen, this Arab New Left signified a "sweeping radicalization" that pushed aside old-school Arab nationalism as the dominant trend in Arab politics until political Islam gained prominence in the 1980s.<sup>59</sup>

Arab governments were profoundly threatened by the rising tide on the Left and responded with violence. Across the region, Leftists were seen as so threatening that States supported and empowered Islamists to rival their popular appeal.<sup>60</sup> Though many human rights NGOs were formed within this milieu, rights did not operate as a single vision, rising like a phoenix from the ashes of the 1967

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55. See ADEED DAWISHA, *ARAB NATIONALISM IN THE TWENTIETH CENTURY: FROM TRIUMPH TO DESPAIR* (2016); James Jankowski, *Arab Nationalism in 'Nasserism' and Egyptian State Policy, 1952-1958*, in *Rethinking Nationalism in the Arab Middle East* 150 (Jankowski and Israel Gershoni, eds. 1997) (delineating the place of Arab nationalism in Nasser's ideology and policy). Several other chapters in this volume provide a deeper understanding of Arab nationalism and its intersection with individual nationalist movements.

56. YOAV DI-CAPUA, *NO EXIT: ARAB EXISTENTIALISM, JEAN-PAUL SARTRE, AND DECOLONIZATION* 109 (2018) (describing Arab nationalism as "a theological system of political faith . . . by formulating new notions of sovereignty, authenticity, and freedom, Pan-Arabism sacralized politics and offered a form of postcolonial salvation.").

57. In the most notable example, Syria and Egypt formed a political union that survived from 1958 until 1961, when a coup in Syria led to its withdrawal. North Yemen also federated with Egypt and Syria during this time. Iraq and Jordan entered into a short-lived union to counter Egypt and Syria. Libya, Egypt, and Syria also attempted a unification during the 1970s. None of these projects realized the Arab Nationalist vision of unification.

58. Manfred Sing, *Arab Self-Criticism After 1967 Revisited: The Normative Turn in Marxist Thought and its Heuristic Fallacies*, XXV Arab Stud. J. 144, 149 (2017).

59. Nicolas Dot-Pouillard, *After the Defeat, The Arab Left on the Offensive*, Orient XXI Magazine (Aug. 29, 2017), <https://perma.cc/362J-N7XP>.

60. Gilles Kepel, *Islamists versus the State in Egypt and Algeria*, 124 *Daedalus* 109, 111 (1995); Joel Beinin, *Political Islam and the New Global Economy: The Political Economy of an Egyptian Social Movement*, 5 CR: The New Centennial R. 111, 119 (2005).

war.<sup>61</sup> Rather, a range of political actors mobilized human rights in different ways in response to increasing State violence, economic disruption, and evolving international politics. In Morocco, initial activists were radical Marxists whose politics were formed in student unions and leftist political parties.<sup>62</sup> They identified human rights as part of a larger political platform that embraced democracy and socialism.<sup>63</sup> They largely rejected the old politics of Arab nationalism in favor of the Arab New Left. However, the members of AOHR and its chapter in Kuwait looked to human rights as a way to *continue* the Arab nationalist project. For them, regional unity in human rights was a new forum for old political goals. In Palestine, human rights were an alternative to the Palestinian Liberation Organization (PLO), the radical politics of the New Left, and the regional Arab nationalism that had failed the Palestinian cause. Both the form and substance of human rights supported a range of political ideologies.

### B. Mobilizing for self-determination in Palestine

The Arab defeat in 1967 made it clear that Palestinians could not rely on Arab States for liberation.<sup>64</sup> In the West Bank, Israeli State violence and increasing efforts towards annexation prompted more organized Palestinian resistance. Several Palestinian groups turned to violence, including the Popular Front for the Liberation of Palestine (PFLP), a revolutionary socialist group that occupied the ideological center of the Arab New Left but originated from within the Arab Nationalist Movement, and Fatah, an older resistance organization that came to dominate Palestinian politics after 1967.<sup>65</sup>

Al Haq's founders distanced themselves from Fatah, the PFLP, and other political parties, insisting on strict non-partisanship and a foundation in international law.<sup>66</sup> They embraced human rights as a non-violent way to oppose the occupation, using international legal standards to confer legitimacy on the

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61. On its face, the political trajectory of the Arab world mirrored that of Europe as portrayed by Moyn in *The Last Utopia*. But Moyn's focus on the United States and Europe obscured the different ways human rights functioned in the Third World. Human rights activism in the Arab world in the 1970s and 1980s was not a simple alternative to Arab nationalism. See also Antony Anghie, *Whose Utopia? Human Rights, Development, and the Third World*, 22 *Qui Parle* 63, 73 (2013) (noting how Moyn's focus on Europe's ideological development blinded him to the relevance of the New International Economic Order to his discussion of utopian visions).

62. Interview with Abdelhamid Amine, former President, AMDH, in Rabat, Morocco (Oct. 1, 2015); Interview with Abdelaziz Bennani, Co-Founder, OMDH, Imo (Sept. 22, 2016).

63. Interview with Esslami Abdelhafid, regional board member, AMDH, in Rabat, Morocco (Sept. 7, 2015).

64. JAMES L. GELVIN, *THE ISRAEL-PALESTINE CONFLICT: ONE HUNDRED YEARS OF WAR* 199 (2005).

65. Daniel Byman, *The 1967 War and the Birth of International Terrorism*, *Lawfare* (May 30, 2017), <https://perma.cc/RJ8Z-KLLH>.

66. Interview with Charles Shamas, Co-Founder of Al Haq, in East Jerusalem (Dec. 22, 2015); interview with Kuttub, *supra* note 47.

Palestinian national struggle.<sup>67</sup> Their strategy foregrounded daily life in occupied Palestine: documenting travel restrictions, land expropriation, harassment, torture and house demolitions.<sup>68</sup> They invoked both humanitarian law (governing armed conflict) and human rights law and principles (governing domestic action).<sup>69</sup>

Al Haq's founders were highly educated professionals who had studied abroad. Raja Shehadeh, who came from a family of distinguished lawyers, became familiar with the International Commission of Jurists (ICJ) during his legal studies in London.<sup>70</sup> The ICJ is an international organization founded in the early 1950s to advance human rights and the rule of law, focusing on the role of judges.<sup>71</sup> Shehadeh partnered with Charles Shamas, a recent graduate of Yale University, and Jonathan Kuttab, who had just finished a brief stint as a corporate lawyer after completing his law degree at the University of Virginia.<sup>72</sup> With support from ICJ Secretary-General Niall McDermott, their new organization became an ICJ affiliate.<sup>73</sup>

Al Haq had two broad goals: to promote human rights among Palestinians and to end the Israeli occupation.<sup>74</sup> The founders believed exposing the nature of the occupation would hasten its end.<sup>75</sup> They chose international law as their organizing framework because it held Israelis to impartial standards. In the words of Shamas, "when we made an argument, we made it in the way that was compelling to the audience, that they couldn't say no to it. And that gave us increasing legitimacy because it wasn't [that] we were our version of a human rights organization, but we were *their version of a defender of human rights too*."<sup>76</sup> The universal standards of human rights law combined with the practice of documentation created a particular type of knowledge that transcended the lack of credibility Palestinians had internationally.

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67. *Id.*

68. See RAJA SHEHADEH & JONATHAN KUTTAB, THE WEST BANK AND THE RULE OF LAW (1980); AL-HAQ: LAW IN THE SERVICE OF MAN, PUNISHING A NATION: HUMAN RIGHTS VIOLATIONS DURING THE PALESTINIAN UPRISING, DECEMBER 1987-DECEMBER 1988 (1988).

69. *See id.*

70. Interview with Raja Shehadeh, Co-Founder of Al Haq, in Ramallah, Palestine (Dec. 15, 2015).

71. The ICJ was founded to investigate abuses in Soviet-occupied Germany after WW2 and secretly funded by the CIA. This became public in 1967, and Niall MacDermot sought to distance the organization from its ties to intelligence and become a pioneer in human rights. See YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002) (positioning the ICJ's early activities and ties to the CIA within the landscape of American Cold War domestic politics). See also HOWARD B. TOLLEY, THE INTERNATIONAL COMMISSION OF JURISTS: GLOBAL ADVOCATES FOR HUMAN RIGHTS (1994) (detailing the trajectory of ICJ's advocacy from Cold War politics to human rights).

72. Jonathan Kuttab, Middle East Institute Profile, <https://perma.cc/CF2J-VX7U>.

73. Interview with Shehadeh, *supra* note 70.

74. Interview with Kuttab, *supra* note 47.

75. Interview with Shehadeh, *supra* note 70.

76. Interview with Shamas, *supra* note 66 (emphasis added).

### 1. *Structure and management*

During the 1980s, Al Haq grew from the passion project of a few individuals into a professional, elite organization. It operated similarly to a law firm, albeit a fairly democratic one.<sup>77</sup> The organization had a unique structure due to the particularities of Jordanian law and Israeli practice. Under the law governing the West Bank in the 1970s, organizations could register as either charities or businesses.<sup>78</sup> Instead of establishing a charity, which would have attracted greater oversight from Israeli authorities, the founders created a private corporation.<sup>79</sup> This classification shielded the organization from Israeli scrutiny at the outset and protected them from the appearance of collusion with Israeli officials.<sup>80</sup> Forming an NGO, instead of working through a law firm or existing political group, gave the founders independence, provided some separation between their day jobs and their voluntary work, and allowed them to form formal partnerships with peer organizations, including the ICJ, Amnesty International, the National Lawyers Guild, and other organizations abroad.<sup>81</sup>

The corporate legal structure maximized independence from both Israel and other groups within Palestine. This rationale extended to Al Haq's decision to seek funding from foundations in the United States and Europe.<sup>82</sup> The founders wanted to create an alternative vision for Palestinian nationalism, one that did not rely on violent resistance or existing political parties. They sought an international credibility that the PLO and other existing Palestinian groups lacked.<sup>83</sup> In order to separate themselves from these popular forms of social organizing, they had to distance themselves from actual or apparent reliance on existing groups within Palestinian society. Al Haq would not accept donations from States or political parties, and it carefully vetted—and sometimes rejected—funding from groups or individuals who seemed suspect or politically motivated.<sup>84</sup>

Al Haq's initial funding needs were manageable; the organization was small and could rely on administrative support from the Shehadeh family law firm. Significant foreign funding, however, eventually allowed Al Haq to hire a professional staff whose efforts were supported by volunteers and guided by two volunteer directors and a steering committee.<sup>85</sup> Staff members were organized into

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77. See Mouin Rabbani, *Palestine Human Rights Activism under Israeli Occupation: The Case of Al-Haq*, 16 *Arab Stud. Q.* 28 (1994).

78. Interview with Kuttab, *supra* note 47.

79. Registration of Law in the Service of Man as a Corporation, Reel 8686, Ford Foundation Records, Rockefeller Archive Center [RAC].

80. Shukri Nashashibi & James Fine, Preliminary Report: Consultancy on the Future of al-Haq, Aug. 10, 1997. Reel 8686, Ford Foundation Records, RAC.

81. Interview with Shamas, *supra* note 66.

82. Rabbani, *supra* note 77, at 28.

83. Interview with Kuttab, *supra* note 47.

84. *Id.*; Interview with Shehadeh, *supra* note 70.

85. Law in the Service of Man, Annual Report 1-5 (1984) (Reel 7240, Frames 001541- 001548, Ford Foundation Records, RAC).

different groups: fieldwork, database, research, library, and support. Throughout the 1980s, the full staff met weekly to discuss matters of institutional governance and operations. These were not merely pragmatic operational discussions—staff were engaged in setting the NGO's priorities and goals.<sup>86</sup>

The professional staff and large budget allowed Al Haq to carry out a robust slate of documentation, public education, and direct legal aid. It maintained rigorous evidentiary standards, developed several active public-facing programs, provided a wide range of client services, and developed close relationships with local and foreign organizations. Al Haq was transnational from the beginning, bringing together Palestinian staff with foreign volunteers. The organization targeted the United Nations, foreign governments, and the foreign press as well as Palestinian and Israeli audiences.

## 2. Documentation

Al Haq epitomized the ways in which human rights practices, particularly documentation, were intertwined with the content of international law. Fact-finding and legal analysis were at the core of Al Haq's practice. Al Haq's first significant action was to jointly publish, with the ICJ, a sweeping condemnation of Israeli governance of the West Bank.<sup>87</sup> The result was groundbreaking—not just in Palestine, but abroad as well. The premise of the work was that Israel must be held accountable to the Geneva Conventions.<sup>88</sup> Al Haq argued that under both customary international law and the Fourth Geneva Convention, an occupying power may alter local laws (in this case, Jordanian) only when necessary for the security of its forces or to implement the Convention itself.<sup>89</sup> Al Haq documented how Israel altered various legal provisions through its system of military orders, some of which did not state a security rationale as required by the Convention. Al Haq argued that these were *prima facie* violations of international law.

The report also documented substantive violations of human rights law, including civil, political, and economic rights. The authors focused on the violations that were least known, where their documentation would add something

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86. Interview with Kuttab, *supra* note 47; Rabbani, *supra* note 77, at 28.

87. Shehadeh & Kuttab, *The West Bank and the Rule of Law*, *supra* note 68.

88. Israel did not accept the position of the United Nations that it was bound by the Conventions as a belligerent occupier, but it did agree to abide by their principles. See Meir Shamgar, *The Observance of International Law in the Administered Territories*, 21 *Israel Y.b. on Hum. Rts.* 262, 266 (1971); see also ESTER ROSALIND COHEN, *Human Rights in the Israeli-Occupied Territories, 1967–1983* 93 (1986) and ALLAN GERSON, *Israel, the West Bank and International Law* 111 (1978) (noting that an Israeli military order stating that the Geneva Convention would take precedence over Israeli security legislation was deleted by a subsequent proclamation in October 1967); see further Adam Roberts, *Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967*, 84 *Am. J. of Int'l. L.* 44, 62-66 (1990).

89. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 75 UNTS 287.

new to the common understanding of the occupation.<sup>90</sup> These sections described violations of the freedom of assembly, speech, and expression; academic freedom; property rights; the right to development; and freedom of movement. Though it used international references, the report remained rooted in Palestinian experiences rather than relying solely on treaty law. For example, one section was titled “Right to Development and Adequate Government Services,” but it would be another five years before the United Nations would issue a declaration on the right to development.<sup>91</sup>

The report detailed specific violations without reducing them to isolated incidents stripped of the context of the occupation. Al Haq used individual violations to illustrate systemic patterns.<sup>92</sup> For example, Israeli settlers were regularly permitted to drill new wells while permit applications from Palestinians were denied. As a result, Palestinian agricultural activity was curtailed. Al Haq described the rippling economic effects on the community: “This policy of withholding permits for drilling wells meant that a large sector of the population who would otherwise be engaged in agriculture began to seek work in Israel as unskilled laborers, with the result that the West Bank has become dependent on Israel even for agricultural products.”<sup>93</sup> Other types of economic restrictions, including import and export limitations, stifled economic development and fostered dependence on Israel.<sup>94</sup> These violations of individual rights had communal economic effects.

Al Haq authored or co-authored nearly twenty reports in the 1980s, setting a pattern of well-researched, detailed work.<sup>95</sup> Most publications focused on a particular issue such as prison conditions, infrastructure plans, torture, military censorship, or deportations. These reports were bleak. One from 1984, starkly titled *Jnaid, The New Israeli Prison in Nablus: An Appraisal*, painted a detailed, visceral picture of life in the prison:

The prisoners in Jnaid suffer above all from extreme overcrowding, especially in the cells. In one cell of 21 square metres there are 12 prisoners, in another of 30 square metres there are 16 prisoners.... The prisoners sleep in bunks, 180cms long. The iron bedsteads are so constructed that the beds are not flat but wavy and ridged. The sponge mattresses supplied which are 5 cm thick, cannot remedy this.<sup>96</sup>

Here, Al Haq described the human experience of being imprisoned. Thin mattresses may not have been illegal, but the report leaves the reader feeling every

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90. Shehadeh & Kuttub, *The West Bank and the Rule of Law*, *supra* note 68, at 58.

91. Declaration on the Right to Development, Dec. 4, 1986, A/RES/41/128.

92. See Allen, *supra* note 50, at 48.

93. Shehadeh & Kuttub, *The West Bank and the Rule of Law*, *supra* note 68, at 66.

94. *Id.* at 65-68.

95. See Al Haq Publications, <https://perma.cc/8TBF-YJMJ>.

96. Law in the Service of Man, Jnaid, *The New Israeli Prison in Nablus: An Appraisal* 3 (1984).

indentation. Al Haq published the report after the overcrowding led prisoners to resist the introduction of yet more bodies into their cramped space by launching a hunger strike and issuing a list of demands.<sup>97</sup> Although the situation at Junaid was already well known within Palestine,<sup>98</sup> this report took that knowledge and transformed it into an evidentiary document that could be preserved, referenced, and understood by legal and international audiences. Other early reports by Al Haq served a similar purpose for military censorship, administrative detention, and deportation.<sup>99</sup>

The impact of any one of these reports is unclear, but together they established Al Haq as a credible voice before the First Intifada (uprising) in 1987. Al Haq's blistering account of human rights violations during the first year of the Intifada, *Punishing a Nation*,<sup>100</sup> solidified a new era in which human rights became a prominent discourse for discussing the Israeli-Palestinian conflict alongside Palestinian nationalism, Israeli security, and religion. This report documented the use of force, obstruction of medical treatment, administrative detention, house demolitions, school closures, and other violations.<sup>101</sup> It detailed threats to the freedom of association, life and liberty, and the rule of law.<sup>102</sup> Though the press also covered the Intifada, Al Haq's report became the "standard reference work for human rights groups, journalists and policy makers alike."<sup>103</sup>

*Punishing a Nation* marked a shift away from simply proving that violations were occurring. As noted in the introduction, this was "redundant" since Israel admitted many of the practices, many of which were adequately covered in the news.<sup>104</sup> Instead, the purpose of the report was "to indicate the scope of the practices . . . [to] help our audience in assessing the significance and implications of Israel's violations of international law."<sup>105</sup> Having achieved its initial goal of exposing the practices of the occupation, Al Haq then set about demonstrating that these practices were pervasive and important.

In what is now a hallmark of human rights reporting, Al Haq highlighted the voices of individual Palestinians. Personal testimony served as evidence, but it also brought violations to life. *Punishing a Nation* included extensive quotations from witnesses and victims as well as full affidavits that include the name, age, residence, and profession of the affiant. The identification numbers attached to

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97. I use the more common spelling Junaid. It is sometimes also rendered al-Junaid in English.

98. Law in the Service of Man, *supra* note 96, at 2.

99. VIGIL FALLOON, *Excessive Secrecy, Lack of Guidelines: A Report on Military Censorship in the West Bank* (2d edition, 1986); JOOST HILTERMANN, *Israel's Deportation Policy in the Occupied West Bank and Gaza* (1986); EMMA PLAYFAIR, *Administrative Detention in the Occupied West Bank* (1986).

100. *Supra* note 68.

101. *Id.*

102. *Id.*

103. Joost Hiltermann, *Al Haq: The First Twenty Years*, MERIP Middle East Rep. 214 (2000).

104. Al Haq: Law in the Service of Man, *Punishing a Nation*, *supra* note 68, at 6.

105. *Id.*, at 6.

the affidavits suggested that there were hundreds more.<sup>106</sup> Al Haq was able to bring so much lived experience into its reporting because of its pioneering fieldwork unit.<sup>107</sup> After training in how to collect affidavits, Al Haq fieldworkers collected more than 500 testimonies in just one year,<sup>108</sup> and this almost doubled in the next two years.<sup>109</sup> Al Haq developed a standard procedure for collecting evidence: “In each instance, information was taken down as dictated by the affiant. Questions were asked on points of which he or she might have been unsure. The rule against hearsay was followed, as well as other rules relating to evidence that are observed in judicial inquiries. Finally, the written version was read to the affiant who was asked to sign it.”<sup>110</sup> An internal vetting process ensured that testimony was accurate and reliable.

Al Haq’s reports were more than legal documents; they were chronicles of Palestinian history. This function of human rights reporting was particularly significant to Shehadeh. He worried that without rigorous documentation, Palestinians would lose track of their own history: “How did the settlements happen? How did the land get taken over? How did the Israelis re-define and change the law and so on? I was concerned that we would be confused. And I think this confusion is a big part of colonization.”<sup>111</sup> Compiling the affidavits into a cohesive narrative was another form of resistance, one that had value even if it did not end the occupation. “Maybe we cannot stop this,” Shehadeh continued. “We cannot stop them from taking the land and building settlements on it, but at least we would know how they did it. And that would be very important. And we would know and we would be able to say to them you didn’t do it legally, as you claim. And this is why.”<sup>112</sup>

### 3. Public Engagement

In addition to its documentation efforts, Al Haq carried out a robust program of public education.<sup>113</sup> The organization regularly produced instructional pamphlets, authored weekly newspaper columns, and operated a legal aid clinic. It hosted lectures and opened Ramallah’s first public library dedicated to law and

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106. For example, the affidavits offered in support of the portion of the report documenting the use of force were numbered 1151, 1161, 1233, 1245, 1447. *Id.* at 53-71.

107. FATIH SAMIH AZZAM, *WAITING FOR JUSTICE: AL-HAQ IN 2004: A TWENTY FIVE YEAR PROSPECTIVE*, AL-HAQ: 25 YEARS DEFENDING HUMAN RIGHTS (1979-2004) 6 (Rouba Al-Salem, ed. 2005).

108. Al Haq: Law in the Service of Man, Punishing a Nation, *supra* note 68, at 3.

109. Al Haq Law in the Service of Man, Interim Programme Report, January 1986 – September 1986 (Reel 7240, Frames 001421 – 001481, Ford Foundation records, RAC).

110. WORLD COUNCIL OF CHURCHES, *IN THEIR OWN WORDS: HUMAN RIGHTS VIOLATIONS IN THE WEST BANK: AFFIDAVITS COLLECTED BY LAW IN THE SERVICE OF MAN* 9 (1983).

111. Interview with Shehadeh, *supra* note 70.

112. *Id.*

113. Law in the Service of Man, Yearly Report 1984 (Reel 7240, Frames 001541- 001542, Ford Foundation records, RAC).

human rights.<sup>114</sup> Like other NGOs around the world, Al Haq created “Know Your Rights” pamphlets to educate Palestinians about land seizure, town arrest, taxation, travel restrictions, military courts, and arrest.<sup>115</sup> These pamphlets promoted law as the arbiter of correct behavior in interactions between Palestinians and Israeli State and military officials. They also educated Palestinians about what behavior could be considered illegal, which might assist in future documentation efforts.

Al Haq also provided free legal aid. From September 1981 to the end of 1982, Al Haq spent more than ten percent of its total budget on legal services.<sup>116</sup> In 1985, Al Haq opened a legal advice bureau where lawyers and staff were available on a weekly basis to provide advice on any legal question, not just human rights issues.<sup>117</sup> After the first six months, the bureau had to open twice a week to meet demand.<sup>118</sup> By October 1986, Al Haq had provided advice in 111 cases.<sup>119</sup> Hosting an advice bureau was more than just good publicity — it promoted law as a tool for resolving conflict, educated the public about legal tools, and strengthened Al Haq’s credibility. The organization hoped the clinic would make legal remedies more accessible to the public both in disputes related to the occupation and in private matters.<sup>120</sup>

While it offered many consultations, Al Haq also accepted a few cases with broader policy implications for full legal representation.<sup>121</sup> Al Haq used litigation as another advocacy strategy in its toolkit: a way to force hidden practices into the open, establish a factual record, and redress individual wrongs. But eventually, the organization decided not to establish a specific unit devoted to strategic litigation. Al Haq struggled to identify robust criteria to select lawyers and

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114. *Id.*, at Frame 001545.

115. Town arrest refers to restricting the movement of an individual through administrative order without bringing criminal or civil charges. Individuals were usually limited to a single town or village, confined to their homes after dark, and required to report to a local police station every day. The practice became common in the early 1980s. Amnesty International, *Town Arrest Orders in Israel and the Occupied Territories*, 14 *J. of Palestine Studies* 186, 186 (1985)

116. Law in the Service of Man, Yearly Report 1982 (Reel 4848, Frames 0234-0244, Ford Foundation records, RAC).

117. Al Haq Law in the Service of Man, Interim Programme Report, January 1986 – September 1986 (Reel 7240, Frames 001432, Ford Foundation records, RAC).

118. Law in the Service of Man, Newsletter No. 9, 11-12 July – October 1985 (Reel 8686, Ford Foundation records, RAC).

119. Al Haq Law in the Service of Man, Interim Programme Report, January 1986 – September 1986 (Reel 7240, Frames 001432, Ford Foundation records, RAC).

120. Law in the Service of Man, Newsletter No. 9, *supra* note 118.

121. Al Haq Law in the Service of Man, Interim Programme Report, January 1986 – September 1986 (Reel 7240, Frames 001421 – 001481, Ford Foundation records, RAC). Al Haq staff were not the first lawyers to challenge the occupation through litigation. Two Israeli lawyers, Felicia Langer and Leah Tsemel, began representing Palestinians in military courts shortly after the 1967 war. See Lisa Hajjar, *From the Fight for Legal Rights to the Promotion of Human Rights, in Cause Lawyering and the State in a Global Era* 78-82 (Austin Sarat and Stuart Scheingold, eds. 2001).

cases.<sup>122</sup> There were concerns about how to handle cases that did not have attorneys already, as well as how to balance the private law practices of the founders with their role in selecting and possibly arguing cases. This was a limitation of the part-time, voluntary nature of the founders' role at Al Haq, though it did not prevent the organization from continuing legal aid or intervening in ongoing cases.

By its nature as a Palestinian organization documenting Israeli action, Al Haq operated in a more international sphere than many other rights NGOs. It was an organization for and of Palestinians, but it also sought to change narratives in the United States, Europe, the United Nations, and Israel. Transnationalism was embedded in the very structure of the organization. As an affiliate of the ICJ with funding from exclusively foreign organizations, Al Haq was enmeshed in an international network of human rights and advocacy professionals. The organization maintained and developed these ties through small meetings, conferences, and personal relationships. Staff members participated in conferences abroad, and foreign delegations often visited Palestine. Al Haq hosted lawyers, journalists, students, professors, women's groups, and NGOs from within Israel and Palestine, as well as from abroad. These ties brought friendship and solidarity as well as funding and training. Al Haq's staff also included several foreign volunteers who were integral to early operations. According to a volunteer fieldworker, who later joined the leadership, Al Haq was like a "school" for young activists from the United States and Europe.<sup>123</sup>

Al Haq participated in several workshops, conferences, and meetings through the United Nations, but the founders had little hope that these would make a difference. The U.N., according to Shehadeh, "paid lip service and nothing more."<sup>124</sup> It is hard to dispute his perception; the United Nations has issued dozens, if not hundreds, of resolutions on Israel and Palestine to little effect.<sup>125</sup> Indeed, the initial draft of Al Haq's first report was put together as testimony for a United Nations hearing on Palestine and only published as a book once McDermott, the head of the ICJ, convinced Shehadeh that nothing would come of his testimony. This experience illustrates the limited utility of the U.N. The institution itself rarely forced change on the ground, but it provided opportunities for Al Haq to establish public record and connect with supportive allies. In later years, Al Haq participated in conferences related to women's rights and human rights more

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122. Al Haq Law in the Service of Man, Interim Programme Report, January 1986 – September 1986. (Reel 7240, Frames 001421 – 001481, Ford Foundation records, RAC).

123. Interview with Shawan Jabarin, General Director, Al Haq, in Ramallah, Palestine (Dec. 21, 2015).

124. Interview with Shehadeh, *supra* note 70.

125. More broadly, the United Nations has had little success pressuring Arab states to change behavior. See Fateh Azzam, *The UN Human Rights Game and the Arab Region: Playing Not to Lose in Land of Blue Helmets* 253, 266 (Karim Makdisi & Vijay Prashad, 2017).

generally.<sup>126</sup> These offered platforms to normalize and publicize Palestinian perspectives, even if they were not likely to generate immediate action.

#### 4. *Other activities of the founders*

Human rights work was only one component of the founders' broader approach towards opposing the occupation. They also pursued other forms of organizing and resistance. Shehadeh is an accomplished memoirist who used personal narrative to bring attention to the daily lives of Palestinians.<sup>127</sup> The title of his first book, *Samed: Diary of a West Bank Palestinian*, refers to the concept of steadfastness—the power of remaining in place, opposing the occupation by refusing exile. In Israel, the book was titled *The Third Way*, a reference to practices of inmates at the Treblinka concentration camp. The third way is an alternative to “exile or submissive capitulation to occupation, on one hand – or blind, consuming hate and avenging the wrongs done to them, on the other.”<sup>128</sup> Shehadeh's vision of a third way meant building institutions that would challenge the occupation and preserve Palestinian history. Human rights reporting was one way of participating in “resistance *sumud*,” which moved beyond merely remaining on the land and “emerged as activist and effective in seeking ways to build alternative institutions, and thus to resist and undermine the occupation.”<sup>129</sup> Al Haq's focus on documenting the lives of Palestinians was a form of resistance *sumud*.

The other founders supported several different organizations that emphasized direct interventions in the lives of Palestinians. Kuttab divided his time between human rights and faith-based groups. He helped to start the Palestinian Center for the Study of Nonviolence in 1983 and the Mandela Institute for Political Prisoners in 1990 and served as the lawyer for Christian Peacemaker Teams.<sup>130</sup> Shamas founded a separate organization, Mattin, which experimented with organizing labor and capital in ways that would advance international recognition of Palestine.<sup>131</sup>

All these efforts were consistent with, and in some cases overlapped with, human rights work, but forming an NGO brought advantages that were not available through other forms of mobilization. The universality of humanitarian and human rights law gave Palestinians access to the same legal protections as Israelis as they struggled to articulate a nationalist vision that would resonate

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126. See, e.g., Law in the Service of Man, Newsletter No. 9, *supra* note 118, at 10.

127. Shehadeh has published at least eight memoirs, including *SAMED: JOURNAL OF A WEST BANK PALESTINIAN* (1984), *STRANGERS IN THE HOUSE: COMING OF AGE IN OCCUPIED PALESTINE* (2003), and *PALESTINIAN WALKS: FORAYS INTO A VANISHING LANDSCAPE* (2007).

128. Shehadeh, *Samed: Journal of a West Bank Palestinian* 38 (1984).

129. *Id.*

130. Katie Hurst, *Jonathan Kuttab: Peacemaking as a Way of Life*, *The Mennonite* (Mar. 6, 2017), <https://perma.cc/BX6Q-7897>.

131. Interview with Shamas, *supra* note 66.

where previous articulations had failed. Al Haq forged a non-partisan, non-violent Palestinian nationalism that differed from both the older visions of Arab Nationalists and those of the New Left. Al Haq's documentation strategy generated a history of the occupation that centered Palestinian lived experience. It laid bare the reality of occupation while building a Palestinian identity using shared language immediately understood around the world.

International law has been both central to Palestinian history and devastatingly irrelevant to the lives of its people. International indifference to the occupation, and Palestinian antipathy towards legal advocacy, created an uphill battle for Al Haq. It was only through a decade of work that Al Haq convinced the international community that Palestinians were full individuals, worthy of protection, and convinced Palestinians that their grievances could be productively framed as violations of international law.

### C. *Mobilizing for political rights in Morocco*

Like Palestinians, Moroccans have a long history of mobilization against foreign occupation.<sup>132</sup> However, by the time members of the Moroccan political opposition turned to human rights in the early 1970s, their antagonist was a domestic king rather than a foreign power. After Morocco's independence from France and Spain in the late 1950s, King Mohammad V sparred with the nationalist political party, Istiqlal. The King, who had aligned himself with the nationalists against the French, declined to share power proportionately and implemented minimal political reforms. Frustrated with the slow pace of change, more radical members of Istiqlal splintered into a separate party: the National Union of Popular Forces (UNFP).<sup>133</sup> With the primary goal of national liberation achieved, other movements began to challenge both the king and established political parties.<sup>134</sup>

After Mohammad V's death in 1961, his son Hassan II consolidated power through violence and political maneuvering. He initiated "a reign of terror . . . marked by sheer violence and utter repression of all those who were considered a threat" known as the Years of Lead.<sup>135</sup> Hassan II used violence and manipulation to keep any one party or group from gaining significant political power.<sup>136</sup> As many as 50,000 people were detained, abused, tortured, raped, disappeared, or killed.<sup>137</sup> In 1963, thousands of UNFP members were arrested, prompting

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132. SUSAN MILLER, *A HISTORY OF MODERN MOROCCO* 129-136 (2013).

133. El-Hussein A'boushi, *The Socialist Union of Popular Forces Party in Morocco* in *A Return to Partisan Politics? Partisan Logics and Political Transformation in the Arab World* 131, ¶ 18 (kindle version) (Myriam Catusse and Karam Karam eds. 2010).

134. ALMA RACHEL HECKMAN, *THE SULTAN'S COMMUNISTS* 144-45 (2020).

135. FADOUA LOUDLY, *TRANSITIONAL JUSTICE AND HUMAN RIGHTS IN MOROCCO: NEGOTIATING THE YEARS OF LEAD* 71 (2014).

136. Miller, *supra* note 132, at 16.

137. Loudly, *supra* note 135, at 73.

resistance and even calls to end the monarchy from the influential Moroccan National Students Union (UNEM).<sup>138</sup> Though Hassan II had some popular support, he faced rising dissatisfaction due to wage stagnation and price inflation.<sup>139</sup> Popular demonstrations became a regular strategy of the Moroccan opposition during the mid-1960s, with strikes, protests, and riots attracting students and disaffected workers. The King responded by suspending the Constitution, bypassing parliament, and ruling directly until 1970.<sup>140</sup> This sidelined political parties, pushing political organizing into increasingly informal spaces.

As in other parts of the Arab world, Moroccans—particularly young people and students—turned to revolutionary Marxist-Leninist groups. Abraham Serfaty, Abdelhamid Amine, and other Communists broke with their former party in 1970 and formed a new underground group that organized under the name *Ila al-Amam* (Forward). Unions and syndicates provided spaces for these leftist activists to organize and work together openly and together they formed a Committee Against Repression in Morocco. Amine, who later became a leader of AMDH, sat on the Committee as a representative of UNEM, which was aligned with this resurgent leftism. The Committee was primarily concerned with political prisoners, not international law *per se*.<sup>141</sup> The Moroccan League for the Defense of Human Rights (LMDDH), founded in 1972 in affiliation with the nationalist Istiqlal party, observed political trials and published reports on unfair trials of opposition members.<sup>142</sup> The fate of political prisoners gained more salience among leftists when many of the leading members of *Ila al-Amam* and the Committee Against Repression were arrested and imprisoned in 1972. Amine would remain in prison until 1984, Serfaty until 1991. Some of their colleagues were tortured to death. The short-lived committee dissipated after this wave of arrests.<sup>143</sup>

### 1. *Non-partisanship and the origins of AMDH and OMDH*

As opposition and crackdowns continued, family members of political detainees began to organize. They joined with members of the Socialist Union of Popular Forces, a radical party which had broken from the UNFP over its decision to cooperate with Istiqlal in a National Unity government,<sup>144</sup> and other leftist activists to form the Moroccan Association for Human Rights. Unlike Al Haq,

138. See Frédéric Vairel, *Politique et mouvements sociaux au Maroc* 102-06 (2014).

139. Miller, *supra* note 132, at 173.

140. Susan Waltz, *Human Rights and Reform: Changing the Face of North African Politics* 114 (1995).

141. Interview with Amine, *supra* note 62.

142. JAMES SATER, *CIVIL SOCIETY AND POLITICAL CHANGE IN MOROCCO* 43 (2007).

143. Abdelhamid Amine, *Entretien avec Abdelhamid Amine, vice-président de l'OMDH (sic): 'Tant que nous combattons pour les droits humains, l'avenir ne peut être que meilleur [Interview with Abdelhamid Amine, vice president of OMDH (sic): 'As Long as We Fight for Human rights, the Future can Only be Better]*, interview by Montassir Sakhi, *Libération*, May 30, 2009.

144. A'boushi, *supra* note 133, ¶¶ 39-40.

early rights activism in Morocco was intimately connected with radical politics and the New Left. Many early activists were involved in both party politics and human rights.<sup>145</sup> They formed NGOs to complement their partisan work as a direct response to State violence.<sup>146</sup> Within an NGO, they could focus on issues that benefited all members of the political opposition—political prisoners, freedom of speech, and freedom of association. As in Palestine, both documentation of violations and the language of universality were important, but the claim to non-partisanship was also a core motivating factor in organizers' decision to employ human rights.<sup>147</sup> The separate organizational structure allowed for formal institutional independence, though even so, the NGOs struggled to be free from partisan influence.<sup>148</sup>

Many members continued to be active in political parties and syndicates. Human rights activism complemented those forms of organizing. Najia Labrim, whose husband was a political prisoner, was involved with AMDH from its earliest days.<sup>149</sup> She also worked extensively within a syndicate and with families of detainees. Labrim explained why international law appealed to her:

[I]t was an amalgam of several civilizations . . . . There's a little religion. There's a little of the French revolution, the history of humanity. So we cannot have a law more advanced than this. Impossible. And more than that, I do a comparison between these laws and national laws, and I see that there is a very large difference. In Moroccan laws there is a lot of discrimination, a lot of injustice . . . . Anyway Morocco ratified many and it is obligated to change its local laws.<sup>150</sup>

For Labrim, international law represented the best the world had to offer and, most importantly, provided a universal standard that was higher than domestic law. Morocco had signed both the ICCPR and the ICESCR in January 1977 and ratified them in May 1979, giving AMDH binding international reference points.<sup>151</sup>

AMDH's limited activities stopped completely after a government crackdown in 1983 when the State imprisoned its most active members.<sup>152</sup> AMDH was too closely associated with a radical wing of the USFP, which refused to

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145. Waltz, *supra* note 140, at 145.

146. *Id.*

147. Interview with Khadija Riyadi, former President, AMDH, in Rabat, Morocco (Oct. 1, 2015).

148. Interview with Amine, *supra* note 62.

149. Interview with Najia Labrim, Section President, AMDH, in Rabat, Morocco (Oct. 28, 2015).

150. *Id.*

151. United Nations Treaty Collection, Status of Treaties, International Covenant on Civil and Political Rights, <https://perma.cc/ZRT5-93NP>; United Nations Treaty Collection, Status of Treaties, International Covenant on Economic, Social and Cultural Rights, <https://perma.cc/7LJZ-XMV5>.

<https://perma.cc/7LJZ-XMV5>.

152. AMDH, Wathā'iq Marjiyya [Reference Documents] 14 (2014) (Ar.).

participate in elections, for the State to tolerate its existence.<sup>153</sup> Extensive repression limited the ability of both AMDH and LMDDH to function in the early 1980s. In the late 1980s and early 1990s, Moroccans began to create more social and political organizations that were not as closely linked to political parties.<sup>154</sup> Human rights, with their international legitimacy and (formal) non-partisan character, were a natural framework to unite members of the opposition. While LMDDH and AMDH were repressed, there was no domestic organization devoted exclusively to human rights activism and Moroccans inclined to support international law found a “gap.”<sup>155</sup>

In 1988, political elites formed a new organization, the Moroccan Organization for Human Rights (OMDH). Like the human rights activists of the 1970s, the founders saw international law as a useful framework in responding to widespread State violence. But OMDH rejected the radical politics of AMDH. Though focused on many of the same issues and employing many of the same strategies, the new organization envisioned gradual change.<sup>156</sup>

Wary of experiencing the same type of repression as the earlier NGOs, OMDH sought to identify as a non-partisan.<sup>157</sup> Of the three founding members who occupied early leadership positions, two were political independents.<sup>158</sup> The founders sought political balance among members by implementing a quota system for members with partisan affiliation and those without.<sup>159</sup> Use of the quotas, however, seemed to accept the principle that individuals could not separate their partisan identity from human rights work. In fact, OMDH’s efforts to insulate itself from government repression were initially unsuccessful. The State prevented OMDH from holding an event to mark its founding three times in

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153. José M. González Riera, *Des Années de plomb au février: Le rôle des organisations des droits humains dans la transition politique au Maroc* [*The Years of Lead: The Role of Human Rights Organizations in the Political Transition in Morocco*], 3 *Confluences Méditerranée* 35, 45 n. 3 (2011).

154. Sater, *supra* note 143, at 52-53.

155. Interview with Bennani, *supra* note 62.

156. See Vairel, *supra* note 138, at 118.

157. Interview with Bennani, *supra* note 62.

158. Omar Azziman and Mahdi Elmandjra served as the Chair of the National Bureau and the founding President, respectively. Azziman was a professor at the University of Rabat and a prominent non-partisan public figure. He had been involved with UNEM and was a leader in the National Syndicate for Higher Education. He had participated in some of the early conversations about AMDH but never joined. (Marguerite Rollinde, *Le Mouvement Marocain Des Droits De L’hommes* [The Moroccan Movement for Human Rights] 289 (2002)). Elmandjra was another prominent political figure with no partisan affiliation. He was also a professor at the University of Rabat and spent more than a decade with various positions at UNESCO. He was also active in the World Futures Studies Federation, a transnational organization that brought social science approaches of modeling and prediction to bear on questions of the future of peace and democracy. (Kaya Tolon, *Futures Studies: A New Social Science Rooted in Cold War Strategic Thinking*, in *Cold War Social Science: Knowledge Production, Liberal Democracy and Human Nature* 53-54 (Mark Solovey and Hamilton Cravens, eds. 2012)).

159. Rollinde, *Le Mouvement Marocain Des Droits De L’hommes* [The Moroccan Movement for Human Rights] at 271.

1988,<sup>160</sup> only relenting after negotiations with public officials. Finally, OMDH marked the fortieth anniversary of the adoption of the UDHR on December 10, 1988 by holding its opening congress.

OMDH quickly established that human rights activists could work with state officials. Activists began meeting with government officials and remained committed to dialogue even in the face of continuing violations.<sup>161</sup> The organization did not fundamentally contest the legitimacy of the monarchy.<sup>162</sup> Though OMDH was less combative than the earlier organizations, its existence signaled that the State might be more open to human rights organizing. International organizations, foreign governments, and the foreign press also put pressure on the King to change State practices at a time when he was trying to build Morocco's international reputation. The dormant members of AMDH and LMDDH took advantage of the opening to again engage in public advocacy.

OMDH and AMDH had radically different visions for Morocco's future, but they used international law for many of the same reasons. Human rights provided non-partisan framework for political engagement. The universalism of human rights allowed NGOs to mobilize all Moroccans without drawing directly on ineffectual or insular party structures. AMDH and OMDH were less successful in mobilizing universalism to secure their own institutional legitimacy because so many of their leaders and members were active in political parties. It was difficult to separate the goals of the human rights organizations from those of the political opposition. Nevertheless, international law gave activists of the Arab New Left, who were ruthlessly persecuted, a way to advocate for greater political space.

## 2. *Mass organizing*

If Al Haq epitomized one version of a human rights NGO—centralized, professional, and well-funded from abroad—the Moroccan organizations offered contrasting visions of mass organizing. Though AMDH was often characterized as a mass organization while OMDH was viewed as more elite, both chose organizing structures that drew on large memberships. Their connections to political parties, membership bases, and mass appeal kept them more integrated into the existing associational fabric of society than was the case for many NGOs. AMDH in particular held on to its radical roots. Their greater connectivity, however, made it difficult to be independent from party politics.

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160. *Pour la troisième [sic] fois . . . L'Assemblée est interdite* [For the Third time . . . the Assembly is Prohibited], Sept. 16, 1988, in *L'Organisation Marocaine des droits de l'homme à travers ses communiqués et déclarations : mai 1988 – mars 1991* [The Moroccan Organization of Human Rights: through its communiqués and declarations, May 1988 – March 1991] [hereinafter *communiqués and declarations*] 15 (1991).

161. *Conséquences dramatiques de l'obstination des autorités*, [Dramatic consequences of the stubbornness of authorities], August 21, 1989, in *id.* at 72-73.

162. Sater, *supra* note 142, at 55-56.

AMDH formed sections across the country. Volunteers, rather than professional staff, provided most of the labor. During its early years, before it was effectively shuttered by the State, the organization focused on Palestine, rising prices, and political prisoners.<sup>163</sup> Activities were limited, as Morocco was still in the midst of intense repression and widespread State violence. Still, AMDH managed to hold a founding congress in 1979 and build its membership base. Mass organizing was a core principle. As one early member noted: “Elites cannot assert human rights. It’s the masses, and masses that are organized and trained.”<sup>164</sup>

By 1981, more than a dozen sections were meeting across the country. At this point, organizing *was* practice. AMDH began in an era of strict repression, when “it was not possible to talk about human rights . . . belonging to a human rights group . . . was like talking or being subversive, opposing to the regime.”<sup>165</sup> Human rights were decidedly not apolitical; they signaled opposition to the regime. Holding meetings of like-minded individuals was difficult, and information was sparse. Though there were hundreds of political prisoners in dire conditions, knowledge about secret prisons spread through small meetings of members of the opposition. Most of AMDH’s early members were already active in parties and unions, or they were family members of political prisoners. Human rights activism complemented these activities and united members of the opposition and their families by centering the concerns of prisoners.

AMDH’s organizational structure gave it a fundamentally different character than many other human rights organizations. Instead of operating like a quasi-law firm such as Al Haq, AMDH owed more of its form to labor unions and political parties. Its goals were not merely to produce well-documented reports or influence government policy, but to change political consciousness around human rights.<sup>166</sup> This was more than a difference in strategy; it reflected fundamentally different understandings of social change. Al Haq’s founders were convinced that exposing human rights violations would be a path towards ending them. AMDH never placed such reliance on reporting. It was concerned with both producing knowledge and mobilizing people. Its outreach was not based primarily on public education about the law, as was Al Haq’s, but on mass participation in a social movement. AMDH epitomized an alternative vision of human rights organizing that prioritized mass mobilization with an emphasis on domestic consciousness-raising.

When AMDH was effectively shut down in the mid-1980s, the lesson for other members of the opposition was that political independence was essential.<sup>167</sup>

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163. Susan Waltz, *Making Waves: The Political Impact of Human Rights Groups in North Africa*, 29 J. of Modern African Stud. 481, 486 (1991).

164. Interview with Abdelhafid, *supra* note 63.

165. Interview with Mohamed Elboukili, member of the administrative committee, AMDH, in Rabat, Morocco (Sept. 15, 2015).

166. Interview with Abdelhafid, *supra* note 63.

167. LMDDH was also quiet during this time due to extensive repression.

Outsiders perceived AMDH to be too closely linked to partisan politics, though AMDH contested that this was, in fact, true. The overlap between individuals' partisan work and human rights activism presented a challenge for the organization on both an ideological and practical level; it was hard for AMDH to claim that it advocated for neutral legal principles when its central figures were so politically active. And the association between radical, revolutionary politics and human rights limited the appeal.

But despite efforts by OMDH to recruit political independents, many of the founders were firmly rooted in partisan and labor organizing. These ties shaped their early practices. Like AMDH, OMDH sought to hold an inaugural national congress, a decision more reminiscent of a political party than a professional human rights organization. This decision put the nascent group on a collision course with the regime. Securing the right to organize a large founding meeting was fundamental to OMDH, just as preparing a book-length investigative report was fundamental to Al Haq.

In many ways, OMDH was the elite organization described by its own members, scholars, and—pejoratively—AMDH. Members were mostly professionals and its language was that of gradual change. But structurally, OMDH was closer to the mass organization of AMDH than the highly technocratic Al Haq. OMDH established sections outside of the capital with membership open to those who were not full-time human rights workers. OMDH's membership was smaller than AMDH's, and its sections tended to be in larger cities, but this is still a far different model from that of many other human rights NGOs with a small professional staff.

### 3. *Documentation and Public Engagement*

As with most human rights organizations, fact-finding and research occupied a central place in the work of Moroccan NGOs. Like Al Haq, Moroccan organizations sought to counter official narratives that denied and minimized human rights abuses. However, unlike their Palestinian counterparts, Moroccan activists did not mobilize human rights as part of a nationalist struggle against a foreign occupier.<sup>168</sup> They were far less concerned with re-writing history. Even OMDH, with its more elite character, pursued documentation alongside more direct methods of intervention. This may explain why Moroccan organizations favored frequent press releases, shorter reports, newsletters, and direct action over book-length reports. Documentation was only one element in a panoply of core activities.

The first task for Moroccan NGOs was to expose the system of State repression of political dissent through secret prisons and abuse. These efforts, as

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168. Sahrawi activists in Western Sahara are an exception, though they did not organize into formal NGOs until later. A Sahrawi human rights NGO was formed in early 2005 and recognized by the Moroccan government in 2015. See Human Rights Watch, *Morocco/Western Sahara: Rights Group Legalized* (Aug. 24, 2015), <https://perma.cc/T7MK-58EV>.

well as advocacy by Amnesty International, had some success. In May 1989, fifty political prisoners were freed, when previously amnesty had only been granted to those serving criminal sentences.<sup>169</sup> Even as the State began releasing some political prisoners who had been held for years, many more remained in detention. In the summer of 1989, both OMDH and AMDH published detailed lists that were difficult to refute. In June, AMDH published a list of 175 detainees, along with their location of arrest, place of detention, profession, and family status.<sup>170</sup> Just a month later, OMDH published a list of 226 names with details of their locations and length of detention.<sup>171</sup>

In addition to documentation and publications, both organizations pursued a range of activities designed to change the public conversation around human rights. Education was particularly important to many of the early members of AMDH because of its potential for reaching the masses. The organization convened seminars and conferences on political prisoners, equality between men and women, and Palestine.<sup>172</sup> Perhaps the most notable effort to set the terms for public debate was the joint effort to issue a common set of standards specific to Morocco, which all the major rights organizations endorsed. AMDH, OMDH, and LMDDH worked with lawyers' associations, and with support from international groups, to issue a common National Charter of Human Rights on December 10, 1990.<sup>173</sup> AMDH had begun a similar effort by 1981, so this was not a novel idea.<sup>174</sup> But the Charter had more impact coming from a united front of NGOs. Crucially, this effort was not in opposition to universal, international standards, but in furtherance of them.

#### 4. *State co-operation*

Despite many collaborations, OMDH and AMDH faced their starkest area of disagreement when it came to interactions with the State. During its early years, AMDH demonstrated a limited willingness to work with State officials but became more wary of government cooperation. OMDH cultivated a different stance, demonstrating that human rights advocacy could coexist with participation in the governing structure. According to scholar Margarite Rollinde, this decision “was about standing out from AMDH, perceived as in opposition to the regime,

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169. Amnesty International, Morocco: A Pattern of Political Imprisonment, “Disappearances,” and Torture 4 (1991).

170. AMDH, *Aperçu sur la détention politique au Maroc* [Overview of Political Detention in Morocco], Attadamoun 10-13 (July 1989) (on file with author).

171. *Présentation du dossier de presse relative aux prisonniers politiques* [Presentation of the Press Dossier on Political Prisoners] (July 1989), in *Communiqués et déclarations*, *supra* note 160, at 68.

172. Interview with Elboukili, *supra* note 165.

173. *Charte Nationale des Droits de l'Homme* [National Charter of Human Rights] (Dec. 10, 1990), in *Communiqués et déclarations*, *supra* note 160, at 141.

174. *Mithāq Huqūq al-Insān* [Human Rights Charter], Attadamoun 5 (June 1988) (on file with author).

and perhaps also, of finding potential allies against the ‘hard-liners’ in the regime.”<sup>175</sup>

The creation of the State-sponsored Consultative Council on Human Rights highlighted this key difference between AMDH and OMDH. The Council was a vehicle for the King to rehabilitate his image after several embarrassing incidents abroad.<sup>176</sup> It brought together government officials with representatives from unions, political parties, civil society, and the Moroccan bar association to investigate and make recommendations on human rights practices. Structurally, the organization was not set up to generate significant change. Its purview was limited, and the King selected the members. Some of the ministers on the Council were themselves implicated in the mistreatment and torture of detainees. AMDH refused to participate.<sup>177</sup> OMDH participated but criticized the Council’s inaction.<sup>178</sup> Nevertheless, the formation of the Council as well as the appointment of Omar Azziman, a founding leader of OMDH, to the newly created position of Minister for Human Rights institutionalized the State’s commitment to some reforms of pre-trial detention and prison conditions.

Azziman’s position illustrated OMDH’s greatest challenge: demonstrating sufficient independence from the King and the government. The biographies of OMDH leaders reveal the revolving door between the organization and government positions.<sup>179</sup> In addition to Azziman, there was Habib Belkouch, who served as Vice President of OMDH before being named the head of a public research institute. More recently, former OMDH President Amina Bouayach was appointed Ambassador to Sweden and Latvia in 2016 and President of the National Human Rights Council in 2018. One former member of OMDH viewed these connections critically, as a sign that OMDH had lost its initial independence and become too beholden to government interests.<sup>180</sup> But in many ways this is a matter of degree; OMDH had always pursued a strategy of gradual change, working within the system rather than seeking to overthrow it.

##### 5. *International relations*

Regional and international relations were another area where AMDH and OMDH took different approaches. Disputes over partnerships with European NGOs initially divided the organization but OMDH quickly joined several

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175. Rollinde, *supra* note 159, at 272.

176. These included Amnesty International’s reports of torture and abuse, the publication of a damaging book in France, *Notre Ami le Roi*, and the failure of the King’s rehabilitation initiative in Paris.

177. Rollinde, *supra* note 159, at 263.

178. Biyyān al-makṭaba al-waṭanī bimināsiba ‘āshir dijanbar (sic) [Statement from the General Office on Dec. 10, 1992] (Dec. 10, 1992) (on file with author).

179. Vairel, *supra* note 138, at 119.

180. Interview with a former member, OMDH, in Rabat, Morocco (2016).

international and regional partnerships.<sup>181</sup> AMDH did not seek out strong foreign ties until later in the 1990s, giving OMDH the upper hand in framing Morocco's human rights practices internationally. AMDH was primarily concerned with building a Moroccan social movement that centered mass action. International networking was not necessarily at odds with this goal, but it was not a priority.<sup>182</sup> However, when AMDH did decide to devote greater resources to its international presence, it found the landscape somewhat unwelcoming.<sup>183</sup> OMDH already spoke for Morocco. As OMDH became more closely associated with the State and State-sponsored efforts to adopt human rights language, its amplified voice on the world stage was particularly problematic for AMDH. As Khadija Riyadi said, "we cannot accept that OMDH speaks in our name . . . . It does not represent our positions, is not in agreement with them, so it is necessary to have another voice."<sup>184</sup> AMDH did not want OMDH to be the sole voice speaking for the country in international networks, so it stepped up its international presence.

AMDH and OMDH competed to advance their vision of social change, even as they cooperated under the umbrella of human rights. In doing so, they demonstrated that human rights language and practice were broad enough to accommodate multiple, contested visions of what it meant to practice human rights in Morocco.

#### D. Mobilizing for Arab Democracy

Human rights activism in Palestine and Morocco was in response to the decline of Arab nationalism, but for some Arab nationalists, human rights activism was another way to continue the movement. Arab nationalist intellectuals created the Arab Organization for Human Rights to promote democratic governance and political unity. Though Arab nationalism as practiced under Nasser was on the decline in the 1970s, "the [1967] war did not sound the death knell of Arab nationalism as a political force."<sup>185</sup> Many Arab nationalists were persecuted and imprisoned for their partisan activities. In Egypt, radical leftists and remaining Nasserists were marginalized in the 1970s under Anwar Sadat.<sup>186</sup>

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181. E-mail from Abdelaziz Bennani, founding Secretary-General, OMDH (Sept. 4, 2016) (on file with author); *Affiliation à l'Organisation Arabe des Droits de l'Homme [Affiliation with the Arab Organization for Human Rights]* (n.d.) and *Déclaration d'Alger sur le Maghreb des Droits de l'Homme [Algiers Declaration on Human Rights in the Maghreb]* (Feb. 13, 1989), in *Communiqués et déclarations*, *supra* note 160, at 34–37. On the conflict with the Paris-based International Federation of Human Rights, see Waltz, *supra* note 163, at 493.

182. Interview with Riyadi, *supra* note 147; Interview with Amine, *supra* note 62.

183. Interview with Riyadi, *supra* note 147.; AMDH, *L'Unité d'Action dans le Domaine des Droits de l'Homme [The Unity of Action in the Field of Human Rights]*, Attadamoun, 4 July 1989 (on file with author).

184. Interview with Riyadi, *supra* note 147.

185. Rashid Khalidi, *The 1967 War and the Demise of Arab Nationalism*, in *The 1967 Arab-Israeli War: Origins and Consequences* 264 (Wm Roger Louis & Avi Shlaim, eds. 2012).

186. Bahey el-Din Hassan, *A Question of Human Rights Ethics: Defending the Islamists*, in *Human Rights in the Arab World* 42-3 (Anthony Chase & Amr Hamzawy, eds. 2008).

Torture was re-introduced in the 1980s under Hosni Mubarak.<sup>187</sup> Persecution was not limited to leftists; violence against secularists, Coptic Christians, and foreigners increased.<sup>188</sup> Creating a regional human rights organization was a practical way to foster the Arab unity that proved elusive at the political level while protecting increasingly threatened civil and political rights.

International human rights law offered an organizing framework that could accommodate a range of political goals and pragmatic political reforms. The universal claims of human rights law created opportunities for AOHR to pressure foreign governments about internal affairs. This transnational quality is one of the reasons why human rights law can be a tool of more powerful States against less powerful ones, but it also facilitated the regional activism of AOHR. By grounding complaints in international law, the central body of AOHR amplified domestic voices, synthesized regional analysis, and intervened directly with States in ways that aligned with the regionalism of Arab nationalism, even after the political movement for Arab unity seemed lost. Universalism also allowed national affiliates to make legal arguments that did not depend on domestic law, which was especially important when it came to the rights of minorities and non-citizens.

### 1. *Founding of AOHR*

In 1983, thirty-five activists met in Hammamat, Tunisia and agreed to a short Declaration calling for “Democracy and the fundamental freedoms it implies” as “fundamental goal[s] in themselves.”<sup>189</sup> The Declaration laid the groundwork for the founding of AOHR at a subsequent meeting, held in Cyprus because the governments of Egypt, Kuwait, and Jordan would not permit it.<sup>190</sup> Though many of the founders of AOHR were Arab nationalists, they centered democracy, not Arab unity, in the founding document:

The last 30 years have witnessed the complete disappearance of democratic freedoms in the Arab world. This suppression of democracy has been justified in various ways and under different pretexts. It sometimes was justified by the need to build socialism and to pursue economic development, sometimes by the need to establish Arab unity, and at other times by the requirements of defending independence and in the name of struggle against Israel, when in fact none of these objectives could be achieved without democracy.<sup>191</sup>

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187. *Id.*

188. *Id.*

189. *The Hammamat Declaration*, 120 MERIP Middle East Rep. (1984).

190. Jill Crystal, *The Human Rights Movement in the Arab World*, 16 Hum. Rts. Q. 435, 439 (1994).

191. *The Hammamat Declaration*, *supra* note 189.

The Declaration went on to specifically reference the rights enshrined in the UDHR, particularly political rights and those regarding political prisoners, extra-legal courts, emergency laws, and secret police.<sup>192</sup>

Though it was a regional network, Egyptians were central to the creation of AOHR. As in Morocco, the imprisonment of dissidents from across the political spectrum sparked their embrace of human rights law as a framework separate from partisan advocacy. In Egypt, Sadat detained opponents from different political persuasions in the final months of his presidency.<sup>193</sup> After Sadat's assassination on October 6, 1981, many of these detainees were released and found they had common ground in their support for political rights. Some formed an Egyptian Committee for the Defense of Democracy that included liberals, communists, and Islamists.<sup>194</sup> The Committee did not last, but it sparked the initiative that became AOHR.<sup>195</sup>

AOHR was an eclectic group, but the initial members were politically engaged, educated professionals. In addition to Egyptian dissidents, they included several authors and poets: Abbas Beydoun of Lebanon, the Syrian poet Adonis, and the Egyptian journalist Ahmad Bahaeddin.<sup>196</sup> Others were academics, like prominent sociologist Saad Eddin Ibrahim of Egypt. As in the Moroccan and Palestinian NGOs, members of AOHR engaged in other forms of social organizing. Some were active in political parties, others in civil society. Ibrahim launched a center on democracy in Egypt and the Arab world that organized pro-democracy trainings and monitored elections.<sup>197</sup> Jassim al-Qatami of Kuwait was a successful politician. Some, like Beydoun, had been imprisoned and tortured for political activism.<sup>198</sup> Several of AOHR's founders lived in exile or had strong ties to the United States and Europe.

AOHR was not a revolutionary organization. Naseer Aruri, an AOHR founder who also served on the boards of Amnesty International and Human Rights Watch, described the organization as having a "non-confrontational demeanor, non-political character and middle-class values."<sup>199</sup> Many early members were former officials or had family ties to the state. As political scientist Jill Crystal noted, "they were disillusioned, aware that the states that they helped

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192. *Id.*

193. Crystal, *supra* note 190, at 437-38.

194. *Id.* at 438.

195. *Id.*

196. All three signed the Hammamat Declaration.

197. See Saad Eddin Ibrahim, *Human Rights and democracy are a matter of principle, and they should be supported across the board*, The Forum on Women, Religion, Violence & Power, The Carter Center (June 10, 2016).

198. Abbas Beydoun, *Writing the Language of Absence* 10/11 Banipal: Magazine of Modern Arab Literature (2001).

199. Naseer Aruri, *Disaster Area: Human Rights in the Arab World*, 149 MERIP Middle East Rep. 7 (1987).

build were not working as well as intended.”<sup>200</sup> These were well-connected elites who were dissatisfied but not necessarily pushing for massive social change or economic transformation.

AOHR focused primarily on political and civil rights that most affected political engagement: personal freedom and security, the rights of prisoners, the right to a fair trial, freedom of expression and association, and the right to participate in the management of public affairs.<sup>201</sup> AOHR did not engage in mass organizing to promote social change but instead prioritized high-level organizing such as planning conferences, publishing reports, launching international campaigns, and engaging with the United Nations. It established a headquarters in Cairo and formed chapters in eight Arab countries, several European nations, and the United States.<sup>202</sup>

## 2. *Advantages and disadvantages of regionalism*

AOHR’s structure allowed it to aggregate and analyze violations from the entire region, giving rigor to the underlying belief of many of its founders that Arab governments were dismally failing their citizens.<sup>203</sup> In its first few years, AOHR focused on documentation and direct petitions to governments. By January 1987, AOHR had received 155 complaints from 19 countries.<sup>204</sup> It relayed these complaints to Arab governments, forcing replies in contexts where domestic complaints could be more easily ignored. Responses were not always promising. Aruri, the AOHR founder, noted that “[g]overnment responses ranged from total rejection of the very concept of human rights to the usual denial of serious violations,” though “some governments expressed willingness to discuss practical steps to improve the situation on a modest scale.”<sup>205</sup> Moderate wins included permission to conduct prison visits in Egypt and Libya and the release of a prisoner in Jordan. Other missions were less successful. AOHR was permitted to join the defense team of Tunisian labor union leader al-Habib Ashour contesting charges related to a strike; Ashour, however, was still sentenced to imprisonment.<sup>206</sup> Even failed efforts reflected a growing, if begrudging, recognition from Arab governments.

Despite the limited protection afforded to AOHR by its regional status and international profile, the organization still had to devote considerable effort to

200. Crystal, *supra* note 190, at 452.

201. Al-Jam‘iyya al-‘Arabiyya lil-Huqūq al-Insān [Arab Organization for Human Rights], *Huqūq al-Insān fī al-Watan Al-‘Arabi* [Human Rights in the Arab World] (1988).

202. Crystal, *supra* note 190, at 443.

203. See Bahey el-Din Hassan, *A Question of Human Rights Ethics: Defending the Islamists*, in *Human Rights in the Arab World* 42 (Anthony Chase and Amr Hamzawy, eds. 2008).

204. Naseer Aruri, *Disaster Area: Human Rights in the Arab World*, 149 *MERIP Middle East Rep.* 9 (1987).

205. *Id.*

206. *Id.*

merely exist in the face of State opposition. Egypt showed more tolerance than most other Arab governments—allowing AOHR to locate its headquarters in Cairo and establish a local branch—but that also gave the Egyptian government the greatest ability to impede operations of central leadership and staff. In 1986, Egypt prevented AOHR from holding its first general meeting, scheduled three years after the founding meeting in Cyprus.<sup>207</sup> Having made it impossible for AOHR to officially register, the State then faulted the organization for operating without a license.<sup>208</sup> Denying official recognition was a common way for Arab governments to limit activities of human rights NGOs. AOHR found a more welcoming reception in Sudan, where it was permitted to hold its first general meeting the following year.

AOHR's Arab nationalist background and regional orientation opened it to discord in the face of regional conflict. This arose most clearly in the case of the First Gulf War, which tested the organization's commitment to universalism. As the head of the Iraqi faction of the pan-Arab Baath party, Saddam Hussein had positioned himself as an Arab unifier.<sup>209</sup> Pan-Arabism notwithstanding, however, AOHR was no ally to Saddam and had published a report on human rights violations in Iraq in 1990.<sup>210</sup> But when Iraq occupied Kuwait and the U.S. military intervened, AOHR faced the dilemma of how to critique an act of military aggression by an Arab State followed by military intervention by a foreign power. Eventually, the organization settled on a course of action that "stood steadfast by the principles on which it was founded," condemning all violations and taking positions against both the occupation of Kuwait and the subsequent American invasion and sanctions against Iraq.<sup>211</sup> The conflict over the Iraqi and American military action illustrates the challenge of building supposedly universal, apolitical human rights standards. These standards did not provide a unifying political vision in the face of regional conflict.

### 3. *Documentation and research*

Like Al Haq and the Moroccan organizations, much of AOHR's efforts were devoted to documenting rights violations. The organization published numerous book-length reports that systematically collated violations in more than twenty countries. Published in Arabic, these reports were remarkable for making this information available in one volume. Some of the material was available in reports published by individual NGOs or Amnesty International. By compiling a regional

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207. *Id.* at 7; Crystal, *supra* note 190, at 440.

208. Mohsen Awad, *Pan-Arab Civil Organizations: The Arab Organization for Human Rights*, 1 *Contemporary Arab Aff.* 621, 622.

209. See John Devlin, *The Baath Party: Rise and Metamorphosis*, 96 *The Amer. Historical Rev.* (1991).

210. AOHR, *Huqūq al-Insān fi al-'irāq* [Human Rights in Iraq] 1990.

211. Awad, *supra* note 208, at 627. See also Crystal, *supra* note 190, at 448.

dossier of violations, AOHR was able to identify trends and variations and locate certain violations in specific political dynamics.<sup>212</sup>

The nature of these reports reflected how AOHR navigated legal, political, and social analysis. The annual reports contained a section on each country and also documented regional trends. The 1989 report summarized the commitments of Arab States to follow international law as well as their failure to do so.<sup>213</sup> In the dry language common to many human rights reports, AOHR noted: “The fact that most Arab countries have manifestly failed to adapt their domestic legislation in a manner consistent with their ratification of these conventions has sometimes created a certain degree of incompatibility between their domestic legislation and their international obligations.”<sup>214</sup> The “degree of incompatibility” was made abundantly clear as the report went on to document widespread violations, accompanied by domestic legal protections that fell far short of international obligations.<sup>215</sup>

In addition to cataloging violations, AOHR took an academic approach to the study of politics, democracy, and human rights. It organized conferences and published edited volumes on human rights and international relations. In 1989, AOHR hosted a symposium in Vienna on human rights and the international system in the Arab world. Other topics included prospects for democracy and the UDHR. Though AOHR aligned its annual reports with standards from the United Nations and collaborated with UN bodies and foreign NGOs, its publications were in Arabic and sought to further regional connections. Holding events in Europe—ironically—facilitated participation from activists throughout the region by avoiding travel to Arab countries that would be politically sensitive for certain members. AOHR also undertook significant efforts to educate the public. It published a regular magazine and research journal in addition to episodic reports on specific issues.<sup>216</sup> It played an integral role in the creation of the Arab Institute for Human Rights, based in Tunis, which focused on education and training.<sup>217</sup>

These events and publications established AOHR as more than a clearinghouse for individual violations: they set the stage for AOHR to become a leading intellectual force among Arab NGOs, and potentially within a broader movement for political reform. The organization self-identified as “the conscience of the Arab nation.”<sup>218</sup> However, this promise never came to fruition. Arab human rights organizing remained fragmented and subject to political cleavages. Even AOHR, where many members and leaders shared a general political philosophy,

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212. Aruri, *supra* note 204, at 11.

213. Arab Organization for Human Rights, *Human Rights in the Arab World*, 12 Arab Stud. Quarterly 105 (1990).

214. *Id.*

215. *Id.*

216. Awad, *supra* note 208, at 625.

217. *Id.*

218. AOHR, *supra* note 208, at 120.

was susceptible to political discord. Abdullahi An-Na'im, a legal scholar originally from Sudan who has long studied (and participated in) human rights efforts, cited political fragmentation as one of the reasons why AOHR "failed to develop a comprehensive strategy for the movement as a whole, thereby forcing NGOs to seek independent coordination among themselves."<sup>219</sup> An-Na'im remarked that AOHR "alienated those of other political and philosophical orientations and undermined the credibility of [the] umbrella organization," finding that "external political competition and rivalries tended to be reflected in the leadership and activities of AOHR."<sup>220</sup> Even supporters found themselves excluded if they lacked the right connections. One Kuwaiti activist, who often collaborated with members of AOHR, still felt that he "didn't have much entry, I guess, still. It had this elitist structure. And [members] mostly are politicians who used to know each other in the political struggle for Arab nationalism, mostly Arab nationalists."<sup>221</sup> Though the speaker thought highly of AOHR, and was involved in some of its projects, the organization did not create the openness necessary to welcome people from outside its original political tendencies. Its activities—aggregating reports, publishing studies, and convening conferences—provided few onramps.

#### 4. *Early Human Rights Activism in Kuwait*

True to its Arab nationalist roots, one of AOHR's goals was to strengthen regional integration by supporting national chapters, some of which eventually spun off into independent organizations like the Kuwait Society for Human Rights (KSHR). Several prominent Kuwaitis were involved with AOHR from its beginning in Cyprus, including al-Qatami and Su'ad al-Sabah, a member of the Kuwaiti ruling family.<sup>222</sup> Al-Qatami, who later became known as the "godfather" of the Kuwaiti human rights movement, was a leader in the Kuwaiti political opposition and a long-standing Arab nationalist.<sup>223</sup> He and others formed the local chapter which eventually became KSHR.

Compared to its neighbors on the Arabian Peninsula, Kuwait had a history of open interactions between State and society, though not without sporadic bursts of political repression.<sup>224</sup> The emir (leader) repeatedly disbanded parliament,

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219. Abdullahi An-Na'im, *Human Rights in the Arab World: A Regional Perspective*, 23 *Hum. Rts. Q.* 717 (2001).

220. *Id.* at 728.

221. Interview with Ghanim al-Najjar, Professor of Pol. Sci., Kuwait Univ., in Kuwait City, Kuwait (Apr. 18, 2016).

222. Mahmoud Harbi, Jasim al-Qatami: al-'ruba wa dimaqrāṭiya wa Huqūq al-Insān [Jasim Al-Qatami: Pan-Arabism, Democracy, and Human Rights] 27 (2012).

223. Interview with Maha Albargas, Vice President, AOHR, in Kuwait City, Kuwait (Apr. 19, 2016).

224. MARY ANN TÉTREAU, *STORIES OF DEMOCRACY: POLITICS AND SOCIETY IN CONTEMPORARY KUWAIT* 59-75 (2000).

banned political parties, and limited freedom of the press.<sup>225</sup> Kuwait's economy revolved around oil revenue that funded education, guaranteed employment, and subsidized social services.<sup>226</sup> These entitlements engendered bonds of loyalty between many Kuwaitis and the State.<sup>227</sup> The State further solidified these bonds by supporting quasi-independent organizations that facilitated social ties and civic engagement, including women's organizations and professional societies.<sup>228</sup>

This relatively harmonious relationship between State and society was shaken in the late 1980s by the war between Iran and Iraq and the oil price crash of 1986. The war heightened domestic upheaval resulting in a restive parliament, heightened pro-democracy activism, and increased government repression.<sup>229</sup> The drop in oil prices created economic pressure on the State,<sup>230</sup> which began restricting financial entitlements to Kuwaiti citizens.<sup>231</sup> This excluded large segments of the population, including foreign workers and stateless residents. Women also did not have full rights of citizenship; they could not vote, run for elected office, or pass citizenship to their children.<sup>232</sup> Established women's organizations stepped in to advocate for the rights of women and their children.<sup>233</sup> They primarily relied on the Kuwaiti constitution, though they often partnered with human rights NGOs on issues of mutual concern.<sup>234</sup>

Other groups who found themselves shut out of government programs could not, however, use the constitution as a legal basis for their claims. Foreign workers with few legal protections made up a significant element of the labor force. Kuwait's stateless residents, known as Bedoon, were particularly vulnerable. Bedoon, which means "without" in Arabic, refers to the children of Kuwaiti mothers and non-citizen fathers and to communities who historically lived within the boundaries of Kuwait but had never registered for citizenship. As non-citizens,

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225. Neil Hicks & Ghanim al-Najjar, *The Utility of Tradition: Civil Society in Kuwait*, in *Civil Society in the Middle East 190-91* (1995).

226. *Id.* at 70.

227. JILL CRYSTAL, KUWAIT: THE TRANSFORMATION OF AN OIL STATE 70-71 (1992).

228. Hicks & al-Najjar, *supra* note 225, at 187; Interview with Lulwa al-Mullah, Chair of the Bd., Women's Cultural and Soc. Soc'y, in Kuwait City, Kuwait (Feb. 23, 2016).

229. Ghanim Alnajjar, *Human Rights in a Crisis Situation: The Case of Kuwait after Occupation*, 23 *Hum. Rts. Q.* 188, 192-95 (2001).

230. John Kifner, *An Oil Glut and a War Close in on Kuwait's Utopia*, *N.Y. Times*, Apr. 23, 1986.

231. Mary Ann Tétreault & Haya al-Mughni, *Gender, Citizenship and Nationalism in Kuwait*, 22 *British J. of Middle Eastern Stud.* 64, 68-71 (1995).

232. Margot Badran, *Gender, Islam, and the State: Kuwaiti Women in Struggle, Pre-Invasion to Postliberation*, in *Islam, Gender, and Social Change 190-208* (Yvonne Yazbeck Haddad and John Esposito, eds. 1998); Tétreault & al-Mughni, *supra* note 231, at 74.

233. Haya al-Mughni, *Women's Movements and the Autonomy of Civil Society in Kuwait*, in *Conscious Acts and the Politics of Social Change 173-76* (Robin L. Teske and Mary Ann Tétreault, eds. 2000).

234. Interview with Lulwa Al-Qatami, Founder, Women Cultural and Social Society, in Kuwait City, Kuwait (Feb. 24, 2016).

Bedoon had few rights under Kuwaiti domestic law. Until the mid 1980s, Bedoon could access education and employment benefits, but beginning in the late 1980s, the State excluded Bedoon from many subsidies and treated them more like foreign workers.<sup>235</sup>

International law became particularly valuable to Kuwaitis who opposed the exclusion of Bedoon and others because it leveled the playing field for citizens and non-citizens alike. Human rights law could elevate the plight of non-citizens who were excluded from State entitlements and the patronage networks that animated Kuwaiti society. Limited human rights activism began in the 1980s through the work of Ghanim al-Najjar, a political scientist at Kuwait University. Al-Najjar joined Amnesty International as a student in London and then founded a branch in Kuwait.<sup>236</sup> However, the local branch did not survive long after al-Najjar stepped away from a leadership role after the Iraqi invasion.

Around the same time, the Kuwait Society for Human Rights began limited activities under the umbrella of AOHR. KSHR held general meetings and promoted publications of AOHR.<sup>237</sup> It was largely decentralized, comprised of individuals with a shared political persuasion,<sup>238</sup> and did not form a large social base. KSHR focused on creating an intellectual space for like-minded elites to develop ideas and push for political change, though often on behalf of less elite populations. In the early 1990s, the Iraqi invasion and its aftermath spurred rapid development in the human rights field.

##### 5. *Impact of the Iraqi invasion*

The Iraqi occupation revitalized Kuwaiti human rights activists, who invoked international law to advocate for disfavored groups, non-citizens, and Kuwaitis detained in Iraq. Before the war, basic rights were more respected in Kuwait than in many other countries. Giving faint praise, Aruri noted in 1987: “Kuwait, by no means a citadel of enlightenment, is probably least bad.”<sup>239</sup> This may have contributed to the relative quiescence of the small Kuwaiti branch of AOHR before the war.<sup>240</sup>

During and after the war, however, the treatment of foreign workers, particularly Palestinians, deteriorated significantly.<sup>241</sup> Palestinians and Bedoon

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235. Amnesty International, *The ‘Withouts’ of Kuwait: Nationality for Stateless Bidun Now* (2013).

236. Interview with al-Najjar, *supra* note 221.

237. Al-Jam‘iyya al-‘Arabiyya lil-Huqūq al-Insān – Far‘ al-Kuwītīya [Arab Organization for Human Rights – Kuwait Branch] al-Taqrīr al-Sanawī ١٩٩٣ [Annual Report 1993] 6 (1993).

238. Interview with al-Najjar, *supra* note 221.

239. Aruri, *supra* note 199, at 11.

240. Al-Jam‘iyya al-‘Arabiyya lil-Huqūq al-Insān – Far‘ al-Kuwītīya [Arab Organization for Human Rights – Kuwait Branch] al-Taqrīr al-Sanawī ١٩٩٣ [Annual Report 1993] 6 (1993).

241. Human Rights Watch, *Nowhere to Go: The Tragedy of the Remaining Palestinian Families in Kuwait* (1991).

were accused of collaborating with Iraqi forces.<sup>242</sup> Many lost their jobs and their children were prohibited from going to government schools.<sup>243</sup> Some were killed, disappeared, tortured, or expelled.<sup>244</sup> Hundreds of thousands of Palestinians left Kuwait, where many of them had lived for decades.<sup>245</sup> The stateless Bedoon, of course, had nowhere to go. Human rights activists took up their cause, as well as the plight of Kuwaiti prisoners of war detained in Iraq. Al-Najjar, the founder of the Kuwaiti chapter of Amnesty International, started a new organization called the Kuwaiti Association to Defend War Victims, which worked closely with international organizations and journalists.<sup>246</sup> Advocates engaged the Kuwaiti government as well as private employers and the U.S. government to advocate for Kuwaiti prisoners of war as well as marginalized communities within Kuwait.<sup>247</sup>

Initially supportive of efforts to work for the release of Kuwaitis detained in Iraq, the State quickly soured on continued human rights activism. The new entities, as well as older ones like KSHR, were not officially registered. In August 1993, the State shut down all unlicensed organizations, cutting off the most dynamic organizations in the country.<sup>248</sup> KSHR was able to continue work through the Graduates Society, an NGO licensed in the 1960s that enjoyed State support.<sup>249</sup> Under its umbrella, KSHR escaped the most severe State repression.

A few months earlier, in December 1992, KSHR had taken the first steps to establish itself as a separate entity from AOHR, which would allow it to pursue official recognition.<sup>250</sup> The war and its aftermath prompted KSHR to re-organize as an independent organization and become more active domestically, regionally, and internationally. From its founding meeting as an organization separate from AOHR, KSHR called for addressing all human rights abuses against both Kuwaitis and foreigners.<sup>251</sup> Though KSHR's membership remained fairly small and primarily drew from politically connected Kuwaiti citizens, the organization

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242. William Gasperini, *Stateless Bedoons are Shut Out of Kuwait*, *Christian Sci. Monitor*, Aug. 20, 1991.

243. Human Rights Watch, *A Victory Turned Sour: Human Rights in Kuwait Since Liberation* 9 (1991).

244. *Id.*

245. Youssef M. Ibrahim, *Palestinians in Kuwait Face Suspicion and Probably Exile*, *N.Y. Times*, Mar. 14, 1991.

246. Al-Najjar, *supra* note 228, at 198.

247. *See, e.g.*, Ghanim Al-Najjar, *Speech to National Press Club*, Jan. 22, 1992, <https://perma.cc/8RGG-2NU4>.

248. Human Rights Watch, *Kuwait Closes All Human Rights Organizations* (1993).

249. Interview with Albargas, *supra* note 223.

250. Fadi Abdullah Burikan, "Al-jam 'iyya al-kuwītiya al-ḥaqūq al-ānsān tatanatkhāb hī'taha al-ta' sīsiyya" [The Kuwait Society for Human Rights Elected its founding body], *Al-Siyasa* (Kuwait), Dec. 26, 1992, University of Kuwait Library—Center for Kuwait and the Gulf (on file with the author).

251. "Al-jam 'iyya al-kuwītiya al-ḥaqūq al-ānsān ta'qid ājtimā' hā al-ta' sīsi wa tatanatkhāb jāsm al-qatami r'īsā" [The Kuwait Society for Human Rights held its founding meeting and elected Jassim Al-Qatami as the President], *Al Amal Magazine* (Kuwait), Mar. 31, 1993, University of Kuwait Library—Center for Kuwait and the Gulf (on file with the author).

focused on the rights of marginalized populations. Its early practices centered around publicizing the organization and the concepts of human rights. In contrast with the urgency of advocacy during the war, when the aggressors were Iraqi, its post-war activism focused more on changing public values about human rights. This led to a greater focus on education and awareness, though KSHR also engaged in limited direct advocacy.

#### 6. *Elite Activism*

KSHR stressed education and cultural change more than confrontation. The organization took advantage of its elite membership to try to integrate human rights awareness into political, social, and educational institutions. Members worked to establish a permanent human rights committee within parliament. Al-Qatami advocated for rights education in schools and universities.<sup>252</sup> The organization sponsored a two-week art exhibit in 1993 and began planning additional, educational cultural exhibits.<sup>253</sup> Several members published articles about human rights in Kuwaiti newspapers.<sup>254</sup>

Government relations were relatively collegial for KSHR because several members came from politically connected families or were members of parliament. The organization published Kuwaiti legislation and commentary related to human rights and advised legislators on controversial issues, including rights for Bedoon and naturalized Kuwaitis.<sup>255</sup> However, the real power in Kuwait lay with the ruling family, not parliament.<sup>256</sup> KSHR was still affected by State action against all unlicensed associations in August 1993. In addition to State pressure, KSHR faced low levels of awareness about human rights within the population and among government officials.

Though KSHR did not take on individual cases, members were able to use personal connections to resolve some human rights violations in an ad hoc manner. For instance, some government-run stores were treating employees differently based on their religion and KSHR leaders were able to intervene.<sup>257</sup> But litigation and public shaming were not significant tactics of the organization, which relied more on persuasion and individual networks. The organization was not structured as a small technocratic group of legal professionals, like Al Haq. With 187 members in 1993, it was not a mass political movement like AMDH

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252. Faril Al-Ataar. "Ahzābnā tanadī bi al-dīmaqrāṭīya . . . wa tuṭabīq al-diktātūrīya" [Our Parties Call for Democracy . . . and apply Dictatorship], *Al-Qabas* (Kuwait) Feb. 16, 1994 (on file with the author).

253. KSHR, Annual Report, *supra* note 240, at 10, 12 (1993).

254. *See id.* at 11.

255. *Id.* at 10.

256. Hicks & al-Najjar, *supra* note 225, at 186.

257. KSHR, Annual Report, *supra* note 240, at 11.

either.<sup>258</sup> Instead, KSHR functioned more as a group of elites working to change perceptions and practices among other elites.

KSHR was quite active regionally and internationally. It participated in regional trainings and networking opportunities. In 1993 KSHR sent a delegate to a training on human rights education and democracy in Tunisia organized by the Arab Institute for Human Rights. Afterwards the organization presented a report to the Minister of Education and a KSHR member on the faculty at Kuwait University proposed a new course on human rights.<sup>259</sup> KSHR also sent delegates to conferences in Cairo and Beirut. The 1993 World Conference in Vienna was a significant opportunity for KSHR to make an impression internationally.<sup>260</sup> In its written submission, which was distributed to all attendees, al-Qatami asserted that the “decision to liberate Kuwait [from Iraqi occupation] is a clear example of the world community’s refusal of acceptance or tolerance of any violations on human rights.”<sup>261</sup> It was hardly a consensus position that the American-led coalition of military forces invaded Kuwait on a humanitarian mission, but Al-Qatami cleverly positioned Kuwait as the lynchpin in the global commitment to human rights. Invoking the “new world order” of the post-Cold War era, he made the case that political rights in Kuwait, and the release of Kuwaiti POWs, were issues of global concern.

AOHR and its Kuwaiti branch illustrate yet another vision for the future of the Arab world grounded in human rights. Other Arab human rights organizations participated in regional networks but regionalism was a core element of AOHR’s political vision. Through fairly elite activities—conferences, reports, exhibits, and behind the scenes advocacy—AOHR and KSHR put a greater emphasis on cultural and intellectual change. KSHR, in particular, demonstrated the relevance of human rights even in a political context that valued acquiescence and conformity. The non-partisan framework of human rights was valuable in a context like Kuwait, where political parties were banned and citizenship was limited. International law provided a way for those denied full citizenship rights to claim them under a different legal scheme. But perhaps most significantly, human rights provided a vehicle for regional integration at a social and cultural level while promoting protections for members of the political opposition.

### III.

#### IMPLICATIONS

It is tempting to return to the image of Raja Shehadeh on the plane to Geneva, nervously carrying a draft of the manuscript that would become Al Haq’s

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258. *Id.* at 98-102.

259. *Id.* at 9.

260. *Al-qaṭāmī yughādir alā fīyinā* [*Al-Qatami leaves for Vienna*], *Al Qabas* (Kuwait), (June 12, 1993) (on file with author).

261. Position of Kuwait Society for Human Rights: Agenda for World Conference, Annual Report 73 (1993) (on file with author).

first publication, and see a momentous rupture—the beginning of something entirely new. Al Haq’s form of activism, echoed across the region, was novel yet still based in the universal claims of international law. Suggesting that human rights arose in the 1970s out of nowhere, as Moyn does, ignores the ties between the growth of NGOs and the specific content of international treaties.<sup>262</sup> The continuity between post-war agreements and late 20th century organizing suggests that the trajectory of human rights—as ideas, practices, and laws—have multiple points of rupture and continuity rather than a single origin.

The histories of Arab organizations illuminate the timeline of human rights internationally by shifting the focus away from ideological change within Europe as the only explanation for the growth of rights NGOs. Regional context is crucial. Arab rights activism blossomed in the late 1970s and 1980s, not only because of the decline of international Socialism, but also because of the relevance of international law to national and regional crises after the 1967 war. The success of national independence movements meant that human rights activism became a tool of individuals against their own governments, rather than foreign powers. International law united political opposition against State violence.

The embrace of human rights by members of the domestic opposition complicates characterizations of international law as foreign or Western. Regimes often accused human rights activists of being Western agents and tried to discredit international law as an imposition on domestic sovereignty, but doing so required denying the ideological commitments of the activists themselves. Even critical analysts of Arab rights activists acknowledge that these commitments were real.<sup>263</sup>

The work of Arab NGOs demonstrates that universality is not determined solely in a moment or a document. The treaty drafting process was significant, and clarifying the role of less powerful States is a valuable contribution to our understanding of the provenance of the UDHR and subsequent treaties. But it is not the final answer on whether the documents, and the subsequent organizing they engendered, are universal. The diversity of ideologies and practices found among this small group of NGOs— and a larger selection would show even more variety—suggests that the human rights framework is broad enough to support vastly different political visions. Perhaps ironically, it is precisely this diversity that indicates that universality can be seen over time; it does not rest exclusively on the text of a treaty or the context of its drafting. Instead, evidence for universality can be found progressively.

This is not to say that human rights were universally accepted. Clearly, they were not. The endorsement of human rights by a moderate number of activists in the Arab world does not demonstrate universal embrace of international law in the region. But it does show that arguments about the

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262. Moyn, *supra* note 6.

263. See LORI ALLEN, *A HISTORY OF FALSE HOPE: INVESTIGATIVE COMMISSIONS IN PALESTINE* 15 (2019) (“[T]here is evidence of Palestinians engaging in canny readings of the performative demands of the powerful. But we also see them enacting their liberal-legal mode of being through professional and moral discourse that they believed to be not just effective, but the correct way of going about things.”)

fundamental incompatibility between human rights and Islam, or human rights and Arab cultures, have a formidable challenge to address: the tens of thousands of Arabs (Muslim, Christian, and secular) who not only embraced human rights but paid dues and volunteered with organizations explicitly dedicated to international law. Even the smaller organizations without mass membership, like KSHR, showed the relevance of human rights through research, education, and public engagement. The work of these NGOs makes an important contribution to the understanding of the nature of human rights.

Finally, it has become increasingly vogue to focus on the ‘failure’ of the human rights movement.<sup>264</sup> Why should we care so much about human rights law when it has objectively failed to dramatically change the power dynamics of the Arab region or mitigate human suffering? Morocco is an outlier in that State violence has markedly declined since the period considered in this Article in response to a domestic and international rights advocacy campaign. But elsewhere, the situation remains grim. Palestine is still occupied, the Kuwaiti Bedoon still lack citizenship, and Egyptians still suffer arbitrary detention and torture.

The language around the failure of human rights, however, misunderstands human rights to be a single, complete framework for social change. This is not how Arab NGOs operationalized human rights. Arab activists saw human rights as one avenue to affect state and society even as they continued to call for political and economic reform through other channels— political, civic, and religious. Human rights activism was part of broader political agendas. Rights work was often seen as a step to securing political protections like freedom of expression that would create conditions for more expansive social change. Activists were aware of both the promise and the limitations of rights work. Al Haq’s founders, for example, were idealistic but also pragmatic and at times deeply skeptical of their own work. As Raja Shehadeh was devoting his nights to writing Al Haq’s first report he opined, “[b]ut these documents we are collecting are on the state of law, and it seems too late to speak of law now. They are just words, and it all seems too late.”<sup>265</sup> Shamas, who harbored concerns about the ability of human rights to convince powerful actors to change their behavior, nevertheless noted that “it was not just a question of the value of human rights. It was a question of its relevance—its relevance to solving problems.”<sup>266</sup> These activists—not just in Palestine but in Morocco, Egypt, Kuwait, and beyond, demonstrate that human rights were relevant and even integral to multiple visions for the future of the Arab world.

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264. See Moyn, *supra* note 6; Hopgood, *supra* note 9; Eric Posner, *The Twilight of Human Rights Law* (2014).

265. Shehadeh, Samed, *supra* note 127, at 50.

266. Interview with Shamas, *supra* note 66.



# Willful Blindness: Applying a Drug Trafficking Theory of Liability to International Human Trafficking Prosecution

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## ABSTRACT

*Evidentiary issues regarding the requisite mens rea for human trafficking complicate how and when corporations with human trafficking in their supply chains can be brought to justice. Currently, corporations need to have actual knowledge of trafficking in their supply chain in order to establish liability for labor trafficking. This Note argues that the willful blindness doctrine could and should be used to satisfy mens rea in human trafficking. The willful blindness doctrine is commonly used as a substitute for actual knowledge to satisfy mens rea in drug trafficking cases despite clear statutory guidance that the mens rea element of the crime of drug trafficking is actual knowledge. In the context of human trafficking cases, the willful blindness doctrine would be applied to a corporation that turned a blind eye to human trafficking in its supply chain, replacing the element of actual knowledge of human trafficking. This Note addresses the history of human trafficking and the Trafficking Victims Protection Reauthorization Act (TVPRA), the precedent of the willful blindness doctrine in drug trafficking prosecution, the mens rea standard in human trafficking cases, arguments for applying the willful blindness doctrine to human trafficking cases, and case studies that illustrate how to do so. The extension of the willful blindness doctrine to human trafficking cases will usher in an overdue era of corporate supply chain accountability under the TVPRA, a US law with an international reach.*

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## I. INTRODUCTION

In 2020 an estimated eighty-nine percent of children in the Ivory Coast labored in the nation's vast cocoa farming industry.<sup>1</sup> Under the leadership of Chief Executive Officer Mark Schneider,<sup>2</sup> Nestlé purchases nearly ten percent of all cocoa produced globally and sources thirty percent of its cocoa from the Ivory Coast.<sup>3</sup> Few would suggest that Schneider and Nestlé are unaware of the high likelihood of forced child labor in the company's supply chain.<sup>4</sup> Nonetheless, US

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1. Jonathan Copulsky et al., *Supply Unchained: Fighting Labor Abuse in Your Supply Chain*, 15 DELOITTE REV. 24, 31 (2014); U.S. Dep't of State, Office to Monitor and Combat Trafficking in Persons, 2019 Trafficking in Persons Report: Côte d'Ivoire 157 (June 2019), <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

2. *Nestle Board of Directors*, NESTLE, <https://www.nestle.com/aboutus/management/boardofdirectors> (last visited Oct. 16, 2020).

3. Copulsky et al., *supra* note 1, at 31.

4. Nestlé has been lauded as a leader among food companies for joining the Fair Labor Association (FLA) in 2012. Through the FLA, Nestlé subjected its supply chain to intense scrutiny. Forced child labor, among other violations, were found. In response, a four-year plan to implement

law provides no clear theory of liability by which Schneider or Nestlé can be held liable for this form of human trafficking<sup>5</sup> and US courts have historically found the linkage between such corporations and trafficking too attenuated to successfully prosecute.<sup>6</sup>

Compare Nestlé and *human* trafficking to FedEx and *drug* trafficking. Under the leadership of Chief Executive Officer Frederick Smith,<sup>7</sup> FedEx facilitates shipments spanning the globe, including shipments across the US-Mexico border.<sup>8</sup> Various actors traffic significant quantities of illegal drugs, including marijuana, fentanyl, cocaine, heroin, and methamphetamine across the US-Mexico border annually.<sup>9</sup> Under the framework provided by the Ninth Circuit decision *United States v. Heredia*, FedEx can be held criminally liable for shipments that, unbeknownst to FedEx, contain illegal drugs; it does not matter whether FedEx, in order “to save time, or money, or offense to customers,” fails to search for and therefore does not gain actual knowledge of the presence of this contraband.<sup>10</sup> Since FedEx and Smith are aware of a high probability that contraband is present in these cross-border shipments, they are subject to liability regardless of actual knowledge of contraband.<sup>11</sup> This theory of criminal liability is known as willful blindness.<sup>12</sup>

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eleven changes was developed and acted upon. Nonetheless, Nestlé is used in this introduction by way of example. *Id.* at 31–32.

5. Angela Mudukuti, *The Mighty Apple, Google, Tesla, Dell and Microsoft in “the Dock” – A Look at the Child Labour Lawsuit*, OPINIOJURIS (Jan. 13, 2020), <http://opiniojuris.org/2020/01/13/the-mighty-apple-google-tesla-dell-and-microsoft-in-the-dock-a-look-at-the-child-labour-lawsuit/>.

6. See Naomi Jiyoung Bang, *Justice of Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work*, 43 U. MEM. L. REV. 1047, 1049–50, 1054 (2013) (identifying the inadequacy of agency theories of liability for prosecuting corporations for human trafficking in their supply chains).

7. *FedEx Corp. Leadership*, FEDEX, <https://www.fedex.com/en-us/about/leadership.html> (last visited Oct. 17, 2020).

8. *Reach Customers in Mexico*, FEDEX, <https://www.fedex.com/en-us/shipping/freight-services/itl/international-services/mexico.html> (last visited Oct. 17, 2020).

9. U.S. DEP’T. JUST. DRUG ENF’T. ADMIN., 2019 DRUG ENF’T. ADMIN. NAT’L. DRUG THREAT ASSESSMENT 99 (2019), [https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020\\_Low\\_Web-DIR-007-20\\_2019.pdf](https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-DIR-007-20_2019.pdf).

10. *United States v. Heredia*, 483 F.3d 913, 928 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring in the result).

11. *Id.*

12. Robin Charlow, *Willful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1352 (1992). Legal scholarship has multiple names for this theory, including deliberately choosing not to learn; deliberately omitting to make further inquiries; studied ignorance; conscious avoidance; purposely abstaining from all inquiry; deliberately avoiding knowing; knowledge of the second degree; conscious purpose to avoid learning the truth; avoidance of any endeavor to know; connivance; willful shutting of the eyes; and deliberate ignorance, among others. This Note will use the language “willful blindness” to refer to this theory of liability. *Id.* at 1352 n.1.

Willful blindness is “a technical, stipulative term of legal art with no precise analog in everyday speech.”<sup>13</sup> The Model Penal Code provides the following explanation of the term: “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist.”<sup>14</sup> Commentaries to the Model Penal Code further articulate that a “defendant who only believed a fact to be highly probable would not be said to know it unless his lack of genuine knowledge were due to wil[l]ful [sic] ignorance.”<sup>15</sup> Similar to the Model Penal Code, the common law mens rea<sup>16</sup> standard of knowledge “includes guilty belief *and a guilty avoidance of knowledge*.”<sup>17</sup> Willful blindness and actual knowledge therefore both satisfy the common law mens rea standard of knowledge and are equally culpable.<sup>18</sup>

The issue of the knowledge element is pertinent to the interpretation and application of the Trafficking Victims Protection Reauthorization Act (TVPRA).<sup>19</sup> The TVPRA is landmark legislation in the fight against the form of human labor trafficking described in the Nestlé supply chain.<sup>20</sup> The TVPRA, in part, provides a right of action against corporations<sup>21</sup> that know or should have known about trafficking in their supply chains.<sup>22</sup> However, over twenty years

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13. Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the Equal Culpability Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 35 (1994).

14. MODEL PENAL CODE § 2.02(7) (Proposed Official Draft 1962).

15. Husak & Callender, *supra* note 13, at 36 (citing Model Penal Code § 2.02(2)(b)(i) (Official Draft, review and commentary at 228, 1985)).

16. The meaning and significance of mens rea is as follows: “No problem of criminal law is of more fundamental importance or has proved more baffling through the centuries than the determination of the precise mental element or *mens rea* necessary for crime. For hundreds of years the books have repeated with unbroken cadence that *Actus non facit reum nisi mens sit rea*. ‘There can be no crime, large or small, without an evil mind,’ says Bishop. ‘It is therefore a principle of our legal system, as probably it is of every other, that the essence of an offence is the wrongful intent, without which it cannot exist.’” Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932) (internal citations omitted).

17. Rollin M. Perkins, *Knowledge as a Mens Rea Requirement*, 29 HASTINGS L.J. 953, 959 (1978) (emphasis added).

18. *Id.*

19. 22 U.S.C. §§ 7101–7114.

20. Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director’s Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 501–02 (2016).

21. Corporations play a significant role in perpetuating human trafficking, as scholar Naomi Jiyoung Bang describes: “Human trafficking and forced labor reflect the dark side of globalization, where illicit enterprises trade people through a rapidly growing network of electronic communications and support. Unfortunately, it is not just the criminal element that is complicit in these activities. Multinational corporations who produce goods through massive global production chains also increase chances that their products could be made by trafficked workers.” Bang, *supra* note 6, at 1048.

22. “[B]usinesses can no longer turn a blind eye to the problem of child sex trafficking, because they run the risk of being held liable for their part in the problem simply because they should have known it was occurring.” Erika R. George & Scarlet R. Smith, *In Good Company: How Corporate*

after the inception of the TVPRA, it remains unclear what facts are needed to establish that a corporation knew or should have known about trafficking in its supply chain.<sup>23</sup> In fact, a recent case<sup>24</sup> against Apple, Google, Tesla, Dell, and Microsoft is one of the first in which plaintiffs argued that corporations were willfully blind to human trafficking in their supply chains.<sup>25</sup> Specifically, the plaintiffs contended that if the aforementioned tech giants “d[id] not have specific knowledge of forced child labor in their cobalt supply chain ventures, then this [wa]s an extreme form of willful ignorance.”<sup>26</sup>

This Note argues that the willful blindness doctrine, commonly used to establish the mens rea element of knowledge in drug trafficking cases,<sup>27</sup> could and should satisfy the mens rea required in international human trafficking cases.<sup>28</sup> In human trafficking cases, the willful blindness doctrine would permit the mens rea standard to be satisfied where a corporation knows of a high probability of human trafficking in their global supply chains instead of requiring actual knowledge to satisfy the mens rea element of the crime.<sup>29</sup> The extension of the willful blindness doctrine to human trafficking cases will usher in an overdue era of corporate supply chain accountability under the TVPRA, a US law with international reach.

Part II of this Note provides a brief summary of human trafficking and the TVPRA. Part III addresses the development of the willful blindness doctrine in several seminal cases concerning drug trafficking. Part IV applies the willful blindness doctrine to human labor trafficking. Part V explores the international significance of the TVPRA, a US law combating trafficking in global supply chains. Part VI provides recommendations for corporate compliance and corporate social responsibility. Lastly, Part VII addresses the gaps between the purpose, current application, and potential of the TVPRA in the fight against human trafficking. This Note primarily compares human trafficking to drug trafficking, but the analysis could apply to other crimes for which knowledge is a mens rea element.<sup>30</sup>

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*Social Responsibility Can Protect Rights and Aid Efforts to End Child Sex Trafficking in Modern Slavery*, 46 N.Y.U. J. INT’L L. & POL. 55, 92 (2013).

23. Ezell, *supra* note 20, at 539.

24. International Rights Advocates, plaintiffs’ counsel in this class action case, filed an amended complaint in the US District Court for the District of Columbia on June 26, 2020. It states that “[a]s a direct and proximate result of [the d]efendants’ conduct, [the p]laintiffs have suffered damages in an amount to be ascertained at trial.” This trial has yet to take place. Plaintiff’s First Amended Complaint, Jane Doe 1 et al. v. Apple, Inc. et al., No. CV: 1:19-cv-03737 (CJN) (D.D.C. June 26, 2020).

25. Mudukuti, *supra* note 5.

26. Plaintiff’s First Amended Complaint, *supra* note 24, at 89.

27. Atossa Katharine Jackson, *Willful Blindness: The Threat to Innocent Property Owners of Recent Federal Drug Law Amendments*, 31 THOMAS JEFFERSON L. REV. 191, 198 (2008).

28. 18 U.S.C. § 1589(b).

29. *Id.*

30. For example, the Eighth Circuit established that knowledge is an element of the crime of aiding-and-abetting. Perhaps willful blindness could serve as a substitute for actual knowledge in the

Combating human trafficking is now an important moral and financial issue for businesses as “[c]ivil society and victims’ rights groups are finding new ways to hold accountable not only the perpetrators, but also the beneficiaries of [forced labor], increasingly targeting supply chains.”<sup>31</sup> Thus, as shown by the recent case against Apple, Google, Tesla, Dell, and Microsoft, corporations must scrutinize their supply chains to avoid liability for human trafficking.<sup>32</sup> This Note provides a unique application of the willful blindness doctrine to litigation that invokes the TVPRA to hold corporations accountable for human trafficking in their supply chains. In doing so, this Note offers a new avenue to help corporate directors, legal practitioners, and human rights advocates advance justice for survivors.

## II.

### HUMAN TRAFFICKING AND THE TVPRA

Consider the plight of one trafficked individual: a citizen of India recruited to work in the United States with promises of a green card and permanent residence, “and forced ... to pay inbound travel expenses, visa expenses, and other recruiting expenses.”<sup>33</sup> He is lured to the job with “false promises and representations,” but upon arrival in the United States he is confronted with “deplorable conditions,” faces high debts he must repay, and is forced to continue working despite being “discriminated against.”<sup>34</sup> Furthermore, he is fearful of bringing legal action due to his employer’s threats, and he fears leaving because he believes that staying with the employer is the only way to keep his proper immigration status.<sup>35</sup> Similar iterations of this story still exist and “will continue to exist” so long as “the profit to traffickers from using fear or fraud to subject workers to harmful conditions is greater than the cost to traffickers of legal penalties.”<sup>36</sup>

The term human trafficking is generally used to describe modern-day slavery whereby an individual is forced by deceit, demand, or fear to work in order to survive.<sup>37</sup> Human trafficking is marked not only by unfair wages or the complete denial of wages, but also by an inability to escape poor working conditions.<sup>38</sup> It includes “the giving or receiving of payments or benefits to achieve the consent

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context of the crime of aiding-and-abetting as well. *Metge v. Baehler*, 762 F.2d 621, 623 (8th Cir. 1985).

31. *Corporate Liability and Human Trafficking*, HUMAN RIGHTS FIRST 1 (Dec. 2015), <http://www.humanrightsfirst.org/sites/default/files/HRFCorporateLiabilityTraffickingreport.pdf>.

32. Mudukuti, *supra* note 5.

33. Ezell, *supra* note 20, at 505 (footnotes omitted).

34. *Id.*

35. *Id.*

36. *Id.*

37. GARY A. HAUGEN & VICTOR BOUTROS, *THE LOCUST EFFECT: WHY THE END OF POVERTY REQUIRES THE END OF VIOLENCE* 67–68 (2014).

38. *Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 991, 1013 (S.D. Ind. 2007).

of a person having control over another person, for the purpose of exploitation.”<sup>39</sup> Exploitation can take multiple forms, including prostitution, slavery, organ removal, forced labor, and servitude.<sup>40</sup> According to the United Nations Human Rights Office of the High Commissioner for Human Rights, recruiting, transporting, transferring, harboring, or receiving persons subjected to exploitation constitutes human trafficking.<sup>41</sup> In summary, human trafficking is an expansive and abhorrent crime founded on the “abuse of power or [...] a position of vulnerability.”<sup>42</sup>

Among different forms of human trafficking, labor trafficking in particular yields major financial benefits for corporations by reducing the cost of labor which, in turn, reduces the cost of goods sold.<sup>43</sup> Labor trafficking creates an estimated \$150.20 billion in profits per year.<sup>44</sup> A US Department of Labor report provides a list of 418 line items ranging from sugarcane to textiles to gold that forced labor around the globe widely produces. It is evident that traces of human trafficking are in the supply chains of many corporations,<sup>45</sup> yet most corporations benefiting from it are geographically distanced from the trafficking locations, hiding the practice and complicating prosecution.<sup>46</sup> The practice of subcontracting labor also complicates prosecution as it creates even greater distance between corporations and traffickers.<sup>47</sup>

Impunity is therefore common, as evidenced by the statistic that “[i]n 2014 there were only 216 criminal convictions based on labor trafficking worldwide – a stark number compared to estimates of over twenty million people in various forms of human trafficking globally.”<sup>48</sup> However, the TVPRA, the first federal law to combat human trafficking, provides an opportunity to change this situation.<sup>49</sup> The TVPRA was “designed to combat trafficking in the United States by establishing it as a federal crime and providing assistance programs to

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39. UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMM’R, HUMAN RIGHTS AND HUMAN TRAFFICKING, at 2, (2014), [https://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS36_en.pdf).

40. *Id.*

41. *Id.*

42. *Id.*

43. Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 Hous. J. Int’l L. 255, 262-63, 268 (2013).

44. INT’L LABOUR OFFICE, PROFITS AND POVERTY: THE ECONOMICS OF FORCED LABOUR 13 (2014), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_243391.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf).

45. U.S. DEP’T OF LABOR, THE 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 16 (2018), <https://www.dol.gov/sites/dolgov/files/ILAB/ListofGoods.pdf>.

46. Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 750 (2002).

47. Bang, *supra* note 43, at 257.

48. Ezell, *supra* note 20, at 508; 22 U.S.C. § 7101 (explaining the historically low regulation of trafficking in the United States).

49. Ezell, *supra* note 20, at 518.

survivors, including visa protections for victims trafficked across international borders.”<sup>50</sup> Since its original passage in 2000, the TVPRA has been reauthorized five times: in 2003, 2005, 2008, 2013, and 2019.<sup>51</sup> Each iteration addresses the crime of human trafficking more comprehensively.<sup>52</sup> The 2008 iteration, in particular, contained a significant addition.<sup>53</sup> It expanded liability beyond direct perpetrators of labor trafficking to corporations with labor trafficking in their supply chains.<sup>54</sup> It “applies to corporations that financially benefit from trafficked labor even if the labor-trafficking violation occurred abroad or was perpetuated in the supply chain of the corporation by a separate legal entity.”<sup>55</sup> The TVPRA reads, in pertinent part:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by [labor trafficking], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).<sup>56</sup>

However, despite the introduction of this provision, the cases on the matter remain sparse.<sup>57</sup> Many factors could explain the continued dearth of human trafficking cases despite the passage and expansion of the TVPRA. One factor is that survivors of human trafficking are often both difficult to find and reluctant to self-identify.<sup>58</sup> Additionally, most survivors may be unable to fund the cost of litigation,<sup>59</sup> and external funding for these cases may be lacking.<sup>60</sup> Finally, litigators may be reluctant to bring cases under the TVPRA because they are unfamiliar with the law and the best strategies for applying it in court due to the lack of case law.<sup>61</sup>

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50. *Trafficking Victims Protection Reauthorization Act*, THE FREEDOM COMMONS, <https://freedomcommons.ijm.org/resources/about-tvptra>.

51. Ezell, *supra* note 20, at 500; *Policy and Legislation*, POLARIS PROJECT, <https://polarisproject.org/policy-and-legislation/> (last visited Feb. 12, 2021).

52. H.R. Rep. 106-939, at 1 (2000) (Cong. Rep.); *Current Federal Laws*, POLARIS PROJECT, <http://www.polarisproject.org/current-federal-laws> (last visited Oct. 26, 2020).

53. Ezell, *supra* note 20, at 502.

54. 18 U.S.C. § 1589.

55. Ezell, *supra* note 20, at 502; 18 U.S.C. §§ 1589, 1595-96.

56. 18 U.S.C. § 1589(b).

57. Ezell, *supra* note 20, at 508.

58. Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678, 1687 (2007).

59. SIDDHARTH KARA, BONDED LABOR 6 (2012).

60. Martina E. Vandenberg, *Ending Impunity, Securing Justice*, THE HUMAN TRAFFICKING PRO BONO LEGAL CENTER AND THE FREEDOM FUND 2 (2015), <http://freedomfund.org/wp-content/uploads/STRATEGIC-LITIGATION-FINAL-FOR-EMAIL.pdf>.

61. *Id.*

Just as the United States has failed to combat human trafficking through existing domestic law (*i.e.*, the TVPRA),<sup>62</sup> the United States has also failed to combat human trafficking via international law.<sup>63</sup> The United States has failed to ratify the United Nations Convention on the Rights of the Child (“Convention”).<sup>64</sup> The Convention is the “world’s most comprehensive framework for the protection of children’s rights” and “supports protections for children from forced labor.”<sup>65</sup> The United States has asserted that ratification of the Convention would threaten the US constitutional system, which “gives the exclusive authority for the creation of law and policy on issues about families and children to state governments.”<sup>66</sup> Regardless of the policy reasons, the failure of the United States to comprehensively address human trafficking in both international conventions and domestic prosecution underscores the need for new strategies to seek justice for survivors.

This Note offers one such strategy: applying the willful blindness doctrine as used in drug trafficking prosecution to human trafficking prosecution. An analysis of the willful blindness doctrine follows.

### III.

#### WILLFUL BLINDNESS AND DRUG TRAFFICKING

Willful blindness provides a substitute for actual knowledge.<sup>67</sup> According to the Model Penal Code, the doctrine of willful blindness can be used as follows: “[w]hen knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if [1] a person is aware of a high probability of its existence, [2] unless he actually believes that it does not exist.”<sup>68</sup>

While the willful blindness doctrine can promote justice in cases where establishing actual knowledge would be difficult, the doctrine can also lead to unjust outcomes if not applied carefully.<sup>69</sup> It can lead to “the unfair conviction of defendants whose actions are less culpable than those of the knowledgeable actor.”<sup>70</sup> By differentiating between reckless<sup>71</sup> actors and willfully blind actors,

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62. Ezell, *supra* note 20, at 508.

63. Karen Attiah, *Why Won't the U.S. Ratify the U.N.'s Child Rights Treaty?*, WASH. POST (Nov. 21, 2014, 4:12 PM), <https://www.washingtonpost.com/blogs/post-partisan/wp/2014/11/21/why-wont-the-u-s-ratify-the-u-n-s-child-rights-treaty>.

64. *Id.*

65. *Id.*

66. *Id.*

67. MODEL PENAL CODE § 2.02(7) (1985).

68. *Id.*

69. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, 121 HARV. L. REV. 1245, 1248 (2008).

70. *Id.*

71. Knowledge and recklessness fall on a spectrum of mens rea requirements: “Purpose and knowledge are entirely on the subjective side, focusing completely on the individual actor’s state of

courts can avoid unfair convictions.<sup>72</sup> This is demonstrated by the use of the willful blindness doctrine in drug trafficking litigation.

The doctrine of willful blindness is often used as a substitute for actual knowledge in drug trafficking prosecution.<sup>73</sup> For example, consider the following “classic scenario” at a border checkpoint.<sup>74</sup> A third party recruits the defendant to drive a certain car to a specific location across the border.<sup>75</sup> A rational driver in this scenario should suspect the presence of illegal contraband in the car; the request for a driver in this cross-border scenario makes it likely that there is contraband in the car given local drug trafficking trends.<sup>76</sup> The defendant claims to have no actual knowledge of illegal contraband in the car, but does not investigate the contents of the car, so the defendant is purposefully ignorant regarding the presence of illegal contraband.<sup>77</sup> An officer finds marijuana at the border checkpoint,<sup>78</sup> and the defendant is charged with drug trafficking, a crime for which the mens rea element is knowledge of the likely presence of illegal contraband on the part of the defendant.<sup>79</sup> Here, the willful blindness of the defendant regarding the presence of illegal contraband in the car serves “as a substitute for actual knowledge ... to prevent [the] culpable [defendant] from escaping liability by purposely avoiding the requisite state of mind.”<sup>80</sup> Because the defendant was aware of the likelihood of contraband in the car and still failed to investigate the car for contraband, the defendant is culpable under the willful blindness theory.

A seminal case in the development of the willful blindness doctrine is *United States v. Jewell*.<sup>81</sup> In *Jewell*, a stranger paid the defendant to drive a car across the US-Mexico border.<sup>82</sup> Border agents stopped the defendant and found a significant

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mind; negligence is almost entirely on the objective side, focusing on the actor’s failure to be aware of a risk and gross deviation from reasonable care; and recklessness is somewhere in between, with a purely subjective focus on consciousness of risk but also the same objective “gross deviation” standard that the negligence test provides.” Kenneth W. Simons, *Should the Model Penal Code’s Mens Rea Provision Be Amended?*, 1 OHIO STATE J. CRIM. L. 181 n.5 (2003).

72. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1248.

73. Jackson, *supra* note 27, at 199.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 532 F.2d 697, 698 (9th Cir. 1976); *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249. *See also* Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 775 n.9 (2011); *United States v. Sdoulam*, 398 F.3d 981, 993 n.8 (8th Cir. 2005); *United States v. Jaffe*, 387 F.3d 677, 681 (7th Cir. 2004); *United States v. Espinoza*, 244 F.3d 1234, 1242 (10th Cir. 2001); *United States v. Scott*, 159 F.3d 916, 922 (5th Cir. 1998).

82. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976).

amount of marijuana in the vehicle.<sup>83</sup> The defendant stated that he was unaware of the presence of the marijuana in the vehicle.<sup>84</sup> At trial, the court instructed the jury according to the willful blindness doctrine stating:

The Government can complete their burden of proof by proving, beyond a reasonable doubt, that if the defendant was not actually aware that there was marijuana in the vehicle he was driving when he entered the United States his ignorance in that regard was solely and entirely a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.<sup>85</sup>

Under this standard, the trial court convicted Jewell of drug trafficking.<sup>86</sup> The Ninth Circuit affirmed.<sup>87</sup> The court relied on the language of the Model Penal Code, stating that “[t]o act ‘knowingly’ . . . is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question.”<sup>88</sup> However, the court also clarified that the “required state of mind differs from positive knowledge only so far as to encompass a calculated effort to avoid the sanctions of the statute while violating its substance.”<sup>89</sup> This Ninth Circuit opinion has been widely applied across the United States.<sup>90</sup>

The effect of the willful blindness jury instruction<sup>91</sup> on the outcome in *Jewell* cannot be overstated. The Drug Control Act provides that it is criminal for a defendant to “knowingly” bring marijuana across the border; the statute does not

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83. *Id.*; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

84. *Jewell*, 532 F.2d at 698; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

85. *Jewell*, 532 F.2d at 700; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

86. *Jewell*, 532 F.2d at 698; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

87. *Jewell*, 532 F.2d at 704; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

88. *Jewell*, 532 F.2d at 700; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

89. *Jewell*, 532 F.2d at 704; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

90. *United States v. Flores*, 454 F.3d 149, 156 (3d Cir. 2006); *United States v. Ruhe*, 191 F.3d 376, 384 (4th Cir. 1999); *United States v. Fuchs*, 467 F.3d 889, 902 (5th Cir. 2006); *United States v. Beaty*, 245 F.3d 617, 621 (6th Cir. 2001); *United States v. McClellan*, 165 F.3d 535, 549 (7th Cir. 1999); *United States v. King*, 3531 F.3d 859, 866 (8th Cir. 2003).

91. *Jewell*, 532 F.2d at 700.

indicate that a mens rea standard less than actual knowledge is sufficient to convict an individual of drug trafficking.<sup>92</sup> The facts of the case were insufficient to establish actual knowledge, as “there was evidence from which the jury could conclude that [Jewell] spoke the truth” and lacked “positive knowledge of the presence of the contraband.”<sup>93</sup> Nonetheless, despite clear statutory guidance that the requisite mens rea for drug trafficking is actual knowledge, the court stated that the lower mens rea standard of willful blindness is sufficient to convict an individual of the crime.<sup>94</sup> The majority indicated that there was no need for statutory permission to accept willful blindness in lieu of actual knowledge because, in the words of English scholar John Llewelyn Jones Edwards, “[f]or well-nigh a hundred years, it has been clear from the authorities that a person who deliberately shuts his eyes to an obvious means of knowledge has sufficient mens rea for an offence based on such words as . . . ‘knowingly.’”<sup>95</sup> The court found it appropriate to accept willful blindness as sufficient to establish knowledge generally—not just for drug trafficking cases alone.<sup>96</sup> Thus, the court laid the foundation for the willful blindness doctrine to apply to a variety of crimes.

Courts have subsequently applied the willful blindness doctrine in varying ways within the context of drug trafficking.<sup>97</sup> When applying the willful blindness doctrine to drug trafficking, some courts require only two elements: “awareness of a high probability of criminal circumstances and deliberate avoidance of steps to confirm those criminal circumstances.”<sup>98</sup> This is how FedEx, in deliberately failing to inspect cross-border shipments in order “to save time, or money, or offense to customers” could be held liable for drug trafficking.<sup>99</sup> Other courts require an additional element: “that the deliberate avoidance be motivated by a desire to avoid criminal responsibility.”<sup>100</sup> This additional element was illustrated in *Jewell* as the court highlighted that “there was evidence . . . [Jewell] deliberately avoided positive knowledge of the presence of the contraband to avoid responsibility in the event of discovery.”<sup>101</sup>

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92. 21 U.S.C.S. § 841(a).

93. *Jewell*, 532 F.2d at 698.

94. *Id.* at 700.

95. *Id.*

96. *Id.*

97. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

98. *Id.*

99. *United States v. Heredia*, 483 F.3d 913, 928 (9th Cir. 2007) (en banc) (Kleinfeld, J., concurring in the result).

100. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1249.

101. *United States v. Jewell*, 532 F.2d 697, 698 (9th Cir. 1976)..

In 2007, the Ninth Circuit revisited the doctrine of willful blindness in *United States v. Heredia*.<sup>102</sup> There, the defendant agreed to drive her aunt's car from Nogales, Arizona to Tucson, Arizona. The defendant, her aunt, her mother, and two of her children occupied the car.<sup>103</sup> The defendant admitted that she noticed a strong scent resembling detergent or perfume in the car.<sup>104</sup> Although the defendant thought the smell was likely marijuana due to her mother's anxiousness and great supply of cash on hand, the defendant's mother told her that the smell was simply fabric softener that had been spilled in the car days prior.<sup>105</sup> When the car was stopped at a border checkpoint, authorities searched the car due to the strong smell.<sup>106</sup> They found some 350 pounds of marijuana.<sup>107</sup> Heredia was prosecuted for drug trafficking, and the trial court gave the following instructions to the jury:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.<sup>108</sup>

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102. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

103. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

104. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245.

105. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245–46.

106. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1245–46.

107. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

108. *Heredia*, 483 F.3d at 917; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

The defendant was found guilty.<sup>109</sup> On appeal, the Ninth Circuit reversed the trial court's decision.<sup>110</sup> Nonetheless, after rehearing en banc, the Ninth Circuit later affirmed the conviction.<sup>111</sup> The court determined it was unnecessary to establish that the "defendant's motive in deliberately failing to learn the truth was to give himself a defense in case he should be charged with the crime."<sup>112</sup> The court reasoned that "the requirement that the defendant have *deliberately* avoided learning the truth" was sufficient to protect defendants.<sup>113</sup> Thus, according to the Ninth Circuit, a defendant must only seek to avoid learning the truth in order to be found willfully blind.<sup>114</sup> The *Heredia* decision has been critiqued for significantly weakening the traditional mens rea requirement by removing the requirement that a willfully blind defendant had the motive to evade criminal liability.<sup>115</sup> Nonetheless, jurisdictions across the United States<sup>116</sup> and even the Supreme Court<sup>117</sup> have cited the *Heredia* decision.

This Note proceeds to apply the willful blindness doctrine, exemplified in drug trafficking cases such as *Jewell* and *Heredia*, to the crime of human trafficking.<sup>118</sup>

#### IV.

##### APPLYING THE WILLFUL BLINDNESS DOCTRINE TO HUMAN TRAFFICKING PROSECUTION

Although the willful blindness doctrine is traditionally used in drug trafficking prosecution,<sup>119</sup> it could and should be applied to human trafficking prosecution as well. Various aspects of applying the willful blindness doctrine to human trafficking prosecution are explored in the sub-parts that follow. These sub-parts address: the mens rea standard in human trafficking cases, the reasons

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109. *Heredia*, 483 F.3d at 918; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

110. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1246.

111. *Heredia*, 483 F.3d at 922; *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69, at 1247.

112. *Heredia*, 483 F.3d at 919.

113. *Id.* at 920.

114. *Id.*

115. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69.

116. *See e.g.*, *United States v. Azubike*, 564 F.3d 59, 66 (1st Cir. 2009).

117. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 769 n.9. (2011).

118. *United States v. Jewell*, 532 F.2d 697, 697–98 (9th Cir. 1976); *United States v. Heredia*, 483 F.3d 913, 919 (9th Cir. 2007).

119. *Jackson*, *supra* note 27, at 199.

for applying the willful blindness doctrine to human trafficking cases, how to apply the willful blindness doctrine to human trafficking prosecution, and case studies.

*A. The Appropriate Mens Rea Standard for Human Trafficking:  
Knowledge, Recklessness, or Willful Blindness?*

Currently, the mens rea element of human trafficking can be satisfied by proving either knowledge of the trafficking or reckless disregard of the existence of the trafficking.<sup>120</sup> Criminal knowledge and criminal recklessness are similar insofar as they require awareness on the part of the perpetrator.<sup>121</sup> However, the degree of awareness differs between the two.<sup>122</sup> That is, “in order to act knowingly the actor must be aware of an actual fact” whereas “[i]n order to be reckless the actor must be aware of the possibility or at most the substantial probability of a fact.”<sup>123</sup> Furthermore, among other differences, “[k]nowledge and recklessness also differ in that the former is an entirely subjective concept, while the latter requires both a subjective and objective assessment.”<sup>124</sup>

Both the knowledge standard and the reckless standard are insufficient in the context of human trafficking prosecution, as evidenced in part by the lack of cases<sup>125</sup> that have been brought forth under the TVPRA standards. The reckless standard is impractical; it requires so little in the way of mens rea that many courts are uncomfortable applying the standard.<sup>126</sup> The knowledge standard is also impractical; it is difficult to prove that corporations are aware of the presence of trafficking in their supply chains in the context of our interconnected, globalized world.<sup>127</sup> Thus, a substitute is needed for one of these two impractical standards. Willful blindness, a substitute for actual knowledge, is an appropriate and effective “hybrid mental state that is neither quite like knowledge nor quite like recklessness.”<sup>128</sup>

Admittedly, some scholars have criticized equating knowledge and willful blindness.<sup>129</sup> As one scholar contends, “[k]nowledge and wil[l]ful [sic] ignorance . . . are simply not the same thing. Therefore, wil[l]ful [sic] ignorance cannot be

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120. 18 U.S.C. § 1589(b).

121. Charlow, *supra* note 12, at 1380.

122. *Id.*

123. *Id.*

124. *Id.*

125. Ezell, *supra* note 20, at 508.

126. *See* Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011) (emphasizing the Court’s reticence to water down a mens rea standard by stating “[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence”).

127. *See* Bang, *supra* note 6, at 1054 (identifying the inadequacy of agency theories of liability for prosecuting corporations for human trafficking in their supply chains); Ezell, *supra* note 20, at 516.

128. Charlow, *supra* note 12, at 1382.

129. *Id.* at 1355.

used legitimately, or constitutionally, in place of statutorily required knowledge.”<sup>130</sup> However, substantial support for the use of willful blindness, particularly in the context of human trafficking litigation, exists and follows in the subsection below.

### B. *The Case for Willful Blindness*

There are several reasons why it is both legally permissible and normatively desirable for the doctrine of willful blindness to apply to human trafficking prosecution. First, the crimes of drug trafficking and human trafficking both have a mens rea knowledge element, and courts have made clear that willful blindness can apply to crimes other than drug trafficking that have a mens rea knowledge requirement. The Ninth Circuit in *Jewell* quoted Professor Rollin M. Perkins:

[O]ne with a deliberate antisocial purpose in mind . . . may deliberately ‘shut his eyes’ to avoid knowing what would otherwise be obvious to view. In such cases, so far as criminal law is concerned, the person acts at his peril in this regard, and is treated as having ‘knowledge of the facts as they are ultimately discovered to be.’<sup>131</sup>

In recognizing the long tradition of the willful blindness doctrine in criminal common law, the *Jewell* court emphasized that willful blindness is sufficient to establish the mens rea of knowledge generally, not just in drug trafficking cases. The applicability of the willful blindness doctrine to satisfy the mens rea element of knowledge in non-drug trafficking cases is further evidenced in the Supreme Court’s 2011 opinion in *Global-Tech Appliances v. SEB S.A.*<sup>132</sup> There, the Court highlighted that “every Court of Appeals . . . has fully embraced willful blindness, applying the doctrine to a wide range of criminal statutes.”<sup>133</sup> Thus, in analyzing “whether a party who ‘actively induces infringement of a patent’ . . . must know that the induced acts constitute patent infringement,” the Court held that willful blindness can substitute for actual knowledge.<sup>134</sup> The application of the willful blindness doctrine to the patent infringement matter in *Global-Tech* indicates that courts are willing to expand the willful blindness doctrine beyond drug trafficking to other areas of law that require a mens rea element of actual knowledge.<sup>135</sup>

Additionally, the use of the willful blindness doctrine in human trafficking prosecution expands access to justice for survivors. Actual knowledge of forced labor, which is an element of the crime of human trafficking,<sup>136</sup> is difficult to

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130. *Id.* at 1355–56.

131. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976).

132. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 755 (2011).

133. *Id.* at 768.

134. *Id.* at 757, 771.

135. *Id.* at 766–67.

136. 18 U.S.C. § 1589(b).

establish.<sup>137</sup> This is largely because corporations point to “the extraterritorial location of suppliers, and the appearance of ‘arm’s length’ contracts with suppliers” to indicate a lack of knowledge and thus evade criminal liability.<sup>138</sup> By lowering the mens rea requirement from requiring actual knowledge<sup>139</sup> to including willful blindness, the knowledge element of the crime could be established with greater ease, allowing more survivors of human trafficking to achieve justice in court.

Finally, applying the willful blindness doctrine to human trafficking prosecution aligns with legislative intent. The stated purposes of the legislature in enacting the TVPRA are, in part, “to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”<sup>140</sup> As scholar Naomi Jiyoung Bang notes, “Congress’ urgency in addressing the scope of human trafficking and forced labor is [further] reflected in . . . language urging both national and international cooperation to eradicate this serious offense.”<sup>141</sup> The legislative history of the TVPRA, including House Reports on the matter, “illustrat[e] the legislators’ awareness of the suspect tactics of foreign contractors and expresses a desire to monitor corporations’ use of these contractors.”<sup>142</sup> Thus, holding corporations widely liable for profiting from “using unmonitored, unscrupulous foreign contractors, is completely consistent with the motives of this statute.”<sup>143</sup> Lowering the mens rea requirement<sup>144</sup> through the application of the willful blindness doctrine in order to increase survivors’ access to justice is therefore consistent with the purpose of the TVPRA.<sup>145</sup> An explanation of how to apply the willful blindness doctrine to human trafficking prosecution follows.

### *C. How to Apply the Willful Blindness Doctrine to Human Trafficking Prosecution*

Past application of the willful blindness doctrine to various crimes, from drug trafficking<sup>146</sup> to patent infringement,<sup>147</sup> should inform the application of the

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137. See Bang, *supra* note 43, at 257 (discussing the ease by which corporations can avoid accountability through numerous layers of subcontracting and outsourcing in global production chains).

138. *Id.* at 257.

139. 18 U.S.C. § 1589(b).

140. 22 U.S.C. § 7101(a).

141. Bang, *supra* note 6, at 1093.

142. *Id.* at 1094.

143. *Id.*

144. 18 U.S.C. § 1589(b).

145. Bang, *supra* note 6, at 1094.

146. *United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976).

147. *Global-Tech Appliance, Inc. v. SEB S.A.*, 563 U.S. 754, 769–71 (2011).

willful blindness doctrine to human trafficking prosecution. The Supreme Court has articulated that “a willfully blind defendant is one who takes deliberate action to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.”<sup>148</sup> This comports with the holding in *Heredia* that, while a defendant need not be willfully blind for the purpose of evading criminal activity, the defendant cannot be blind by happenstance; the blindness must be purposeful.<sup>149</sup> In the context of a corporation culpable of human trafficking in its supply chain, this could look like choosing to not investigate a supplier that provides notably lower priced goods as compared to other suppliers.<sup>150</sup> Alternatively, it could look like choosing to not perform due diligence concerning a supplier of a good that is widely known to be trafficked. In either of the aforementioned hypothetical scenarios, it would not be necessary for the corporation to turn a blind eye deliberately to evade criminal liability.<sup>151</sup> Rather, if the corporation turns a blind eye deliberately for business-related reasons, such as to save money or time, this would warrant a jury instruction of willful blindness. In practice, a jury instruction of willful blindness would likely resemble the following sample from the Eighth Circuit:

You may find that the defendant [(name)] acted knowingly if you find beyond a reasonable doubt that the defendant [(name)] was aware of a high probability that (state fact as to which knowledge is in question (e.g., that ‘drugs were contained in his suitcase’)) and that [he] [she] deliberately avoided learning the truth. The element of knowledge may be inferred if the defendant [(name)] deliberately closed [his] [her] eyes to what would otherwise have been obvious to [him] [her]. [You may not find the defendant acted ‘knowingly’ if you find he/she was merely negligent, careless or mistaken as to (state fact as to which knowledge is in question (e.g., that “drugs were contained in his suitcase”)).]<sup>152</sup>

#### *D. Hypothetically Applying the Willful Blindness Doctrine to Current Litigation*

As previously mentioned, a recent case<sup>153</sup> against Apple, Google, Tesla, Dell, and Microsoft is one of the first in which plaintiffs argued that corporations should have known about human trafficking in their supply chains.<sup>154</sup> The plaintiffs were children who “assert[ed] claims for forced child labor and

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148. *Id.* at 769.

149. *United States v. Heredia*, 483 F.3d 913, 918 (9th Cir. 2007).

150. *Ezell*, *supra* note 20, at 529.

151. Notably, the burden of proof in a TVPRA case is a preponderance of the evidence, which the plaintiff must prove. *United States v. Sabhnani*, 599 F.3d 215, 261 (2d Cir. 2010); *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 443 (E.D.N.Y. 2013) (citing to 18 U.S.C. § 1589); *Shukla v. Sharma*, No. 07-CV-2972, 2012 WL 481796, at \*2 (E.D.N.Y. Feb. 14, 2012).

152. KEVIN F. O’MALLEY, ET AL., *FEDERAL JURY PRACTICE AND INSTRUCTIONS: CRIMINAL* § 17.09 (5<sup>th</sup> ed. 2000).

153. Plaintiff’s First Amended Complaint, *supra* note 24.

154. *Mudukuti*, *supra* note 5.

trafficking” under the TVPRA following their work in the cobalt mines of the Democratic Republic of the Congo (DRC).<sup>155</sup> The Amended Complaint notes that “[a]pproximately two-thirds of the global supply of cobalt is mined in the ‘copper belt’ . . . of the DRC.”<sup>156</sup> Significant amounts of cobalt are used to make rechargeable lithium-ion batteries, which power every device the defendants made.<sup>157</sup>

The willful blindness doctrine could have assisted the plaintiffs in the case. The prosecution had to prove that the defendants both received something of value from the human trafficking and knew about the human trafficking.<sup>158</sup> However, even in the absence of proof of actual knowledge of human trafficking, the defendants are almost certainly aware of a high likelihood that their supply chain involves human trafficking as cobalt sourced from the DRC is noted on the US Department of Labor’s published “List of Goods Produced by Child Labor.”<sup>159</sup> The US Department of State’s 2020 Trafficking in Persons report further cautions about the presence of labor trafficking in the cobalt industry in the DRC:

Traffickers, including mining bosses, other miners, family members, government officials, and armed groups, exploit some men, women, and children working in artisanal mines in eastern DRC in forced labor, including through debt-based coercion. Traffickers subject some children to forced labor in the illegal mining of diamonds, copper, gold, cobalt, tungsten ore, tantalum ore, and tin, as well as the smuggling of minerals. In January 2016, an international organization reported widespread abuse, including forced labor, of some children in artisanal cobalt mines in southern DRC; some children reported extremely long working hours and physical abuse by security guards employed by the state mining company.<sup>160</sup>

The extensive media reporting beyond what is mentioned in the Trafficking in Persons Report also provides notice regarding child labor in the DRC’s cobalt mines.<sup>161</sup> Finally, each defendant has corporate social responsibility reports “on their cobalt supply chains that have specifically flagged the horrors of child miners in the companies’ cobalt supply chains.”<sup>162</sup> The Amended Complaint states:

Plaintiffs’ research team across 2017 to 2019 easily observed, interviewed, and

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155. Plaintiff’s First Amended Complaint, *supra* note 24, at 5, 7.

156. *Id.* at 5.

157. *Id.*

158. *Id.* at 74.

159. *Id.* at 8.

160. Office to Monitor and Combat Trafficking in Persons, *2020 Trafficking in Persons Report: Democratic Republic of the Congo*, U.S. Department of State (Feb. 16, 2020), <https://www.state.gov/reports/2020-trafficking-in-persons-report/democratic-republic-of-the-congo/> (last visited Nov. 21, 2021).

161. Plaintiff’s First Amended Complaint, *supra* note 24, at 8.

162. *Id.* at 85.

photographed children performing hazardous work mining cobalt under horrific conditions. They interviewed and photographed a parade of children maimed by cobalt mining accidents at mines owned, operated, and/or controlled by the suppliers to both ventures, Glencore/Umicore and Huayou Cobalt. Unless Defendants have never had a representative visit the cobalt mining areas of the DRC, which is extremely unlikely, then Defendants themselves have observed the same horrible conditions under which children mine cobalt for them under extremely hazardous conditions. Indeed, as previously alleged, Defendants all have internal or external CSR reports on their cobalt supply chains that have specifically flagged the horrors of child miners in the companies' cobalt supply chains.<sup>163</sup>

To be blind to the presence of human trafficking in their cobalt supply chains despite such reports and other media reports, the defendants would have had to avoid knowledge purposefully. Prosecutors can satisfy the willful blindness doctrine by establishing defendants “made a conscious purpose to disregard” the likely commission of a crime via a “conscious purpose to avoid learning the truth.”<sup>164</sup> Here, while the defendants may lack actual knowledge of specific instances of trafficking in their supply chain, they are at a minimum willfully blind to the presence of it in the face of the aforementioned media reports regarding the industry,<sup>165</sup> CSR reports,<sup>166</sup> and more. Therefore, by applying the willful blindness doctrine, prosecutors could have plausibly satisfied the mens rea standard of knowledge in the case.<sup>167</sup> That is, under the willful blindness standard established in *Heredia*, prosecutors could have likely satisfied the mens rea standard of knowledge by proving that the defendants were “aware of a high probability that [human trafficking was present in their cobalt supply chains] and deliberately avoided learning the truth.”<sup>168</sup>

*E. How Far: Exploring the Boundaries of the Willful Blindness Doctrine's Applicability*

How closely must trafficking in a supply chain be linked to a corporation to hold the corporation liable under the TVPRA? Although the paucity of case law applying the TVPRA<sup>169</sup> leaves this question unanswered, the statutory language of the TVPRA provides some guidance.<sup>170</sup> The 2008 iteration of the TVPRA provides this legal connection between the supplier and the corporation because it encompasses *anyone who benefits from participation in a venture*. The language

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163. *Id.*

164. *Recent Cases: Criminal Law – Willful Blindness – Ninth Circuit Holds That Motive Is Not An Element of Willful Blindness – United States v. Heredia*, *supra* note 69.

165. Plaintiff's First Amended Complaint, *supra* note 24, at 8.

166. *Id.*

167. 18 U.S.C. § 1589(b).

168. *United States v. Heredia*, 483 F.3d 913, 917 (9th Cir. 2007).

169. Ezell, *supra* note 20, at 508.

170. *Id.* at 528.

of the 2008 TVPRA eclipses the need for complicated legal theories of vicarious liability or joint employment to hold corporations accountable for the actions of their suppliers under § 1589(a), since the remedy for both § 1589(a) and (b), the financial benefits subsection of the criminal provision, is the same.<sup>171</sup> That is, the financial benefits provision of the TVPRA clearly provides a path to hold corporations liable as it states that “[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a) . . . shall be punished.”<sup>172</sup>

This broad text clearly intends to expand liability beyond perpetrators of human trafficking to corporations benefitting from human trafficking.<sup>173</sup> Indeed, “[a]s of 2008, the TVPRA is unique compared to other laws because the financial benefits provisions create liability for entities distinct from the actual perpetrators of the crime without requiring an agency relationship.”<sup>174</sup> Nonetheless, “[b]ecause the TVPRA’s financial benefits provisions have not yet been applied to a large corporation, activists, judges, and lawyers may lack a general understanding of how to apply the language of the criminal and civil provisions to traffickers’ actions.”<sup>175</sup>

Due to this lack of understanding, several factors may prove useful in determining how far the theory of willful blindness should extend in the corporate world.<sup>176</sup> One such factor is the relationship between corporations, suppliers, and suppliers’ employees.<sup>177</sup> Courts applying the TVPRA may use the corporate supply contract<sup>178</sup> and parties’ negotiating power within the context of the corporate supply contract to examine the dependence of laborers.<sup>179</sup> Consider the following example:

[I]f examined closely, supply-contract terms may indicate the labor conditions of a supplier. While relevant for the joint employer test, contract terms also give notice to a corporation to be skeptical about true working conditions. Considering how many workers are on staff, how much they are paid, and what their rate of production is may indicate whether the labor costs meet a reasonable wage or reasonable number of hours worked. Red flags may also include reports of concern from NGOs or media outlets. If there were trafficking in the workforce of a supplier but nothing hinted about the actual conditions to the corporation, a corporation would not be on notice of potential

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171. *Id.* (emphasis added) (internal citations omitted).

172. 18 U.S.C. § 1589(b).

173. Ezell, *supra* note 20, at 527.

174. *Id.*

175. *Id.*

176. *Id.* at 528.

177. *Id.*

178. “[C]ontract terms concerning price and deadlines are the factors forming the crux of the economic realities test.” Bang, *supra* note 43, at 298.

179. *See id.* at 300–02; Ezell, *supra* note 20, at 528–29.

TVPRA violations, and there would be insufficient evidence for reckless disregard of trafficking, absent other factors.<sup>180</sup>

Consider this factor again in the context of Nestlé. Nestlé could take certain discrete actions including (1) reviewing supply contract terms to ensure they contain information regarding working conditions, pay of staffers, and rates of production, and (2) monitoring NGO and media reports regarding geographical areas in which suppliers operate.<sup>181</sup> Just as it would be untenable for FedEx to inspect every package it transports across the United States-Mexico border, it would be impossible for Nestlé to review every employment agreement in which its suppliers engage or to read every news article regarding a region of cocoa production. Nonetheless, simple monitoring systems, such as automated email alerts for news reports using search terms like “Ivory Coast and cocoa and human trafficking” could aid in the fight against human trafficking abroad without unduly burdening corporations.<sup>182</sup> So long as a metric within such a monitoring system raises concern (e.g., an automated email alert is sent to a human resources professional due to an article being published that uses all the aforementioned search terms), a sufficient linkage between a corporation and human trafficking in its supply chain would create liability under the TVPRA through the willful blindness doctrine.<sup>183</sup> Ultimately, “[i]ndividual corporations will have to determine how best to incorporate these recommendations, as they may vary based on the industry and the board’s perception of the actual or perceived risk of corporate and suppliers’ violations.”<sup>184</sup> Monitoring systems are addressed more specifically in Section VI.

However, “[u]ntil courts decide more TVPRA cases on the merits and establish precedent for what degree of benefit results in liability or culpability, corporations should be wary of the liability risk from any degree of reduced costs from which they profit by relying on suppliers that used forced labor.”<sup>185</sup> How far liability extends from suppliers to corporations will likely remain a case-by-case issue; nonetheless, the TVPRA extends liability across a supply chain to potentially include multinational corporations such as Nestlé.<sup>186</sup>

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180. Ezell, *supra* note 20, at 529 (internal citations omitted).

181. *Id.*

182. *Id.* at 512.

183. *See* 18 U.S.C. § 1589(b).

184. Ezell, *supra* note 20, at 542.

185. *Id.* at 529.

186. *Id.*

## V.

## A NATIONAL LAW OF INTERNATIONAL SIGNIFICANCE

While the United States is not immune to the horrors of human trafficking,<sup>187</sup> human trafficking occurs at extraordinarily high levels abroad.<sup>188</sup> A 2012 estimate by the International Labour Office suggested that 10.7 million individuals are trafficked annually outside the United States.<sup>189</sup> Each of these individuals, in turn, yields an estimated average of \$4,000 in profits annually as a result of their unpaid labor.<sup>190</sup> Because local law enforcement does not protect trafficking survivors, traffickers enjoy widespread immunity in many countries.<sup>191</sup> This reality underscores the importance of the TVPRA: it provides recourse to survivors that otherwise have no avenues to pursue justice.<sup>192</sup> That is, since the TVPRA establishes criminal liability for corporations “even if the labor-trafficking violation occurred abroad or was perpetuated in the supply chain of the corporation by a separate legal entity,”<sup>193</sup> survivors unable to bring suit in their respective countries can bring suit in the United States if they meet certain criteria.<sup>194</sup> The TVPRA extends beyond US borders to provide:

[E]xtra-territorial jurisdiction over any offense . . . if—(1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence . . . ; or (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.”<sup>195</sup>

The US Department of Labor highlights the importance of the TVPRA by explaining that:

[E]fforts to address child labor and forced labor worldwide depend, first and foremost, on government leadership and action. By ratifying international conventions such as ILO Convention 182 on the Worst Forms of Child Labor and Convention 29 on Forced Labor, governments commit themselves to upholding the international standards enshrined in these instruments. Yet the gap between standards and on-the-ground realities is often wide: many countries have ratified international standards but do not meaningfully implement them, for lack of will, capacity, or resources.<sup>196</sup>

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187. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, 2015 Trafficking In Persons Report 352 (July 2015), <https://2009-2017.state.gov/documents/organization/245365.pdf>.

188. INT’L LABOUR OFFICE, *supra* note 44.

189. *Id.* at 21.

190. *Id.*

191. HAUGEN & BOUTROS, *supra* note 37, at 69.

192. *See* Ezell, *supra* note 20, at 502; 18 U.S.C. § 1589; 18 U.S.C. §§ 1595-96.

193. Ezell, *supra* note 20, at 502.

194. *See* 18 U.S.C. § 1589; 18 U.S.C. §§ 1595-96.

195. 18 U.S.C. § 1596.

196. U.S. DEP’T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 45.

It is therefore important to increase access to justice for survivors by enabling them to pursue legal remedies in courts in the United States. Strategic litigation by human rights lawyers, the potential to use the willful blindness doctrine, and the recent spike in fervent advocacy for survivors all pave a promising path for justice to proceed in US courts.<sup>197</sup>

In response to the widespread global occurrence of human trafficking, recent actions by the House of Representatives demonstrate legislative intent to continue their efforts to reduce trafficking.<sup>198</sup> In 2020, the House passed a resolution to “ensur[e] that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the US market.”<sup>199</sup> Congress found that in Xinjiang the Chinese government “since 2017, arbitrarily detained as many as 1.8 million Uyghurs, Kazakhs, Kyrgyz, and members of other Muslim minority groups in a system of extrajudicial mass internment camps, and has subjected detainees to forced labor, torture, political indoctrination, and other severe human rights abuses.”<sup>200</sup> They further found that the practice of forced labor there “is confirmed by the testimony of former camp detainees, satellite imagery, and official leaked documents from the Government of the People’s Republic of China as part of a targeted campaign of repression of Muslim ethnic minorities.”<sup>201</sup>

The increasing frequency of human trafficking worldwide makes it particularly important to combat human trafficking through litigation.<sup>202</sup> The US State Department’s 2020 Trafficking in Persons report highlights that, despite the COVID-19 pandemic, “[t]raffickers did not shut down. They continue to harm people, finding ways to innovate and even capitalize on the chaos. The ratio between risk and reward is expanding in their favor.”<sup>203</sup> Data has evidenced this sad reality:

The number of crisis trafficking cases handled by the Trafficking Hotline increased by more than 40 percent in the month following the shelter-in-place orders compared to the prior month (from approximately 60 in a 30 day period to 90). Crisis cases are those in which some assistance – such as shelter, transportation, or law enforcement involvement – is needed within 24 hours. The number of situations in which people needed immediate emergency shelter nearly doubled (from around 29 cases in Feb. 14th – March 15th, 2020

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197. Vandenberg, *supra* note 60, at 16; Ezell, *supra* note 20, at 509.

198. Uyghur Forced Labor Prevention Act, H.R. 6210, 116th Cong. § 2 (2020).

199. *Id.*

200. *Id.*

201. *Id.*

202. U.S. Dep’t of State, Office to Monitor and Combat Trafficking in Persons, 2020 Trafficking in Persons Report: Message from the Ambassador-at-Large (June 2020), <https://www.state.gov/wp-content/uploads/2020/06/2020-TIP-Report-Complete-062420-FINAL.pdf> (last visited Nov. 21, 2021).

203. *Id.*

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to 54 in April 2020).<sup>204</sup>

This data underscores the need for revitalized strategies to combat the growing practice of human trafficking around the world.

## VI.

### RECOMMENDATIONS FOR CORPORATE COMPLIANCE AND CORPORATE SOCIAL RESPONSIBILITY GENERALLY

In light of the internationally significant TVPRA, corporations<sup>205</sup> should closely monitor their supply chains to ensure that trafficking does not occur at any point.<sup>206</sup> Specifically, this may “require corporations to develop codes of conduct, resolutions, and enforcement plans that prioritize monitoring and eliminating human trafficking from the corporate supply chain.”<sup>207</sup> The Trafficking in Persons Report notes that:

[a]n effective policy [to monitor and oversee supply chains]: prohibits human trafficking and those activities that facilitate it - including charging workers recruitment fees, contract fraud, and document retention; responds to industry- or region-specific risks; requires freedom of movement for workers; pays all employees at least the minimum wage in all countries of operation, preferably a living wage; includes a grievance mechanism and whistleblower protections; and applies to direct employees, as well as subcontractors, labor recruiters, and other business partners.<sup>208</sup>

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204. *Human Trafficking During the COVID-19 Pandemic*, POLARIS PROJECT (June 10, 2020), <https://polarisproject.org/press-releases/human-trafficking-during-the-covid-19-pandemic/> (last visited Nov. 21, 2021).

205. States also have an obligation to monitor the occurrence of human trafficking:

“States have an obligation to identify and respond adequately to trafficking- related corruption and complicity—an obligation that should be seen as part of the broader duty to prevent trafficking. The United Nations Convention against Transnational Organized Crime, for example, acknowledges the strong link between organized criminal activities such as trafficking and corruption. It requires State parties to take strong measures to criminalize all forms of corrupt practices (art. 8). State parties are also required to adopt measures designed to promote integrity and to prevent and punish the corruption of public officials. They must also take measures to ensure effective action by their authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (art. 9). The provisions of this Convention affirm the much more specific obligations of the United Nations Convention against Corruption.”

U.N. Human Rights Office of the High Commissioner, *Human Rights and Human Trafficking* 47 (2014), [https://www.ohchr.org/Documents/Publications/FS36\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS36_en.pdf) (last visited Nov 21, 2021). Nonetheless, this state-level duty is beyond the scope of this Comment.

206. Ezell, *supra* note 20, at 502.

207. *Id.* at 541.

208. TRAFFICKING IN PERSONS REPORT, *supra* note 187, at 7.

The California Transparency in Supply Chains Act<sup>209</sup> further articulates best practices for corporations.<sup>210</sup> According to the Act, “corporations should verify product supply chains for indications of trafficking violations, audit suppliers for labor practices, require certification that materials were made free from trafficking violations, develop and maintain internal governance standards, and provide employee training on trafficking awareness.”<sup>211</sup> Affirmative steps that corporations can take to this end are “(1) implementing monitoring systems, (2) developing a human trafficking resolution or committee prepared to take enforcement action when aware of violations, and (3) giving adequate disclosure of risks.”<sup>212</sup>

Corporations that do not fulfill this duty may subject themselves not only to reputational harm and financial loss but also to a lawsuit under the TVPRA.<sup>213</sup>

## VII. CONCLUSION

Human trafficking is an abhorrent crime that occurs across the globe, often for the benefit of US corporations.<sup>214</sup> Although hidden to many consumers, human trafficking enslaves some twenty million individuals<sup>215</sup> and creates approximately \$150.2 billion in profits around the globe annually.<sup>216</sup> Labor trafficking is involved in the production of at least 418 goods that are commonly exchanged and used in corporate supply chains.<sup>217</sup>

The TVPRA is a significant law in that it seeks to combat human trafficking in the United States.<sup>218</sup> Its five amendments since 2000 mark continued progress to that end.<sup>219</sup> However, the TVPRA as currently applied is insufficient because it has resulted in little litigation for survivors of human trafficking.<sup>220</sup> A look at drug trafficking prosecution, however, provides hope.

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209. Cal. Civ. Code § 1714.43 (Deering 2010).

210. Ezell, *supra* note 20, at 540.

211. *Id.* (citing Jonathan Todres, *The Private Sector’s Pivotal Role in Combating Human Trafficking*, 3 CALIF. L. REV. 80, 96–97 (2012)).

212. *Id.*

213. *Id.* at 503 (citing *In re Caremark Int’l*, 698 A.2d 959, 970 (Del. Ch. 1996)).

214. Plaintiff’s First Amended Complaint, *supra* note 24, at 1.

215. Ezell, *supra* note 20, at 508.

216. INT’L LABOUR OFFICE, *supra* note 44, at 13.

217. U.S. DEP’T OF LABOR, 2018 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 45 at 8, 16.

218. *Trafficking Victims Protection Reauthorization Act*, *supra* note 50.

219. Ezell, *supra* note 20, at 500; *Policy and Legislation*, *supra* note 51; H.R. Rep. 106–939, at 1 (2000) (Cong. Rep.); *Current Federal Laws*, *supra* note 52.

220. Ezell, *supra* note 20, at 508.

Drug trafficking prosecution has applied the willful blindness doctrine to advance justice.<sup>221</sup> Under this doctrine, the mens rea knowledge element of the crime of drug trafficking is satisfied if, for example, prosecutors demonstrate that an alleged cross-border drug trafficker did not know of the presence of contraband as “a result of his having made a conscious purpose to disregard the nature of that which was in the vehicle, with a conscious purpose to avoid learning the truth.”<sup>222</sup> In other words, willful blindness is an actual knowledge substitute.<sup>223</sup>

Inspired and informed by the precedent in drug trafficking litigation,<sup>224</sup> the willful blindness doctrine could and should be successfully applied to human trafficking litigation for several reasons. First, drug trafficking case law has made clear that the doctrine of willful blindness can apply generally to crimes that have an actual knowledge element, and the TVPRA includes a knowledge element for human trafficking.<sup>225</sup> Second, applying the willful blindness doctrine to human trafficking litigation, as a substitute for actual knowledge, would reduce the evidentiary requirements on prosecutors,<sup>226</sup> allowing them to convict human traffickers under the TVPRA more easily and thereby increase survivors’ access to justice.<sup>227</sup> Third, applying the willful blindness doctrine to human trafficking litigation aligns with legislative intent, as shown by Congress’s recent resolution banning goods made in the Xinjiang region of China due to reports of human trafficking occurring there.<sup>228</sup>

Courts can and should apply the doctrine of willful blindness to cases alleging violations of the TVPRA.<sup>229</sup> Consider the plight of one John Doe 4 in the case against Apple, Google, Tesla, Dell, and Microsoft.<sup>230</sup> In 2016, eleven-year-old John Doe 4, who would have otherwise been in fifth grade, found employment at the Tilwezembe cobalt mining site.<sup>231</sup> There, he and three other young boys labored in an open pit mining area.<sup>232</sup> Their adult supervisors often deceived the boys concerning the true value of the cobalt they mined, cheating them out of pay.<sup>233</sup> Thus, John Doe 4 received compensation averaging only \$1.00 per day

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221. Jackson, *supra* note 27, at 199.

222. United States v. Jewell, 532 F.2d 697, 700 (9th Cir. 1976).

223. *Id.*

224. United States v. Heredia, 483 F.3d 913, 917 (9th Cir. 2007); *Jewell*, 532 F.2d at 698.

225. Global-Tech Appliance, Inc. v. SEB S.A., 563 U.S. 754, 771 (2011).

226. Charlow, *supra* note 12, at 1355–56 (footnotes omitted).

227. GWYNNE SKINNER ET AL., THE THIRD PILLAR: ACCESS TO JUDICIAL REMEDIES FOR HUMAN RIGHTS VIOLATIONS BY TRANSNATIONAL BUSINESS, <http://www.bhrinlaw.org/the-third-pillar-final1.pdf>.

228. 22 U.S.C. § 7101.

229. See *Heredia*, 483 F.3d at 917; *Jewell*, 532 F.2d at 698.

230. Plaintiff’s First Amended Complaint, *supra* note 24, at 33–34.

231. *Id.*

232. *Id.*

233. *Id.*

for highly dangerous mining work.<sup>234</sup> He surrendered all earnings to his father to cover the basic living expenses of his large family of nine brothers and two sisters.<sup>235</sup> Tragically, on May 7, 2019, a wall of the mining pit collapsed on John Doe 4 and five other miners, including his brother, Robert Doe 4, who also worked in the mine.<sup>236</sup> John Doe 4 survived the incident, but his leg required the insertion of a metal bar to hold the bone in place.<sup>237</sup> John Doe 4 now lives in chronic pain, cannot use his injured leg, and can no longer work at an age when most children would not have even started working.<sup>238</sup> Robert Doe 4 did not survive the incident. He was twenty-five years old and is survived by his two children and wife.<sup>239</sup> For John Doe 4, Robert Doe 4, their families, and all the men, women, and children similarly robbed of their freedom and livelihoods, justice must advance through a novel application of the time-tested legal theory of willful blindness.

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234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*