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FROM THE GLOBAL ISDA MASTER AGREEMENT TO THE CHINESE VERSION OF NAFMII: A STANDARD FORM CONTRACT AS THE SOURCE OF LEGAL TRANSPLANT, IRRITATION, AND INTEGRATION

Mark Hsiao[*]

The legal transplant is frequently used to justify a legal change in the recipient's jurisdiction. Close examination of a global standard form contract, such as the ISDA Master Agreement 2002 and its Chinese version, the NAFMII Agreement 2009, shows that judicial divergences over the boilerplate terms offer a mechanism for an intensified process of integration between the recipient's policies and international private law or transnational law.

I. INTRODUCTION

Standard form contracts (SFCs) have ancient origins where boilerplate terms were modified, adapted, and adopted by an enclosed group of merchants through years of experience engaging in frequent transactions.[1] The standard terms tend to affect a small enclosure of participants who subscribe to it in a particular market. As the markets have expanded, this group of participants has either grown or diminished. However, regardless of whichever influenced others, the market, or the number of groups, the boundary of standardized terms and legal effects certainly followed suit with complexities. From the outset, the normalization of the usage of the SFC invited a curious quest for a global private law order without states.[2] In general, states play a critical role in backing treaties as signature members or directly implementing treaties as part of national law, but SFCs developed through negotiations among market participants and private actors without the involvement of states. Hence, the concern that the interpretative methods applicable to these boilerplate terms often remains unsettled is equally a concern for

*School of Law, City University of Hong Kong. An earlier version of this paper was presented in a school seminar. The author is very grateful to Professor Iain MacNeil, University of Glasgow, for his constructive comments on the paper. The author also wishes to thank Professor Wai Yee Wan, Professor Feng Lin and Professor Qiao Liu for their helpful comments on the earlier draft. The usual disclaimer applies.

[1] A Schroeder Music Publishing Co Ltd v Macaulay [1974] 3 All ER 616 (HL) 625 (Diplock L).

[2] GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE, 3–28 (Dartmouth 1997).

transnational law.[3] There are residual legal uncertainties that contractual terms cannot insulate. Insolvency is an example of such uncertainty.[4] This involves the distribution of assets to creditors, and assets are subject to the lex situs.[5] This begs the question: to what extent the contractual terms, if not a securities' interest agreement, can protect the transacted parties? To summarize, if the terms can deprive third-party creditors of their rights in the event of insolvency, this is reasoned to contravene the insolvency policy of *pari passu*.[6] The regulatory intervention of an insolvency policy will void such contract terms to allow the insolvency proceeding to run smoothly. Conversely, the policy of party autonomy may avail an innocent party by reinforcing the contract's initial terms, hence avoiding the insolvency regulatory intervention.[7] This policy "effectively pits one public policy principle against another."[8]
Does the courts' divergence in their interpretation of the terms of the SFC become a source of anguish and persistent uncertainty? This is unlikely for the following reasons. First, on close examination of cases involving SFC in the event of insolvency, the practical concerns brought by the insolvency administrator sought confirmation on the obligations and rights under the SFC to avoid further litigation against his or her duties in the administration of the bankrupted estate.[9] Second, the outcome of both policies will practically be the same under economic-wide circumstances, except that the latter (party autonomy) might allow an innocent party to suspend payment obligation, enabling them to inevitably settle the final payment obligation with the bankrupted administrator in a timely fashion.[10]

Instead of examining the insightful literature on the interpretative techniques of the SFC, this article argues that once the SFC has been adopted, it becomes a source of legal transplant that can intensify the

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[3] *See* Louise Gullifer, *Interpretation of Market Standard Form Contracts*, J. OF BUS. L. 227 (2021)
[4] *Id*; *See* Steven Edwards, *Legal Principles of Derivatives*, J. OF BUS. L. 1 (2002).
[5] Foskett v McKeown [2001] 1 AC 102 (HL) 126-127 (Millett L) 'Property rights are determined by fixed rules and settled principles. They are not discretionary. They do not depend upon ideas of what is fair, just and reasonable. Such concepts, which in reality mask decision of legal policy, have no place in the law of property.'
[6] *See* Re Harrison Ex p. Jay (1880) 14 LR Ch D 19; *See* Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd [2009] EWCA Civ 1160, [2010] Ch 347 (CA) [73] (Perpetual Trustee*).*
[7] *See* Belmont Park Investments PTY Ltd v BNY Corporate Trustee Services Ltd and Lehman Brothers Special Financing Inc [2011] UKSC 38 (Belmont).
[8] Sarah Worthington & Grainne Mellon, *Statutory Rules, Common Law Rules, and Public Policy in the Global Financial Crisis*, 29(3) PENN. ST. INT'L L. REV. 613, 624 (2011)
[9] Perpetual Trustee, *supra* note 6.
[10] *Id.*

process of integration in two ways: inward integration into the host state's market and outward alignment with its needs. These judicial standpoints, however divergent, offer not only a deferential choice on the policies to be adopted by the host state's court(s), but a manifested reflexive integration into the host state's economic policy. This process has several names, such as irritation,[11] transposition,[12] or a simple transplant in ignorance of other factors.[13] These names, nevertheless, are ascribed to the process; referred to in this paper as a reflexive exercise by the recipient that is outward-looking with respect to judicial guidance and deferential principles and inward-looking for analogous coherency. This sets the view for an industry organization for standard implementation where the private law develops into a transnational or international law without states' involvement or, in simpler terms, *lex mercatoria,* albeit in the international private-law order. [14]

II. FOUNDATIONS – BORROWED LAW, NAFMII.

The first part of this paper clarifies and distinguishes the metaphoric legal transplant from those that are socio-legal comparativist and explicates an alternative dimension through which to perceive legal transplants in the context of an SFC. The second part demystifies the specific features of the SFC and how a standard can be an international setter for principles and rules to be transplanted via adaptation of the SFC by the Chinese market sector. Part 3 illustrates how judicial divergences on the SFC as persistent uncertainties with divergent responses pave the way for further integration in the process of legal alignment.[15] Finally, Part 4 presents concluding remarks on evolving integration.

A. Borrowed Law

According to legal scholar Alan Watson, a frugal way to develop and improve a particular legal system is to borrow rules from another developed legal system and apply them to the recipient

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[11] Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 MOD. L. REV. 11, 12 (1998).

[12] *See* Esin Orucu, *Law as Transposition*, INT'L & COMP. L. QUARTERLY 205 (2002)

[13] *See* ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (Scottish Academic Press, Edinburgh 1974); Alan Watson, *Legal Change, Sources of Law and Legal Culture*, 131 U. PENN. L. R. 1121, 1125 (1983).

[14] Teubner, *Global Law Without a State, supra* note 2, at 3-4; Joanne P. Braithwaite, *Standard Form Contracts and Transnational Law: Evidence From the Derivatives Markets* 75(5) MOD. L. REV. 781-82 (2012).

[15] National Association of Financial Market Institutional Investors (NAFMII) was founded in 3 September 2007 under the approval of the State Council of China (https://www.nafmii.org.cn/englishnew/aboutus/aboutnafmii/).

jurisdiction.[16] He espoused the metaphorical idea that legal change in a third state or jurisdiction occurs through borrowed law and that the latter will grow and become an integrated part of that recipient jurisdiction.[17] This paints an emphatic image for comparative lawyers who tend to categorize legal systems into either common law or civil law and inspires the thought that law has no boundary but is possibly an "autopoietic system."[18] At present, most, if not all, legal jurisdictions do not readily fit into this simple classification. Furthermore, the terminology no longer easily suits a well-developed legal system. For example, prior to Brexit, the United Kingdom (UK) witnessed numerous European Union (EU) regulations and directives being adopted into the legal systems of the four UK nations and interacted with pre-existing legal principles.[19] It is equally true to say that it is not easy to categorize the Chinese legal system as a simple civil law system.

Here, the borrowed law is a thrifty way to modernize domestic law; the socialist planned market economy has taken a selective approach to borrowing laws from Western jurisdictions or international practices through accession to international organizations.[20] The accompanying benefits are twofold: internally, it improves domestic rules by allowing the extraneous law to fill the gap in the market infrastructure, and externally, the rules allow market participants (corporates or financial institutions) in the recipient jurisdiction to be placed on the same level playing field as international practices.
Watson's legal transplant also applied to the legal development of the socialist market economy in the early millennium. The banking regulator at the time, the China Banking Regulatory Commission (CBRC), issued

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[16] WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, *supra* note 13; *See* Alan Watson, *Legal Transplants and Law Reform*, 92 L. QUARTERLY REV. 79 (1976); Alan Watson, *The Birth of Legal Transplant*, 41 GA. J. INT'L & COMP. LAW 605, 607 (2012-13); ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW (The Johns Hopkins University Press, Baltimore and London 2001).
[17] WATSON, *LEGAL TRANSPLANTS:* AN APPROACH TO COMPARATIVE LAW, *supra* note 13, at 27.
[18] *See* GUNTHER TEUBNER, *LAW AS AUTOPOIETIC SYSTEM*, Blackwell Oxford, (1993); *See* Anthony Beck, *Is Law as Autopoietic System?*, 14(3) OXFORD J. OF LEGAL STUDIES 405 (1994); *See* Katarzyna Gracz and Primavera De Filippi, *Regulatory Failure of Copyright Law Through the Lenses of Autopoietic Systems Theory*, INT'L J. OF L. & INFO. TECH. 46 (2014); *See* Kenneth Kang, *Making Paradoxes Invisible: International Law as An Autopoietic System*, 14(3) INT'L J. OF L. IN CONTEXT 332 (2018).
[19] Teubner, *supra* note 11, at 11.
[20] China's compliance with the Basel Committee's Recommendations on Banking Capital Adequacy Ratios and Liquidity Ratio (Basel I, II, and III); *see also* Klaus Peter Berger, *Harmonisation of the European Contract Law: The Influence of Comparative Law*, 50 INT'L & COMP. L. QUARTERLY, 877, 878–79 (2001).

the Provisional Administrative Rules Governing Derivatives of Financial Institutions 2004, with revisions in 2006 and 2011, respectively.[21] This Provisional Administrative Rule set an overarching parameter in recognizing the use of derivatives for hedge purposes, but predominately for micro-prudential policy for the supervisory authority.[22] There was no SFC for over-the-counter (OTC) derivatives transactions, nor was there a designated type of contract for the derivatives being explicitly inserted into the Chinese Contract Law 1999.[23] Until 2007, China had a regulatory and supervisory framework without a standard form of contract for real transactions.[24]

The substance of the contractual rights in OTC derivatives trading was heavily dependent on foreign contracts and deference to practice in Western markets. This was manifested in the case of *the Bankruptcy of Guangdong International Trust Investment Co., Ltd* 2003 (Guangdong International), where the Higher People's Court of Guangdong Province decided that the validity of swap contracts was a legitimate part of the authorization or license issued by the State Administration of Foreign Exchange (SAFE) to trade and deal in foreign exchanges. [25] The judgment also acknowledged the legitimate purpose of swap derivatives by referring to a generally accepted purpose, namely, to hedge to the financial position across the world outside China.[26]

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[21] *See* Interim Measures for the Management of the Dealings of Derivative Products of Financial Institutions Order of the China Banking Regulatory Commission (No. 1 2004), http://www.lawinfochina.com/display.aspx?lib=law&id=3378&EncodingName=big5 (last visited May 3, 2023); Mark Hsiao, *OTC Derivatives Regulation in China: how far across the river?*, 25(1) J. OF BANKING & FIN. L. & PRAC. 14, 15-25 (2014); MARK HSIAO, FINANCIAL REGULATION OF BANKING AND DERIVATIVES, SECURITISATION AND TRUSTS IN CHINA 3 (Carswell 2009).

[22] *See* Hsiao, *supra* note 21, at preface and 15; *see also* Trade Policy Review (China), WTO Doc. (WT/TPR/S/199); *see also* Duncan Alford, *The Influence of Hong Kong Banking Law on Banking Reform in the PRC*" 3 U. PA. E. ASIA L. REV. 35, 54 (2008).

[23] *See generally* Contract Law of China (adopted by the Second Session of the Ninth Nat'l. People's Cong., Mar. 15, 1999, promulgated by Order No. 15 of the President of China, Mar. 15, 1999) (indicating the lack of derivative contracts in Chinese law before 1999); *see* Hsiao, *supra* note 21, at 2.

[24] *See* Kingsley T. W. Ong and Mark W. H. Hsiao, *From ISDA to NAFMII: Insolvency Stalemate and PRC Bankruptcy Jurisdiction*, 8 CAP. MKTS. LAW J. 77, 77 (2013).

[25] *See* Guangdong Guoji Xintuo Touzi Gongsi Pochan An (廣東國際信託投資公司破產案) [Case on the Bankruptcy of Guangdong International Trust & Investment Co., Ltd], 2003 Sup. People's Ct. Gaz. 3 (High People's Ct. of Guangdong Province 2003) (China).

[26] *See id.*

Therefore, Watson's transplant suits such an early stage of Chinese development in the derivatives market as *sui generic* – there was no interaction with other internal branches of law such as Contract Law 1999 or General Principle of Civil Law 1986.

B. NAFMII and Legal Transplants

Although Watson later acknowledged the effect and importance of the cultural values affecting the legal transplant, the borrowed law does not reside in the socialist system as a mere regulatory repository; rather, it was adopted and adapted along with the pre-existing legal culture.[27] With the regulatory parameter being set for the purpose of derivatives, the State Council of the People's Republic of China endorsed and approved the establishment of the National Association of Financial Market Institutional Investors (NAFMII) in 2007, creating the standard setters for derivative transactions known as the NAFMII Master Agreement 2007.[28] The NAFMII Master Agreement is a wholesale importation of the International Swap and Derivatives Association (ISDA) Master Agreement (2002), and was created for derivative transactions within China and cross-border transactions.[29] This legal transplant of the standard set by the ISDA Master Agreement in the form of Chinese version NAFMII Master Agreement 2007 and 2022 cross-border transactions presents observable evidence of foreign judicial views being an important and deferential factor to Chinese courts in the process of "irritation."[30] This has theoretical and practical implications for the comparative development of transnational law. Regarding the former, the notion of transplant guides the metaphysic on the development of private law and shaping of the borrowed law with the recipient state.[31] In terms of practical implications, the standard-terms setter intensifies the integration of the Chinese economy, especially in currency trading, with global economies.

The ancillary benefit for market participants is the legal certainty of the rights and obligations under an agreement or contract. The SFC can benefit markets with respect to three broad aspects.

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[27] *See* Meryll Dean, *Legal Transplants and Jury Trial in Japan*, 31 LEGAL STUD. 570, 570–71, 573, 589 (2011).

[28] *See* Ong & Hsiao, *supra* note 24.

[29] *See* 中國銀行間市场金融衍生產品交易主協議 (輻噫悖掛求 2022年版, *translated in* NAFMII Master Agreement (Cross Border 2022 Version) (NAT'L. ASS'N. OF FIN. MKT. INSTITUTIONAL INVS. 2022).

[30] Teubner, *supra* note 11, at 12, 28, 31.

[31] *See id.* at 16, 28.

According to Lord Diplock, in the case of *A Schroeder Music Publishing Co Ltd v Macaulay*,[32] ("Macaulay"), the SFC can be broadly categorized into two different kinds. The first is an SFC that has an ancient origin. The characteristic of this type of SFC is that firstly, those terms were established according to mercantile transactions of common occurrence to be conducted.[33] Examples include bills of lading, charter parties, policies of insurance contracts of sale in the commodity markets, and the derivative markets. Secondly, the standard clauses or terms in these contracts also have settled over the years by negotiation of representatives of the commercial interests involved.[34] Additionally, they have been widely adopted because experience has shown that they facilitate the conduct of trade.[35] Contracts of these kind affect not only the actual parties but also others who may have a commercial interest in the transactions to which they relate, such as buyers or sellers, charters or shipowners, insurers, or bankers. Finally, SFCs are widely used by parties whose bargaining power is fairly matched, raising a strong presumption that their terms are fair and reasonable.[36] The second type of SFC is not the focus of this paper but can be summarized as a contract with terms that are neither subject to negotiation between the parties involved nor approved by any organisation representing the interests of the weaker party. This type of SFC is dictated by the party whose bargaining power enables it to impose terms on its counterparties that are sometimes colloquially referred to as "take it or leave it."[37]

This paper focuses on the first type of contract with particular reference to those produced by industry organizations. The exemplar is the ISDA Master Agreement,[38] excluding other standardized documents, such as collateral agreements, which have been the subject of judicial interpretations in various jurisdictions over the past three decades. In particular, the global financial crisis that occurred in 2008-2009 led to litigation concerning the contractual terms within the ISDA Master Agreement (2002).[39] Judicial interpretations of the terms of the contract in England and Wales, Hong Kong, Australia, and the United States illustrate the process of irritation or integration between the international

[32] Macaulay v. Schroeder Music Publishing Co Ltd, 1 WLR 1308 (1974).
[33] *Id.* at 1316.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] International Swaps and Derivatives Association and ISDA Master Agreement (ISDA).
[39] *See* Kingsley T.W. Ong, *The ISDA Master Agreement: Insolvency Stalemate and Endgame Solution for Hong Kong Liquidators*, 40 HONG KONG L.J. 337 (2010).

standard setters, the ISDA, and the recipient jurisdictions that use the ISDA Master Agreement as the SFC.

C. Legal Transplant

The phrase "transplant," borrowed from the surgical domain and applied in law, vexes some comparative law scholars who consider it a platitude and an impossibility. [40] The initial idea of the legal transplant undoubtedly is a powerful way to explain why borrowing law occurs, however metaphorically.[41] Watson's idea serves as a narrative of the effort made by several jurisdictions to seek change and improvement to their own legal system.[42] Social-legal comparatists view the term as a platitude by illustrating that the transplant of an organ to a body and a mechanical transplant of a carburettor to another car do nothing more than show a purpose.[43] One would not ask if the carburettor is being rejected by the recipient car. Thus, the critical issue for the social-legal comparativist is the environmental factors surrounding the recipient jurisdiction that affect integration and assimilation.[44] Pierre Legrand, a comparative law scholar, considered Watson's idea to be impossible as each system has its respective complexity and uncertain factors that could lead to a change in meaning, indicating that the transplant fails to yield its initial idea.[45] Other legal scholars, like Gunther Teubner and Otto Kahn-Freund, share the same view that the legal transplant is a misleading metaphor, as it fails to take account of the context and, from

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[40] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, Vol. 37, No. MOD. L. REV. 1, 5 (1974); Pierre Legrand, *The Impossibility of Legal Transplants,* MAASTRICHT J. EUR. & COMP. L., 111, 114 (1997).

[41] ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW, 13 (1974).

[42] *Id.*

[43] Kahn-Freund, *supra* note 40.

[44] *Id.* at 9 (industrialisation, urbanisation, and the development of communications have greatly reduced the environmental obstacles to legal transplantation, and nothing has contributed more to this than the greater ease with which people move from place to place. If anyone doubts that this flattening out of economic and cultural diversity is reflected in the law, let him consider the role played in society by the law of tort.'; *See* REINHARD ZIMMERMAN, DANIEL VISSER AND KENNETH REID (ED)S, MIXED LEGAL SYSTEMS IN COMPARATIVE PERSPECTIVE (OUP Oxford 2004); *See also* VERNON PALMER (ED), MIXED JURISDICTIONS WORLDWIDE: THE THIRD LEGAL FAMILY (CUP Cambridge 2001); *See also* Jacque du Plessis '*Comparative Law and the Study of Mixed Legal Systems'*, THE OXFORD HANDBOOK OF COMPARATIVE LAW (OUP Oxford 2006).

[45] Legrand, *supra* note 40; *See* Pierre Legrand, *Comparative Legal Studies and Commitment to* Theory, 58 MOD. L. REV. 262 (1995).

a legal sociological standpoint, suggests examining the process of assimilation or integration, which is referred to as irritation.[46]

i. Dichotomy in Perspectives

The dichotomy between Watson's metaphorical idea of legal transplant and those who attack the metaphor provide various interpretations of utilizing the same concept. Watson postulates the concept of legal transplant as a narrative of comparative law in an academic discipline or a historical account of legal development.[47] By contrast, the sociological approach to the law is concerned with comparative law as the tool of legal reform, taking into account environmental factors.[48] It is possible to describe the dichotomy in legal transplant using both narrow and broad versions. The narrow version is that a legal system is unique and transplanted for its inherent quality, while the broad version treats the transplant of a legal system as an instrument for triggering the process of irritation through environmental factors and is considered a representation of the integration process.

There is also a third way to consider the legal transplant, which is to combine the narrow and broad versions to conclude that the transplant results in transposition.[49] In Watson's later work, he accepted that cultural values played a role in determining what would happen to the transplanted rules.[50] The fashionable trends that comparative scholars strive to align with "law as rules, the law as a system, the law as culture, the law as social facts, the law in context, law and history and law and economic" are nothing more than descriptions of the process of transposition, tuning, and fitting the law reform.[51]

In the Chinese socialist market economy, where the socialist culture and policy are alleged to be fundamentally different from those of other countries, such a context cannot be ignored when examining the relative success of a transplanted system, rule, or commercial SFC within its residual rules.[52] The study of a mixed, hybrid, or pluralist legal system, such as that in China, benefits from the continuing discourse among legal

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[46] Teubner, *supra* note 11.
[47] *Legal Transplants and Law Reform*, *supra* note 16.
[48] Kahn-Freund, *supra* note 40, at 5; Watson, *supra* note 16 at 79.
[49] Orucu, *supra* note 12, at 205.
[50] Watson, *supra* note 13, at 1121. Alan Watson, *From Legal Transplants to Legal* Formants, AMERICAN J. OF COMP. L., Vol. 43 No. 3, 469–476 (1995).
[51] Orucu, *supra* note 12.
[52] Jaakko Husa, *Developing Legal System, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, CHINESE J. OF COMP. L., Vol. 6 No. 2, 129–150 (2018).

comparativists and generates new interest among those who view it as offering a paradigm for the evolving harmonization of a private law system. However, much of China's borrowed law is an instrument in facilitating the pursuit of economic policy.

ii. Addressing the Dichotomy from an Economic Dimension

Upon closer examination, Watson's legal transplant theory is not restricted to legal rules.[53] His conception of the transplant of Roman law also concerned both legal institutions and structures, despite there being little to no connection to any particular group of people, period of time, or place that such a transplant can sustain.[54] Since Watson's contributions, the objectives of the legal transplant have diversified.[55] These modern objectives range from statutes to foreign judgments used in court decisions.[56] Many decisions explained the various reasons for legal transplants to take effect, including voluntary, involuntary, deliberate, or common legal cultures.[57]

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[53] Watson *supra* note 13, at 81.

[54] *Id*.

[55] Mathias Siems, *Malicious Legal Transplants*, 38 LEGAL STUD. 103-119 (2018); Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57(3) AM. J. OF COMP. LAW 711-744 (2009); Elisabetta Grande, *Legal Transplants and the Inoculation Effect: How American Criminal Procedure has Affected Continental Europe*, 64(3) AM. J. OF COMP. LAW 583-618 (2016); Hideki Kanda and Curtis Milhaupt, *Re-examining Leal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51(4) AM. J. OF COMP. LAW 887-902 (2003); Victoria Barnes and Emily Whewell, *English Contract Law Moves East: Legal Transplants and the Doctrine of Misrepresentation in British Consular Courts*, 7(1) CHINESE J. OF COMP L. 26-48 (2019); Randall Peerenboom, *Toward a Methodology For Successful Legal Transplants*, 1(1) CHINESE J. OF COMP L., 4-20 (2013).

[56] WILLIAM TWINING, GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE, 279 (CUP Cambridge 2009); Siems, *supra* note 55.

[57] Siems, *supra* note 55, at 105; Jonathan Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51(4) AM. J. OF COMP. LAW 839-886 (2003); Louis F Del Duca and Alain Levasseur, *Impact of Legal Culture and Legal Transplants on the Evolution of the U.S. Legal System*, 58 (1) AM. J. OF COMP. LAW 1-30 (2010); David Schorr, *Horizontal and Vertical Influences in Colonial Legal Transplantation: water by-laws in British Palestine*, 61(3) AM. J. OF COMP. LAW (2021); Mathias W Reimann, *A Bottom-up View of Legal Transplants*, 68 (3) AM. J. OF COMP. L. 689-694 (2020)

However, there is little discussion of the common markets among particular trades that lead to the adoption of SFCs by states to achieve a level playing field for their financial institutions.[58]
As a test center for operative comparative law, the Chinese legal system in the socialist market economy provides an arena in which old and new transplant theories can be tested but also adds to the literature on the transplanting of rules and systems for economic efficiency.[59] There is merit in the theory that the transplant can improve economic performance through the adoption of more efficient legal institutions.[60] The tendency is that the pursuit of economic growth is designed without paying much inward attention to the institutional setting.[61] The creation of the NAFMII Agreement, mostly assisted by major law firms[62] and the International Swap and Derivative Association Inc.,[63] provides not only an example of this economic pursuance, but also a reflection of the influence of market actors in shaping a transnational law for derivative markets.

III. STANDARD FORM CONTRACTS IN THE CHINESE SOCIALIST MARKET ECONOMY

The SFC was not novel to the Chinese markets and their counterparties. The PRC foreign trade organizations have used SFCs to transact with global trading partners.[64] In recent years, we witnessed the growth of the level playing field that Chinese market participants have achieved against Western market players. For example, the

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[58] Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in MATHIAS REIMANN AND REINHARD ZIMMERMANN (eds) THE OXFORD HANDBOOK OF COMPARATIVE LAW (OUP Oxford 2008) 442, at 459; Katherina Pistor, Martin Raiser and Stanislaw Gelfer, *Law and Finance in Transition Economies*, 8 (2) ECON. OF TRANSITION, 325-368 (2000).
[59] Graziadei, *supra* note 58, at 459.
[60] *Id.* at 459.
[61] *Id*. at 460.
[62] *See* Statement of English Translation for drafting members, https://www.asifma.org/wp-content/uploads/2018/05/nafmii_master_agreement_2009.pdf (last accessed on Feb. 5, 2024).
[63] IBOR Fallback Documents, ISDA (July 30, 2021), https://www.isda.org/a/LhMgE/ISDA-NAFMII-Publish-Chinese-Language-IBOR-Fallbacks-Documents.pdf accessed 4th Jan 2023; *see* Liu Zhigang & Lv Yinghao, *Inter-Bank Market Financial Derivatives Master Agreement Promulgated*, CHINA LAWINSIGHT (Jan. 13, 2008), https://www.chinalawinsight.com/2008/01/articles/finance/interbank-market-financial-derivatives-master-agreement-promulgated/.
[64] *See* Alan Smith, *Standard Form Contracts in the International Commercial Transactions of the People's Republic of China*, 21:1 INT'L & COMP. L. QUARTERLY 133 (1972).

encouragement by the state for state-owned or controlled enterprises to undertake dual listing outside China, the aim being to utilize foreign rules (listing rules) to strengthen the corporate governance of Chinese corporations, and the establishment of Chinese International Commercial Courts in Shenzhen and Xi'an, respectively, are all the result of the piecemeal progression of legal integration.[65] All are exemplars of some form of legal transplant in private law. The early example of the SFC used to trade with foreign counterparts was a process in which Chinese traders would reflect upon their cultural value against the terms of the foreign counterparty under the SFC.[66] Such a process is often reflected in Gunther Teubner's notion of legal irritation.[67]

The modern Chinese financial market has developed or evolved piecemeal with caution through its mixture of socialist rules and codified law. Although Watson makes no distinction between borrowing private law and international standardisation in the context of recipient jurisdiction, he compares legal transplants with comparative jurisprudence as juxtaposing "like with like."[68] Comparative jurisprudence "represents the effort to define the common trunk on which represent national doctrines of law are destined to graft themselves as a result of both of the development of the study of law as social science and of the awakening of an international legal consciousness."[69]

The hallmark of comparative law is the study of the relationship between one legal system and its rules with another.[70] International standardized terms serve as the medium for bridging a legal relationship where no pre-existing relationship exists.[71] They have thus become important in establishing the nature of a possible relationship, whereby the Western legal terms or concepts are transported into the Chinese financial and legal systems. This is where plausible exploration occurs of the mechanism of Watson's legal transplant when the economic policy detects the integration. The mechanism did not occur without some form of self-reflexive exercise. The process of the legal transplant reflects the

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[65] *See* Wei Cai and Andrew Godwin, *Challenges and Opportunities for the China International Commercial Court*, 60 INT'L & COMP. L. QUARTERLY 869, 872 (2019)
[66] Smith, *supra* note 64, at 133.
[67] Teubner, *supra* note 11, at 11.
[68] Watson, *supra* note 13 at 3. "We shall be here concerned with an approach similar to that of Lambert and Wigmore but it is not proposed to look for an all-embracing definition or an enumeration of parts."
[69] *Id.*
[70] *Id*. at 6.
[71] Teubner, *supra* note 2; Braithwaite, *supra* note 14, at 779-780.

prior reflexive approach from the recipient jurisdiction to exercise some form of self-assessment through the market or governmental actors, first on the needs or weaknesses in the legal system, that involves self-identification of the recipient jurisdiction as to its necessity.[72] This process should focus from top to bottom as part of the political economy where governmental policy dictates.[73] In this instance, the state has a role in fostering the process of national legal change by encouraging the domestic business community to participate in the international SFC, and adopting the terms verbatim, if not identically.

A. A Transplant of a Standard Form Contract

The market SFC has been extensively discussed on various fronts.[74] A well-established consensus exists that a contractual regime has a sector-wide normativity that could result in a significant part of the public dimension, which states cannot ignore, primarily when a large volume of contracts on a specific type of market reflects a critical factor in transferring sovereign functions to private actors.[75] When an agreement is standardized, it affects not only individual rights but also opens new avenues for enforcing contracts by private actors themselves.[76] Some academics view this effect on individual rights as the equivalent of legislation.[77] Examples of such markets are bond and

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[72] Teubner, *supra* note 18.

[73] Aditi Bagchi, *The Political Economy of Regulating Contract*, 62 AM. J. COMP. L. 687, 687 (2014).

[74] Smith, *supra* note 64; George Gluck, *Standard Form Contract: The Contract Theory Reconsidered*, 28(1) INT'L & COMP. L. QUARTERLY 72-90 (1979); Edward Jacobs, *The Battle of the Forms: Standard Term Contracts in Comparative Perspective*, 34(2) INT'L & COMP. L. QUARTERLY 297, 297-316 (1985); Eyal Zamir and Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship: Comments on Florencia Marotta-Wurgler's Studies*, 12(1) JRSLM REV. OF LEGAL STUD. 137, 137-170 (2015); Gino Gorla, *Standard Conditions and Form Contracts in Italian Law*, 11(1) AM. J COMP. L. 1, 1-20 (1962); Stephen J Choi, *Variation in Boilerplate: Rational Design or Random Mutation?* 20(1) AM. L. & ECON. REV.1, 1-45 (2018); Simon Deakin and Jonathan Michie, *Contracts and Competition: An Introduction*, 21(2) CAMBRIDGE J. ECON. 121, 121-125 (1997); John JA Burke, *Contract as Commodity: A Non-Fiction Statutory Approach*, 21(1) STAT. L. REV. 12,12-42 (2000).

[75] Regulation (EU) 648/2012 of 4 July 2012 on OTC derivative, central counterparties and trade repositories [2012] OJ L201/1 (the EMIR Regulation 648/2012 is a classic example).

[76] Dan Wielsch, *Global Law's Toolbox: Private Regulation by Standards*, (2012) 60 AM. J. COMPAR. L. 1075, 1078; George Gluck, *Standard Form Contract: The Contract Theory Reconsidered*, (1979) 28(1) INT'L & COMP. L. QUARTERLY 72, 73-74.

[77] Wielsch, *supra* note 76, at 1078.

derivative markets.[78] The interpretation of these SFCs has become important and is seen as being equivalent to a statute – 'Contract as Statute.'[79]

Intriguingly, this is highly similar to Lord Diplock's first category of the SFC in *Macaulay*.[80] The notion that there is little to no power imbalance among the parties is largely because the SFC has been drafted by a third-party organization whose members consist of participants in a specific market that subscribes to the SFC.[81] This is not only an example of neutrality in the SFC, but a fundamental psychological reflection akin to Rawls' original position.[82] He postulates that, hypothetically, if no one knows what the future entails, it is plausible that everyone will choose terms or rules that are less favourable to themselves in case they fall within this category as events unfold.[83] This presupposition means that parties autonomously choose these terms because they are valuable to them.[84] Rawls argues that everyone lies behind an imaginary veil of ignorance; not knowing the exact circumstances before them means they will be rationally and psychologically influenced by future uncertainty to choose less favourable terms in case they fall within that less favourable category.[85] For Rawls, when people are placed in this hypothetical position, the natural and rational approach by everyone to the choice of governing rules is that those rules benefit the least advantageous group.[86] This reflects Lord Diplock's statement in *Macaulay* that there is less likely to be a principle of reasonableness or fairness at play in this sort of SFC.[87]

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[78] *See id.*

[79] Stephen Choi & G. Mitu Gulati, *Contract as Statute*, MICH. L. REV. 1129, 1130 (2006).

[80] Macaulay*, supra* note 1, at 1136.

[81] *See* About ISDA, ISDA, https://www.isda.org/about-isda/, (last visited Dec. 21, 2023); *see also*, About NAFMII, NAT'L ASS'N OF FIN. MARKET INSTITUTIONAL INVESTS., https://www.nafmii.org.cn/englishnew/aboutus/aboutnafmii/ (last visited Dec. 21, 2023).

[82] JOHN RAWLS, A THEORY OF JUSTICE, 11–12, Harvard University Press revised ed.

[83] *Id.*

[84] *Id.* at 12.

[85] *Id.* at 11, 17.

[86] *Id.*

[87] Macaulay*, supra* note 1, at 1316. "Contracts of these kinds affect not only the actual parties to them but also others who may have a commercial interest in the transactions to which they relate, as buyers or sellers, charterers or shipowners, insurers or bankers. If fairness or reasonableness were relevant to their enforceability the fact that they are widely used by parties whose bargaining power is fairly matched would raise a strong presumption that their terms are fair and reasonable."

The standardization of the SFC also affects legal certainties and predictability. Although these characteristics relate to the choice of law and forum clauses, there are aspects of law or legal risk the contract cannot actually insulate or protect the parties. For example, insolvency law is largely the residual law for the state.[88] However, the judicial interpretations of these standard terms by various developed legal systems are useful as part of the ancillary benefit to the wholesale importation of SFCs.[89] This benefit could be said to fall under what Khan and Klausner described as "learning benefits," even if no one else in the market uses them, and "network benefits" arising from the use of standard terms by other market actors.[90] Following the global financial crisis, the standard terms in the SFC (ISDA Master Agreement 2002) attracted attention for their diverse and various judicial interpretations. Some academics see this as paving the way for the rise of transnational law.[91]

B. ISDA Master Agreement 2002 and NAFMII 2009

The International Swaps and Derivatives Association Inc. ("ISDA") is a not-for-profit corporation based in the state of New York that was formed in 1985 shortly after the emergence of a recognised derivatives market.[92] It has over 1,000 member institutions from 77 countries.[93] These members include corporations, investment managers, government and supranational entities, insurance companies, energy and commodities firms, and international and regional banks that are participants in OTC derivatives.[94] It was established to encourage efficiency and the prudent development of privately negotiated derivative contracts.[95] This need occurred in relation to swaps, and since 1992, standardized terms have been used for numerous types of OTC

[88] Edwards, *supra* note 4; Gullifer, *supra* note 3.
[89] Marcel Kahan and Michael Klausner, *Standardization and Innovation in Corporate Contracting (or Economics of Boilerplate*, 83 VIRGINIA L. REV. 713, 713 (1997).
[90] *See id*.; Gullifer, *supra* note 3.
[91] *See* Braithwaite, *supra* note 14, at 784; Aaron Taylor, *Interpretation of Industry-Standard Contracts*, LLOYDS MAR. COMM. QUARTERLY 261, 261 (2017); Dan Wielsch, *Contract Interpretation Regimes*, 81 MOD L. REV. 958, 958 (2018); *See* Jemeja Penca, *Transnational Legal Transplants and Legitimacy: The Example of Clean and Green Development Mechanisms,* 36 (4) LEGAL STUD. 706, (2016).
[92] About ISDA, ISDA (detail on the brief history and current memberships of the ISDA Inc), http://www2.isda.org/about-isda/; Lomas and others v JFB Firth Rixson, Inc and others, [2010] EWHC 3372 (Ch) [7] (Brigg J) (Lomas)
[93] ISDA Membership, ISDA, https://membership.isda.org/ (last visited Oct. 18, 2023).
[94] About ISDA, *supra* note 92.
[95] ISDA Membership, *supra* note 93.

derivatives.[96] Since then, the ISDA's standardized forms and the Master Agreement have been routinely applied.[97] They were revised in 2002.[98] The successful and widespread use of the ISDA Master Agreement is attributed to the active role of the ISDA.[99] It not only publishes standardized documents but also provides various forms of training for participants, as well as the continuing publication of legal opinion in various jurisdictions.[100] In addition, an effort has been made to lobby with the regulator.[101] A letter was addressed to the Peoples Bank of China (PBOC) regarding the disharmony on a parallel use of the ISDA Master Agreement and the NAFMII Master Agreement over a single agreement concept.[102]

Over-the-counter derivatives are governed by the ISDA Master Agreement, which is supplemented by a schedule as a means for traders to elect and add while negotiating with counterparties that are referenced *inter alia* in the Master Agreement.[103] The foundation of the contractual relationship is that all trades are entered into on the basis that the Master Agreement and schedule combine with all confirmations to form a single agreement.[104] This is structured to avoid cherry-picking by the insolvency practitioner in an attempt to disclaim unprofitable contracts while taking contracts that are beneficial to the insolvent party.[105] Accordingly, this means that in practice, the creditor would have to make full payment in respect of its loss-making contracts and would only receive a portion, if any, of the positive-value contracts. This is no longer the case with the ISDA Master Agreement, where the insolvent party has no right to designate close-outs.[106] Thus, the argument that those

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[96] *See* Lomas and others v JFB Firth Rixson, Inc and others [2010] EWHC 3372 (Ch) [7] (these OTC derivatives includes pure contracts for differences, caps and floors).
[97] Lomas, *supra* note 92, at 7.
[98] ISDA Membership, *supra* note 93; Edwards, *supra* note 4.
[99] Stephen J. Choi & G. Mitu Gulati, *supra* note 79, at 1141.
[100] *Opinions*, ISDA, https://www.isda.org/category/opinions/.
[101] Scott O'Malia, *Steps on the Way to China Netting*, ISDA (Mar. 31, 2017), https://isda.derivativiews.org/2017/03/31/steps-on-the-way-to-china-netting/.
[102] *Letter to Mr. Yi*, ISDA (Aug. 2008) *https://www.isda.org/a/tADDE/submission201aug08-english.pdf.*
[103] Edwards, *supra* note 4, at 4.
[104] *Id*. at 5; ISDA Master Agreement, §1(c) (2002).
[105] *Id*. at § 2(c), 5(vii); *International Insolvency and Restructuring Guide*, THE LAW FIRM NETWORK (Dec. 2014) at 344, https://www.lfnglobal.com/wp-content/uploads/2021/07/International_Insolvency_and_Restructuring_Guide_-_Author__The_Law_Firm_Network.pdf.
[106] Edwards, *supra* note 4; Ong, *supra* note 39, at 337.

derivative contracts are a series of executory contracts,[107] for which the payment obligations remain to be performed on both sides and the mutual promises for performance constitute executory consideration, differs from the operational clause.[108] Edwards, a practitioner, was correct in claiming that, notwithstanding the foundation of a proper concept to support the single agreement, the ability of the insolvency practitioner to bring the case forward depends on the enforceability of the close-out provision.[109] The single agreement concept aims to protect the netting rights that function to reduce the administrative costs associated with cash or securities transfers and minimize mutual counterparty credit risk exposure.[110] Therefore, from the outset of the single agreement concept, the operational terms aim to provide a mechanism to protect the non-fault party in the contract. This means that only a non-fault party can designate the notice of termination with close-out netting.

C. NAFMII Master Agreement

In August 2007, the National Association of Financial Market Institutional Investors (NAFMII), a self-regulated body, was formed by Chinese inter-bank market players working under the direction of the PBOC. A standardized set of documents for derivative transactions was presented in the following October.[111] The NAFMII documents were created to provide uniform documentation for inter-bank market participants in financial derivative transactions in the PRC.[112] They are

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[107] Alastair Hudson, Presentation of One Day Course at UCD, DEALING WITH DERIVATIVES (2005), http://www.alastairhudson.com/financelaw/derivativeslawcourse.pdf; ALASTAIR HUDSON, MODERN FINANCIAL TECHNIQUES, DERIVATIVES AND LAW 105-108 (Kluwer Law International 2000); RASIAH GENGATHAREN, DERIVATIVES LAW AND REGULATION 1*, 3* (Kluwer Law International 2002) (covering derivatives law and regulation in Australia, New Zealand, Singapore, Malaysia, and Hong Kong); Hsiao, *supra* note 21, at 2.

[108] Edwards, *supra* note 4, at 5 (arguing against this concept as being flawed on the single agreement. He opt for the view that counterparties would continue to trade derivatives in the pursuit of profit notwithstanding any defective foundations of the Single Agreement concept).

[109] *Id.*

[110] Kingsley T.W. Ong & Mark W.H. Hsiao, *From ISDA to NAFMII: Insolvency Stalemate and PRC Bankruptcy Jurisprudence,* 8(1) CAP. MARKETS L. J. 77, 77-89 (2012); The Law Firm Network, *supra* note 105, at 344.

[111] *Id.*

[112] David Olsson, Kennies Fung, Maggie Shen et al., *China: New Master Agreement for Financial Derivatives in China*, MONDAQ (Mar. 23, 2009), https://www.mondaq.com/china/commoditiesderivativesstock-exchanges/76684/new-master-agreement-for-financial-derivatives-in-china---18-march-

comparable with the ISDA documents on a like-with-like basis, except for those used for domestic derivative transactions, and have recently expanded for cross-border usage.[113] Accordingly, the NAFMII 2007 was drafted.[114] However, before the internalization of external rules such as ISDA documents, the Renminbi-foreign exchange forwards, swaps, and cross-currency swaps, the foreign exchange market was subject to the strict control of the State Administration of Foreign Exchange (SAFE).[115] These financial derivative transactions are conducted on the China Foreign Exchange Trading System (CFETS).[116] This implies that Renminbi forwards were subject to the CFETS and the NAFMII agreements.[117] These dual agreements created a discrepancy in their respective contractual terms. This conflict was addressed later in 2009 with the amended single documentation of the NAFMII Documents governing these CFETS transactions.[118] The NAFMII undeniably produced results in relation to similar legal difficulties that arose in the operational terms of the ISDA Master Agreement.[119] Take analogous examples on the representation clause on undertaking that there is no continuing occurrence of default was found in section 3(6),[120] the party's

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2009#:~:text=The%20NAFMII%20Master%20Agreement%20(2009,involved%20in%20financial%20derivatives%20transactions; NAFMII 2009 stands for National Association of Financial Market Institution which drafts the OTC derivative contract and approved by the People Bank of China in 2009. The standardized contract duplicates mechanism ISDA Master Agreement 2002. The NAFMII is a self-regulatory body, was newly formed in 2007 by Chinese inter-bank market players working under the direction of the People's Bank of China ("PBOC"). In 2007, it was authorised by PBOC to put forward a standardised set of documents for derivatives, which includes the Master Agreement, the Supplement (or Schedule), the Security Agreement and the Definitions (collectively the "NAFMII Documents"). The NAFMII Documents provide a uniform documentation platform for the inter-bank market participants in financial derivatives transactions in the PRC.

[113] About NAFMII, NAT'L ASS'N OF FIN. MARKET INSTITUTIONAL INVESTS., (Dec. 2023) https://www.nafmii.org.cn/englishnew/aboutus/aboutnafmii/.

[114] *Id.*

[115] *Major Functions*, STATE ADMINISTRATION OF FOREIGN EXCHANGE (SAFE), http://www.safe.gov.cn/wps/portal/english/Home (last visited Dec. 18, 2023).

[116] *See Measures of the Foreign Exchange Trade System and National Interbank Funding Center for the Administration of Information Disclosure on RMB Market*, CHINA FOREIGN BANKING EXCH. TRADE SYS. NAT'L INTERBANK FUNDING CTR. (Feb. 25, 2007), https://www.chinamoney.com.cn/english/svcfopgudrmkBM/20170225/2095.html.

[117] *See Letter addressed to the People's Bank of China* (PBOF), ISDA (Aug, 1, 2008) https://www.isda.org/a/tADDE/submission201aug08-english.pdf.

[118] *See* NAFMII, *supra* note 113.

[119] *See* Ong, *supra* note 110, at 77.

[120] NAFMII Master Agreement, §3(6) (stating "no Event of Default or Potential Event of Default with respect to its continuing and to its knowledge, no Termination Event with respect to it has occurred and is continuing . . .").

right to suspend payment obligation was found in section 4(III),[121] and only the non-defaulting party's right to give notice was found in section 9(I)(1)[122] of the NAFMII Master Agreement (2022).

The NAFMII protects the non-defaulting counterparty's close-out netting position by suspending the performance of its payment and delivery obligation if an event of default or potential event of default has occurred and is continuing in respect of its counterparty.[123] If no automatic early termination occurs, the insolvent counterparty has no power to terminate the NAFMII contract.[124] Only the non-defaulted party can designate a notice to terminate.[125] It is feasible upon a close-out calculation that the non-defaulting party will be out of money and, therefore, obliged to pay monies to the defaulting party.[126] Thus, the non-defaulted party may suspend and wait for the in-the-money alert before assigning a notice to terminate with close-out netting. The combined effect of the operational terms in the NAFMII and ISDA Master Agreement is that the non-defaulting party can take time to designate the termination notice, allowing them alone to choose a particular time that favours their speculative position in the contract.[127] At the same time, pending the designation of a notice of termination, the non-defaulting party does not have to pay a defaulting party even if they are favoured by the speculative position of the contract.[128] In practical terms, the policy of the party autonomy creates an "insolvency stalemate."[129]

When a transacted party is deemed insolvent, the contract becomes a centre of subject matter, whether it is a debt or asset. In common law, the anti-deprivation rule is that "no contract can be valid if a man's property shall remain his until his bankruptcy and on the happening of that event shall go over to someone else and be taken away

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[121] *Id.* at §4(III). "A party's performance of its payment or delivery obligations in accordance with the terms of the effective transaction agreement shall be subject to the satisfaction of all the following conditions precedent: (1) no Event of Default or Potential Event of Default with respect to other party has occurred and is continuing . . .".

[122] *Id.* at §9(I)(1) (stating that the Determination of Early Termination Date is (1) when an event of default specified in §6 of the Master Agreement occurs and is continuing, the non-defaulting party shall give the defaulting party a notice in writing).

[123] *Id.* at §4(III).

[124] *Id*. at §9(I)(1).

[125] Edwards, *supra* note 4 at 16□17.

[126] *Id.* at 16.

[127] *See* ISDA Master Agreement §6 (2002).

[128] *Id.* at §2.

[129] Ong, *supra* note 39, at 341.

from his creditor."[130] In other words, parties could not, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors.[131] It was argued that these provisions in the NAFMII and ISDA Master Agreement together affect the third-party creditors of the bankrupted party.[132]

D. Judicial Interpretations in Hong Kong, the UK, and the United States on operative terms in the ISDA Master Agreement

The financial and credit market has changed since 2007 because of the near-collapse of Citigroup, Lloyds, and the Royal Bank of Scotland due to the governmental sovereign debt crisis.[133] Some have blamed derivatives for the crisis by pointing to the change of law on this aspect,[134] as the globalized trading on derivatives in the 1980s[135] also led to the standardized contract being developed by derivative market counterparties to document OTC transactions.[136] The catastrophic events exposed certain weaknesses in the ISDA Master Agreements,[137] and the fact that the litigated cases arose from the liquidator's power to close out ISDA contracts in numerous jurisdictions,[138] including Hong Kong, which in view of the collapse of the Lehman Brothers, exemplifies the choice of policies.

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[130] "There cannot be a valid contract that a man's property shall remain his until his bankruptcy, and on the happening of that event shall go over to someone else and be taken away from his creditors", Perpetual Trustee, *supra* note 6 at ¶ 26, (citing Lord Neuberger MR on Money Markets International Stockbrokers Ltd v. London Stock Exchange Ltd, 1 WLR 1150, (2002)).

[131] *Belmont*, *supra* note 7, at ¶ 104, (stating that "The policy behind the anti-deprivation rule is clear, that the parties cannot, on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It is possible to give that policy a common-sense application which prevents its application to bona fide commercial transactions which do not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.").

[132] *Id.*

[133] *See* Ong, *supra* note 39, at 337 (examples for Sovereign debts are Greece, Spain, & Ireland).

[134] L. Stout, *Derivatives and the Legal Origin of the 2008 Credit Crisis*, 1 HARV. BUS. L. REV. 1, at 3 (2011); D. Lynn, *Enforceability of Over-the-counter Financial Derivatives*, 50 BUS. L. 291, at 337 (1994); L. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701, 704□05, (1999).

[135] Ong, *supra* note 39, at 338.

[136] *Id.*

[137] *Id.*

[138] Mark Hsiao, *Finality Orders in the Clearing System and OTC derivatives regulation in Hong Kong*, 43 H.K. L. J. 139, 141 (2013).

Section 5(a)(vii) of the ISDA Master Agreement (2002) provides that if a contracting party goes bankrupt, any credit support provided to such party or any applicable specified entity under the contract would be a default.[139] If automatic early termination does not apply, the existing mechanism under the ISDA Master Agreement does not allow the defaulting entity to close out trades where its counterparty has not triggered a termination (even if the defaulting entity has funds).[140] Furthermore, the condition precedent in section 2(a)(iii) permits a party to suspend the performance of its payment and delivery obligation if an event of default or potential default has occurred and is continuing in respect of its counterpart.[141] The combination of section 6 and section 2 led to a peculiar situation in the market.[142] This meant that while the Lehman Brothers were a bankrupted party (at fault), section 6 gave the counterparty the ultimate right to designate a specific termination date.[143] Until that designated termination date was set, the Lehman Brothers' bankruptcy administrator could not terminate the ISDA Master Agreement. Furthermore, the counterparty could, according to section 2 of the ISDA Master Agreement, stopping payment to the Lehman Brothers.[144] This meant that the Lehman Brothers' administrator could neither terminate the ISDA Master Agreement nor receive payment from the counterparty.

According to Ong, a legal practitioner and scholar, the resolution to such an insolvency stalemate under the Hong Kong insolvency regime was to use section 268 of the Companies Ordinance, in which the court is given the discretion to grant leave to a liquidator to disclaim 'onerous property within a twelve-month time limit.[145]

Where any part of the property of a company which is being wound up consists of unprofitable contracts, or of any other property, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section.[146]

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[139] Ong, *supra* note 39, at 339.
[140] *Id.* at 341.
[141] *Id.* at 342.
[142] *Id.* at 341; *see* also ISDA Master Agreement §§ 2, 5 (2002).
[143] *Id.*
[144] *Id.*
[145] *See generally* Hong Kong Companies Ordinance, 32 O.H.K., § 268 (1933).
[146] *Id.* at § 268(1).

Before granting leave to disclaim, the court may require such notices to be given to interested persons as it finds just.[147] The unprofitable contract as part of the onerous property will follow the principles set down in the case *Transmetro Corporation Ltd*:[148]
A contract is unprofitable if it imposes on the company continuing financial obligations which may be regarded as detrimental to the creditors, which presumably means that the contract confers no sufficient reciprocal benefit. Before a contract may be unprofitable for the purposes of the section, it must give rise to prospective liabilities. Contracts that will delay the winding-up of the company's affairs because they are to be performed over a substantial period of time and will involve expenditures that may not be recovered are unprofitable. No case has decided that a contract is unprofitable merely because it is financially disadvantageous. The cases focus on the nature and cause of the disadvantage. A contract is not unprofitable merely because the company could have made or could make a better bargain.[149]

The Hong Kong court adopted such an approach in relation to the Lehman Brothers' contractual obligation under the ISDA Master Agreement and treated the latter as an unprofitable contract.[150] Although Hong Kong mirrored the section 268 unprofitable contract of the Hong Kong Ordinance from section 178 of the Insolvency Act 1986 (UK), this approach to the contractual obligation of the Lehman Brothers under the ISDA Master Agreement was never discussed in the courts in England or Wales.[151]

Courts in the United States view the suspension of payment obligation as a contravention of the Bankruptcy Code, under which section 365(e)(1)[152] provides that parties are prohibited from suspending their performance obligations solely on account of the bankruptcy filings

[147] *Id.* at § 268(3).
[148] *See Transmetro Corp. Ltd. v. Real Inv. Pty Ltd.,* (1999) 17 ACLC 1314 ¶ 21 (Austl.) (extracting five principles from the consolidated cases in *Transmetro Corp. Ltd. v. Real Inv. Pty Ltd*).
[149] Ong, *supra* note 39, at 343□44.
[150] *Id.* at 34.
[151] Insolvency Act 1986, c. 45, §§ 178, 178(3)(a) (Eng.).
[152] 11 U.S.C. § 365(e)(1).

of its counterparties.[153] Thus, the unilateral cessation of its payment obligation following the bankruptcy of the Lehman Brothers violated section 365(e)(1).[154] The *Lehman Brothers* case was concurrently litigated on both sides of the Atlantic.[155] To limit potential conflict between decisions in the two jurisdictions, the English High Court and the Bankruptcy Court in New York agreed that relief would be limited to declaratory relief.[156] This approach meant section 2 of the ISDA Master Agreement would be void, which put the counterparty in a position to consider exercising earlier on the notice of termination.[157] The administrators of the Lehman Brothers International in Europe (LBIE) filed an application to the High Court in England to seek the Court's directions as to the meaning and effect of section 2(a)(iii) of the ISDA Agreement. The Court was asked to consider whether section 2(a)(iii) ceased to be valid after the occurrence of a Bankruptcy Event of Default and, if so, in what circumstances.[158]

Furthermore, the administrators challenged the validity of section 2(a)(iii), arguing that it was inconsistent with the insolvency policy under the *pari passu* principle, where unsecured creditors, without preference, share the assets on pro rata basis.[159] As such, it violated the

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[153] Ong, *supra* note 39, at 347; *see also* Andrea Pincus, *The Metavante Ruling - in a Case of First Impression, US Bankruptcy Court Limits ISDA Counterparty Rights Upon a Bankruptcy Event of Default*, REED SMITH LLP, (last updated Dec. 3, 2009), at 1, http://www.lexology.com/library/detail.aspx?g=bb5c0a1b-4c88-43fb-8b80-f4299542e975 (discussing *In Re Lehman Bros. Holdings, Inc.,* Case No. 08-13555 *et seq*., where the Court deemed eleven (11) months after the filing for bankruptcy to be too late for Metavante to invoke early termination and instead imposed a sunset on a non-defaulting counterparty's right to early termination upon a bankruptcy event of default despite no such sunset provision in either the derivatives contract or the U.S. Bankruptcy Code itself).

[154] Ong, *supra* note 39, at 347; 11 U.S.C. § 365(e)(1); *see also* Pincus, *supra* note 153.

[155] *Belmont*, supra note 7, at ¶ 33.

[156] *Id.*

[157] *See The Metavante Ruling - in a Case of First Impression, US Bankruptcy Court Limits ISDA Counterparty Rights Upon a Bankruptcy Event of Default*, REED SMITH LLP, (last updated Dec. 3, 2009), http://www.lexology.com/library/detail.aspx?g=bb5c0a1b-4c88-43fb-8b80-f4299542e975.

[158] *See Perpetual Trustee, supra note 6, at ¶ 6; see also Re In the Matter of Lehman Brothers International (Europe) (in administration), Case No. 7942 of 2008, Ordinary Application filed on 25th May 2010, ¶¶ 1, 3, 118, 425, European High Court of Justice Chancery Div. Co. Court (Nov. 19, 2010).*

[159] *Id.*

anti-deprivation rule[160] and was contrary to public policy.[161] Both the anti-deprivation rule and the rule that it is contrary to public policy to contract out of *pari passu* distribution are two sub-rules of the general principle that parties cannot contract out of insolvency legislation.[162] However, the anti-deprivation rule only applies in the event of bankruptcy.[163] The *British Eagle* case applied *pari passu* throughout, irrespective of whether the airlines involved had gone into liquidation.[164] However, the anti-deprivation argument was dismissed and disapplied on the basis that there is good faith or a commercial sense of the transaction.[165] With regard to the contracting out *pari passu* principle argument, [166] the court held that the transaction was a sensible commercial arrangement that did not intend to circumvent insolvency law.[167]

The approach by the English courts and its divergence from the U.S. statutory approach seems to create legal uncertainty in the operative terms of the ISDA and NAFMII Master Agreement.[168] Moreover, uncertainty in commercial law can often persist over a long period.[169] The reason or cause of such persistency in uncertainty is suggested to be attributed to the existence of the very mechanism. This means that if such uncertainty can be resolved by whichever mechanisms are being

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[160] Belmont, *supra* note 7, at ¶ 75 ("Earliest days of the rule, it has been based on the notion of a fraud, or a direct fraud per Lord Eldon LC in Higinbotham v Holme (1812) 19 Ves Jun 88 at 92 on bankruptcy law, and that decision was taken to be authority for the proposition that where a person settles property in such a way that his interest determines on his bankruptcy that is evidence of an intention to defraud his creditors…"); *see also* Re Stephenson, Ex parte Brown [1897] 1 QB 638 at 640 (Williams J. holding that "The policy behind the anti-deprivation rule was clear: that the parties could not on bankruptcy, deprive the bankrupt of property which would otherwise be available for creditors. It was possible to give that policy a common-sense application which prevented its application to *bona fide* commercial transactions which did not have as their predominant purpose, or one of their main purposes, the deprivation of the property of one of the parties on bankruptcy.").

[161] Belmont, *supra* note 7, at ¶ 7.

[162] *Id.* at ¶ 1.

[163] *Id.* at ¶ 80.

[164] *Id.* at ¶75.

[165] *See id.*

[166] British Eagle International Airlines Ltd v Compagnie Nationale Air France, 1 WLR. 175 (1975).

[167] Belmont, *supra* note 7, at ¶ 76.

[168] Sarah Worthington, *Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule*, 75 MOD. L. REV. 112, 114 (2012); Sarah Worthington, *Testing the Anti-Deprivation rule: A response to 'Lehman Brothers and the Anti-Deprivation Principle: Current Uncertainties and Proposals for Reform*', 4 CAP. MARKETS L. J. 450, 453 (2011).

[169] Iain MacNeil, *Uncertainty in Commercial Law*, 13 EDINBURGH L. REV. 68, 84 (2009).

adopted, then the need to resolve uncertainty is reduced or eliminated.[170] Therefore, the more successful the responses to uncertainty, the longer the uncertainty is likely to survive. The reliance on non-legal measures can be associated with an ability to tolerate uncertainty within the law governing commercial transactions. Provided that responses to the uncertainty can remove damaging effects such as insolvency stalemate-temporary freeze in the market – and irrespective of the policies to be adopted in response to resolving the operative terms of the ISDA and NAFMII or the mechanism – there will be little pressure for uncertainty to be eliminated.

If such persistent legal uncertainty with divergent approaches or mechanisms holds true, one could categorize the divergences into two aspects of uncertainty. The first relates to the mandatory rule that the effect of uncertainty is greatest because it is not possible to contract around such rules. This mandatory rule is exemplified in the U.S. approach to voiding the provisions of the ISDA and NAFMII.[171] The second refers to the default rules in contract law. For instance, supporting a non-defaulting party's right to suspend all its obligations under the ISDA contract and indefinitely refraining from calling an early termination when faced with an insolvent counterparty would uphold the principle of freedom of contract.[172] Indeed, by protecting the non-defaulting party's contractual right, the English courts affirmed the policy that the courts should not interfere with commercial SFC entered between parties acting in good faith. [173] While academics doubt whether the notion of good faith really sets the anchor in reducing the effect of the anti-deprivation rule in the event of insolvency,[174] the presumption of good faith rests in the fact that these terms are established according to mercantile transactions of common occurrence to be conducted across years of negotiation by representatives.[175] It is this consistency of interpretation of the SFC that provides certainty. Conversely, it is submitted that that in insolvency, it is important to balance the interests and rights of general creditors of the insolvent estate.[176] Assuming the insolvent counterparty is "in the money" under the derivative contract, allowing a non-defaulting party to suspend its obligations and indefinitely delaying any call for early termination will deny the general

[170] *Id.*
[171] ISDA Master Agreement §§ 2, 6 (2002); NAFMII §§ 3, 9.
[172] Belmont, *supra* note 7, at ¶ 33.
[173] *Id.*
[174] *Good Faith, Flawed Assets and the Emasculation of the UK Anti-Deprivation Rule*, *supra* note 168; *Testing the Anti-Deprivation Rule*, *supra* note 168, at 143.
[175] Macaulay, *supra* note 1, at 1316.
[176] Ong, *supra* note 110, at 105.

creditors valuable assets. It was based on this policy consideration that the U.S. court held that the relevant terms of the ISDA contract violated U.S. bankruptcy law.[177]

E. Transplant of the Judicial Responses and the Integration Dimension

This section examines how the divergence in the judicial responses to the ISDA affects the change of law in the adoption of the entire ISDA Master Agreement by the NAFMII, as the NAFMII Master Agreement also manifested wholesale importation.[178] If one approaches the divergence above in a brief two categories, mandatory rules and default rule of contract law, we see an observable reflexive process in the integration. This places the metaphorical term "legal transplant"[179] within an identifiable process of integration or repulsion with the existing law, political economy, and cultural values of the recipient jurisdiction before being entirely absorbed or adopted. In subsequent work, Watson acknowledges that culture plays a role in the settlement of transplanted rules.[180] The question is not so much whether the Chinese legal system will reject or integrate external rules; rather, it is how these judicial divergences can be constructed with an internal context without reconstruction for the fundamental change.

The importation of the SFC has since advanced to integrate with other Chinese laws, while additionally triggering more borrowed laws that could align with international practice. Indeed, social value plays a role in the interpretation of a specific article of the PRC Enterprise Bankruptcy Law 2006 when applied to the terms in NAFMII documents.[181] The notion of individual bankruptcy does not exist in traditional Chinese thinking.[182] In Chinese culture, it is believed that the debt incurred by a father ought to be assumed by the son.[183] Although

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[177] In re Lehman Brothers Holdings, Inc., Case No. 08-13555 et seq. (JMP) (jointly administered) ("Bankruptcy Case") for Metavane case filing. *See also The Metavante ruling - in a case of first impression, US bankruptcy court limits ISDA counterparty rights upon a bankruptcy event of default*, REED SMITH LLP (Dec. 3, 2009), http://www.lexology.com/library/detail.aspx?g=bb5c0a1b-4c88-43fb-8b80-f4299542e975.

[178] Ong, *supra* note 110, at 77-89.

[179] Teubner, *supra* note 11.

[180] *See* ALAN WATSON, SOCIETY & LEGAL CHANGE (Scottish Academic Press, Edinburgh (1977).

[181] Ong, *supra* note 110.

[182] S Li, *Bankruptcy Law in China: Lessons of the Past Twelve Years*, 5 HARV. ASIA QUARTERLY 1 (2001).

[183] *Id.*

this has been the case in Chinese law, this concept was short-lived because of the change of regime to the Communist Party and the subsequent adoption of Marxism in China.[184] The state bore all the losses incurred by state-owned enterprises until the enactment of the PRC Enterprise Bankruptcy Law (EBL) 1986, and when the subsequent EBL 2006 shifted the supremacy rights of creditors piecemeal towards a self-help approach.[185] During this period, creditors' rights were answerable by the state.[186] Although employees' debts from a bankrupted company are settled ahead of other creditors, this is comparable with Western society in its priority ranking of creditors like-with-like.[187] The law is an instrument designed to facilitate their political and economic plan, albeit not every rule is in the exact same paste. It is submitted that the EBL 2006 has a greater policy objective that is comparable with the U.S. Chapter 11, rendering the terms of the NAFMII void in the event of a financial institution triggering the event of default by bankruptcy.[188]

The comparison between Chinese law and the operational terms of the international SFC reveals how law and political economy are interrelated in more subtle ways.[189] Unlike normative integration without reference to social, political or economic factors,[190] the ISDA and NAFMII seems to occur on a mechanical rather than an organic level.[191] The binding arrangement of the law and social-economic policy depends on their interlocking with the specific power structure of the societies involved. The distinction of this mechanical transfer is that it has an impact at the level of financial institutions rather than individuals, as the design of the EBL 2006 and the NAFMII are aim at financial institution.[192] The national culture and union of law are not inadequate for the formulated technique. The economic policy is a more appropriate pitch for integration where little irritation or interaction occurs with the cultural aspects or environment.

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[184] Ong, *supra* note 110.
[185] *Id.*; S Li, *supra* note 182.
[186] S Li, *supra* note 182.
[187] Ong, *supra* note 110.
[188] *Id.*
[189] Teubner, *supra* note 11, at 22.
[190] ALAN WATSON, THE MAKING OF THE CIVIL LAW, 38 (Harvard University Press, Cambridge (1981)).
[191] Teubner, *supra* note 11, at 17.
[192] *See NAFMII Master Agreement (Cross-Border)*, NAT'L ASS'N OF FIN. MARKET INSTITUTIONAL INVESTS., https://www.nafmii.org.cn/ggtz/gg/202208/P020220831632138066172.pdf (last visited Dec. 26, 2023); Enterprise Bankruptcy Law of the People's Republic of China, art. 1 (China); Ong, *supra* note 110.

The policy that dictates the choice of relevant foreign rules dates back to basic general principles of civil law. Where there is a lack of relevant law regulating the contractual terms or SFC, the General Principles of Civil Law 1986 (GPCL) provides that state policies shall dictate.[193] The state policy that governs the issue interplays with the SFC and the EBL 2006 and is relatively easy to contextualize under the state policy to maintain the socialist market economy. Such a policy, manifested in the EBL 2006, is to settle claims and debts fairly so as to maintain the socialist market economy.[194] Due to the supremacy of this objective, the construction of the NAFMII operational terms for self-help in the context of the EBL 2006 is likely to incline towards the U.S. approach – bankruptcy procedural efficacy.[195] The practice is supported by the administration process in which the EBL follows the model of the United States.[196] In the case of a financial institution becoming insolvent, the EBL offers a degree of predictable outcome. Article 18 of the EBL recognises the executory contract to which the bankrupt is a party.[197]

After the people's court accepts an application for bankruptcy, the administrator shall have the right to decide to rescind or continue to perform a contract that is concluded before the acceptance yet remains to be fulfilled by both the debtor and the other party and shall notify the other party of his decision. Where the administrator fails to notify the other party within two months from the date when the bankruptcy application is accepted or to give any reply to the exhortation made by the other party within 30 days from the date the exhortation is made, the contract shall be deemed to be rescinded. Where the administrator decides that the performance of the contract be continued, the other party shall comply; however, the other party shall have the right to request the administrator to provide a guarantee. Where the administrator refuses to do so, the contract shall be deemed to be rescinded.[198]

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[193] General Principles of Civil Law of the People's Republic of China (hereinafter Civil Code), adopted by the Fourth Session of the Sixth National People's Congress on 12 April 1986, art. 6 (China) (civil activities must be in compliance with the law; where there are no relevant provisions in the law, they shall be in compliance with State policies).

[194] Ong, *supra* note 110.

[195] *Id.*

[196] Enterprise Bankruptcy Law (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 27, 2006, effective June 1, 2007), Lawinfochina (北大法律英文网), ch. 8 [hereinafter 2006 EBL], art. 18.

[197] *Id.*

[198] *Id.*

Article 18 contains a few additional clauses, appearing to reconcile the issue of an executory contract in the event of bankruptcy.[199] The contract becomes executed after the court accepts the bankruptcy application.[200] Under the EBL, the bankruptcy court treats the contract as completed upon accepting the application.[201] The right of the non-faulted party is shifted to the power of the administrator.[202] However, there is a balance in the creditor and debtor relationship where the administrator has two options. Administrators could continue to perform the obligation under the contract by serving notice. By doing so, the non-fault party could ask for collateral or a guarantee of performance. If the administrator opts to rescind the contract, damages may be awarded. This can be seen in the subsequent procedure of the EBL, where the administrator can dissolve or accept a contract following a normal bankruptcy petition or reorganization.[203] The latter was drafted on the basis of the protective mechanism from the U.S. Chapter 11.[204] The section 3 of the NAFMII will be treated as violating the procedure of the article 18 of the EBL and policy purpose of the EBL, regardless of an application for bankruptcy petition or reorganisation. This is a similar approach to the Lehman Brothers, which sought to enforce the payment obligation against the Metavante Corporation under the swap agreement between Metavante and Lehman Brothers Special Financing Inc (LBSF) guaranteed by LBHI. [205] The U.S. Bankruptcy Court held in favor of LBHI and LBSF and ordered Metavante to perform its obligation. The Court reasoned that Metavante's unilateral cessation of its payment obligation following Lehman's Bankruptcy filing violated U.S. bankruptcy law.[206] U.S. Bankruptcy Code, section 365(e)(1)[207] prohibits

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[199] Mark W.H. Hsiao, *OTC Derivatives Regulation in China: how far across the river?*, 25 J. BANKING AND FIN. L. AND PRAC. 1, 10 (2017).
[200] 2006 EBL, *supra* note 196.
[201] *Id.*
[202] *Id.*
[203] Haizheng Zhang, Rebecca Parry, et. al, *The Balance of Power in Insolvency Proceedings: The Case of China* 8 (1) INT. CORP. RESCUE 10, 14 (2011).
[204] *Id.* at 17; Lijie Qi, *The Corporate Reorganization Regime Under China's New Enterprise Bankruptcy Law* 17 INT'L. INSOLV. REV. 13, 13 (2008).
[205] Michael H. Torkin, Solomon J, Noh et. al., *Metavante decision: Dispute under section 2(a)(iii) of ISDA,* THOMAS REUTERS (Sep. 13, 2013), https://uk.practicallaw.thomsonreuters.com/7-500-4990?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1; *see also Belmont supra* note 7, at 33.
[206] Ong, *supra* note 129, at 347.
[207] 11 U.S. Code § 365(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease

parties from suspending their performance obligations solely on account of the bankruptcy filings of their counterparties.[208] This reveals that political economy dictates the law as an instrument for the pursuit of economic policy.

F. Integration of the ISDA/NAFMII via Chinese Courts

Other than the interaction of the EBL with the relevant provisions of the NAFMII, there is consistent recognition of the practice of the ISDA and NAFMII Master Agreement by the Chinese courts when adjudicating the disputes: termination and payment arose out of

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that is conditioned on— (A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under this title; or (C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.
(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—(A) (i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and (ii) such party does not consent to such assumption or assignment; or (B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

[208] Ong, *supra* note 39, at 347.

derivative products based on NAFMII Master Agreement 2009.[209] These cases represent the default rules of contract law as another mechanism responding to the persistent uncertainty in the operative terms of NAFMII and ISDA. In the dispute over early termination of a derivative product offered by Citibank, the Chinese court consistently defers to the international practice of the ISDA and the operational term of the NAFMII being mirrored on the same, such as commercial sense in this sort of complex transaction.[210] The judgment also referred to Article 94 of the Contract Law as the basis of authority and alignment.[211] Although

[209] The Supreme Court released the ninth of the top ten outstanding cases in the national courts for practising the concept of active justice: Bank of Tokyo-Mitsubishi UFJ (China) Co., Ltd. Shanghai Branch v. Shanghai Shengfeng Software Co., Ltd. (三菱东京日联银行（中国）有限公司上海分行诉上海晟峰软件有限公司金融衍生品种交易纠纷案) (2010) Pumin Six (Shang) Chu Zi No. 4077 Shanghai Pudong New Area People's Court; Citibank (China) Co., Ltd. v. Yingda Life Appliances (Zhongshan) Co., Ltd. Contract Dispute Case - Judicial Review Path for Liability for Breach of Exchange Rate Swap Transactions 花旗银行（中国）有限公司诉樱达生活电器（中山）有限公司合同纠纷案——汇率掉期交易违约责任的司法审查路径 (NAFMII) (2014) Pumin Six (Shang) Chu Zi No. S3800 Shanghai Municipal People's Court of Pudong New Area (Citibank China 2014); The Shanghai High Court released one of the typical cases of foreign-related financial disputes in Shanghai courts, and the Shanghai Financial Court released the third of eight typical cases of foreign-related, Hong Kong, Macao and Taiwan-related financial disputes: Standard Chartered Bank (China) Co., Ltd. v. Zhangjiakou United Petrochemical Co., Ltd. Financial derivatives transactions Dispute Case - Breach of Contract and Liability for Breach of Contract in Crude Oil Swap Transactions Should Be Determined According to International Practices (ISDA) (2020) Hu 74 Min Zhong No. 533 Shanghai Financial Court; Industrial and Commercial Bank of China (Asia) Co., Ltd., Kangzheng (Tianjin) Financial Leasing Co., Ltd. Financial Loan Contract Dispute Civil Judgment of Second Instance (ISDA) (2020) (中国工商银行（亚洲）有限公司, 康正（天津）融资租赁有限责任公司金融借款合同纠纷二审民事判决书) Supreme Court Minzhong No. 947 *Supreme People's Court of the People's Republic of China; Wu Zhengjun, Shenzhen Branch of DBS Bank (China) Co., Ltd.* (伍正军、星展银行（中国）有限公司深圳分行保证合同纠纷二审民事判决书) (NAFMII) (2019 Shenzhen Branch Civil Judgment of Second Instance on Guarantee Contract Dispute (NAFMII) (2019) Yue 03 Min Zhong No. 29568 Shenzhen Intermediate People's Court of Guangdong Province.

[210] Citibank (China) Co., Ltd. v. Yingda Life Electric (Zhongshan) Co., Ltd., Shanghai Pudong New Area People's Ct. No. S3800, Dec. 15, 2014 (China).

[211] *Id.* (referring to Contract Law 199, art. 94. " The parties to a contract may terminate the contract under any of the following circumstances: (1) it is rendered impossible to achieve the purpose of the contract due to an event of force majure; (2) prior to the expiration of the period of performance, the other party expressly states, or indicates through its conduct, that it will not perform its main obligation;

none of the cases involves an insolvent counterparty, all judgments consider principle on termination under the Chinese contract law is consistent with the standard terms in the ISDA/NAFMII Master Agreement.[212]

This process demonstrates how foreign judicial interpretations may be integrated as part of the legal transplant that occurred via the medium of the SFC, the ISDA Master Agreement, where Chinese policymakers, judges, or practitioners could be guided to pursue either the U.S. economic policy approach or the UK policy approach on party autonomy. Whichever method is adopted, the SFC, as the source of legal transplant, has an evolving role to play in the process of integration through foreign judicial interpretations of the ISDA Master Agreement. This evokes the notion of the learning benefits that SFC can entail, such as drafting efficiency, legal certainties on the terms, and allowing participants to be familiar with them. While these terms were designed to provide legal certainty or precisely on cost efficiency, the divergences in response to these terms lead to uncertainty. In this respect, it is not truly a legal uncertainty. It is possible to see how the judicial interpretations by various jurisdictions of the ISDA Master Agreement become useful responses with which to analyse the process of integration. The learning benefits are not mutually exclusive to the network benefit, which is associated with the derivative products or ancillary products that the network offers. In this sense, it covers the judicial interpretations arising from the use of common terms, as well as other aspects of the law with which such an SFC is associated. This can be illustrated by the market response of using the clearing and settlement system to resolve the 'stalemate' situation that, previously, might have been caused by the terms of the ISDA Master Agreement.[213]

A global political consensus after the Pittsburgh Summit (2009) was to enact a pan-regulation to clear the OTC derivatives,[214] which

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(3) the other party delayed performance of its main obligation after such performance has been demand, and fails to perform within a reasonable period; (4) the other party delays performance of its obligations, or breaches the contract in some other manner, rendering it impossible to achieve the purpose of the contract; (5) other circumstance provided by law").

[212] *Id.*

[213] Mark Hsiao, *Finality Orders in the Clearing System and OTC Derivatives Regulation in Hong Kong*, UNIV. OF LEICESTER SCH. OF L. (Rsch. Paper No-14-08) (2013).

[214] MARK HSIAO, REGULATING OTC DERIVATIVES: THE CCP'S ROLE AND THE EMIR IN RESEARCH HANDBOOK ON SHADOW BANKING: LEGAL AND REGULATORY ASPECTS 205, 210 (Iris Chiue and Ian MacNiel eds, 2018); DAVID MURPHY, OTC

predominately traded with the use of the ISDA Master Agreement. The clearing and settlement process is undertaken by the central counterparty (CCP) system, which is part of the payment system that adopts the finality order concept. The finality order means that any payment order being granted by the system shall, regardless of an insolvency order by the court or relevant authority, be processed and settled.[215] This helped to resolve the contractual stalemate in the Lehman Brothers case. Both CCP and Payment Finality practices have long been adopted by China.[216] A recent joint arrangement with Hong Kong on a Swap Connect to be initiated in 2023 provides another example of further legal integration of Chinese systems with Western practices.[217] This Swap Connect will allow investors from China to access foreign currency derivatives while at the same time allowing foreign investors to access Chinese RMB currency derivatives via Hong Kong as the hub.[218]

IV. CONCLUSION

The modern Chinese financial market has departed from its mixture of socialist rules and traditional Prussian codified law with a substantial number of borrowed laws and rules, achieved through accession to international organisations or with the assistance of market practitioners. Watson's observable idea of legal transplant to the recipient's jurisdiction to enhance their legal system with comparative jurisprudence 'like with like' offers useful insights into the legal development in China.[219] Some borrowed laws have a greater integration, while some have less, and some have none.

DERIVATIVES: BILATERAL TRADING AND CENTRAL CLEARING: AN INTRODUCTION TO REGULATING POLICY, MARKET IMPACT, AND SYSTEM RISK 281 (2013).

[215] MARK HSIAO, REGULATING OTC DERIVATIVES: THE CCP'S ROLE AND THE EMIR IN RESEARCH HANDBOOK ON SHADOW BANKING: LEGAL AND REGULATORY ASPECTS 205, 210 (Iris Chiue and Ian MacNiel eds., 2018).

[216] Payment, clearing and settlement systems in the CPSS countries, BANK FOR INT'L SETTLEMENTS, Vol. 2, Report No. 105 (2012), https://www.bis.org/cpmi/publ/d105.htm; *see also* Progress Report on the CCP Workplan, BANK FOR INT'L SETTLEMENTS (Sept. 2015), https://www.bis.org/cpmi/publ/d134a.pdf.

[217] Press Release, *HKMA Welcomes Swap Connect, Hong Kong Monetary Authority* (Jul. 4, 2022), https://www.hkma.gov.hk/eng/news-and-media/press-releases/2022/07/20220704-4/; *see* also Press Release, HKSAR Government welcomes establishment of Swap Connect, The Government of the Hong Kong Special Administrative Region, (Jul. 4, 2022) https://www.info.gov.hk/gia/general/202207/04/P2022070300806.htm.

[218] *See* About Swap Connect, HONG KONG EXCHANGES AND CLEARING LIMITED https://www.hkex.com.hk/Services/Clearing/OTC-Clear/Special-Topics/About-Swap-Connect?sc_lang=en (last visited Jan. 4, 2024).

[219] Watson, *supra* note 13, at 3.

There is little 'irritation' in financial derivatives markets in the integration process. From China's first adaptation of the capital adequacy ratio from Basel Committee's recommendation,[220] which was the first step towards the legal framework establishing the supervisory and regulatory foundation on derivatives trading, to the formation of the NAFMII, all of the processes involved borrowed laws to facilitate integration with international practices.[221] The comparative jurisprudence "represents the effort to define the common trunk on which represent national doctrines of law are destined to graft themselves as a result of both the development of the study of law as a social science and of the awakening of an international legal conscienceless."[222] The hallmark of comparative law is the study of the relationship between one legal system and its rules with another.[223] It follows that where international standardized terms serve as the medium for bridging a legal relationship where no previous relationship exists, the foreign judicial interpretation of the legal issues arising from the common standard terms also offers an option for recipient jurisdictions to consider. The international standardized terms thus became important in establishing the nature of a possible relationship, whereby Western legal terms or concepts are transported into the Chinese legal system as an integration or internationalization of national systems. Sociological studies on the law explored the mechanism of Watson's legal transplant that observes some form of self-assessment exercise, first on the needs or weaknesses in the legal system, which involves self-identification of recipient jurisdiction as to the necessity.[224] This process could be an exercise from top to bottom as the political economy where governmental policy dictates. In this instance, the state needs to nurture the process of national legal change by encouraging the domestic business community to participate in SFCs as well as adopting the terms verbatim.

Standardization is a common term in daily life. The standard price of a traveling ticket, standardized terms, and standards of practice

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[220] *See* Progress Report on Adoption of the Basel Regulatory Framework, BANK FOR INT'L SETTLEMENTS at 14-16 (Oct. 2021), https://www.bis.org/bcbs/publ/d525.pdf.
[221] *See* Hsiao, *supra* note 21.
[222] Watson, *supra* note 13, at 3.
[223] *Id.* at 6.
[224] *See* GUNTHER TEUBNER, LAW AS AN AUTOPOIETIC SYSTEM (Anne Bankowska & Ruth Adler trans., Zenon Bankowski ed., Blackwell Publishers 1993) (Where professor Teubner developed the idea of law as a kind of self-regulating, which he referred to as an organic system of 'autopoietic' system); *see also* NIKLAS LUHMAN, A SOCIOLOGICAL THEORY OF LAW (Elizabeth King-Utz & Martin Albrow trans., Martin Albrow ed., 2nd ed. 2014).

are examples of standardizing norms, goals, objectives, or rules that a sector of community or community at large reasonably accepts.[225] A standard could even indicate some fairness in terms of value for money. A standard form of contract offers an effective avenue for self-help and transparency regarding the operation of the terms. The efficiency of an SFC lies in the underlying national contract law theories. The change or affirmation of theories underpinning an SFC in a domestic context occurs in the judicial reconstruction in relevant social contexts. Social value plays a key role in shaping national legal change. However, the influence of this can extend beyond the boundaries of national jurisdiction. The simple characteristics of national contract law, once accepted in the wider international community, extend beyond national boundaries. The privately negotiated terms that become an SFC assert the influence of one national contract law over another when global players adopt the SFC by participation such that it becomes the 'global law without a state'.[226]

However, this is a qualified statement. The international SFC represents the collective efforts of a few national courts as the testing ground in the reinforcement of the terms.[227] When an emerging economic state adopts the international SFC, the recipient state effectively engages in the process of legal change in its national law. Although borrowing law from one national system is the most effective way to achieve a legal change, participation in the international SFC also enables legal transplants to occur. This paper illustrates that legal transplants are observable in China's legal system at two different levels when the Chinese financial community adopts, with the support of the state, the International Swap and Derivatives Association Master Agreement into its Chinese version. At the first level are Chinese financial institutions that enter into financial agreements with foreign institutions under the ISDA Master Agreement, which has affected and caused the Chinese judicial practice on jurisdictional clauses to be in alignment with international norms. Secondly, by adopting the NAFMII[228] Master Agreement, the legal transplant of foreign judicial

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[225] COLIN SCOTT, *Standard-Setting in Regulatory Regimes in* THE OXFORD HANDBOOK OF REG. 104 (R Baldwin, et. al. eds., 2010).
[226] GUNTHER TEUBNER, *Global Bukowina: Legal Pluralism in the World Society*, *in* GLOBAL LAW WITHOUT A STATE 3 (Gunther Teubner ed. 1997).
[227] *See* Braithwaite, *supra* note 14.
[228] About NAFMII, NAT'L ASS'N OF FIN. MARKET INSTITUTIONAL INVESTS., https://www.nafmii.org.cn/englishnew/aboutus/aboutnafmii/ (last visited Jan. 2, 2024).

interpretations offers enduring optional responses that are consistently reflected in Chinese national laws.

WHY INTERNATIONAL CRIMINAL JUSTICE ISN'T: THE ABJECT FAILURE OF THE POST-NUREMBERG SYSTEM TO HOLD THE MOST POWERFUL ACCOUNTABLE

Samuel I. Horowitz[*]

> The wrongs which we seek to condemn have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. . . . The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. . . .[T]he law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment. We are able to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law. This trial represents mankind's desperate effort to apply the discipline of the law to statesmen who have used their powers of state to attack the foundations of the world's peace and to commit aggressions against the rights of their neighbors. . . . Civilization asks whether law is so laggard as to be utterly helpless to deal with crimes of this magnitude by criminals of this order of importance. It does not expect that you can make war impossible. It does expect that your juridical action will put the forces of international law, its precepts, its prohibitions and, most of all, its sanctions, on the side of peace, so that men and women of good will, in all countries, may have "leave to live by no man's leave, underneath the law."[1]

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[1] Trial of Major War Criminals, Nuremberg (Nov. 21, 1945) (opening statement of U.S. Chief Prosecutor Justice Robert Jackson).

I. INTRODUCTION

This paper demonstrates—through historical examples—that while international criminal law clearly exists as a legal regime capable of application against any individual responsible for the most serious offenses, it is not applied in accordance with the rule of law.[2] This works to the detriment of international criminal law by destroying the legitimacy it may otherwise enjoy and, most importantly, deprives millions of victims of violations of international criminal law of justice.

The background section of this paper provides a description of the relevant aspects of the concept of rule of law. It also provides some of the most fundamental norms of international criminal law established or given legal effect after World War II (WWII), as demonstrated in documents such as the United Nations (UN) Charter, the Charters of the International Military Tribunals in Nuremberg and Tokyo, and the Geneva Conventions of 1949. The following section analyzes historical examples of breaches of these fundamental norms by the victors of WWII. Utilizing insight provided by the historical examples, this paper concludes that despite the musings of scholars on the geo-political reasons for impunity for these violations, the actual reason is deceptively simple. By creating the post-WWII global legal order, the governments of the five permanent members of the Security Council granted themselves a nearly unlimited ability to avoid accountability for actions taken in violation of the fundamental norms they had established and for which they tried—and frequently put to death—individuals from the countries that lost WWII.[3] While the international criminal justice system still has the potential to provide justice to victims of the most serious violations of international law, as long as the permanent members of the Security Council maintain the power to veto or authorize military force, to delay ICC proceedings,

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[2] *See* Jeff Handmaker, *The Legitimacy Crisis within International Criminal Justice and the Importance of Critical, Reflexive Learning*, *in* THE PEDAGOGY OF ECONOMIC, POLITICAL AND SOCIAL CRISES: DYNAMICS, CONSTRUALS AND LESSONS 189, 200 (Bob Jessop & Karim Knio eds., 2018) ("[T]here is some dispute as to whether a system of international criminal justice really exists, from an institutional and/or doctrinal standpoint. I tend to agree with Sands (2003), who indicates that there is such a system of international criminal justice, particularly following the creation of the International Criminal Court in 2002. Indeed, the international criminal justice system is riddled with practical and legal obstacles, and, as I have already suggested, operates on a highly selective basis. The system also lacks a coherent policy framework.").

[3] *See* ROBERT CRYER, DARRYL ROBINSON & SERGEY VASILIEV, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 118-19 (4th ed. 2019).

remain outside the jurisdiction of the ICC, and to generally oppose accountability for their international crimes, such potential remains just that.

II. BACKGROUND

A. Rule of Law

International criminal law, like the international collective security regime, had and perhaps still has great potential,[4] but suffers from a fatal flaw regarding the rule of law. Rule of law means, in part, that no one is above the law.[5] In the field of international law, this means that no state or its governing officials are immune from the law.[6] The international criminal law system is supposedly based on the rule of law,[7] which, in theory, confers legitimacy upon it. However, just as

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[4] *See* Yves Beigbeder, INTERNATIONAL JUSTICE AGAINST IMPUNITY: PROGRESS AND NEW CHALLENGES 233 (2005) ("The Coalition for the ICC has cautiously and rightly recalled that the Rome Statute and the ICC offer the greatest potential advance in international justice in the 20th century. . . .The term 'potential' refers to whether governments will actually implement the extraordinary new system of international justice envisioned in the Rome Statute. This term also refers to whether the leaders of the ICC will have the wisdom, courage and leadership to create what must be a new kind of international organization for the 21st century. Of course, 'potential' also refers to whether the United States' political and military efforts to undermine the ICC will succeed in sabotaging the Court's aim of justice and deterrence; or whether the US will return to its long-standing support for the rule of law.)

[5] *See* U.N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616 6 (Aug. 23, 2004) (stating that the rule of law "refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards"); Tom Bingham, *The Rule of Law* 8 (2010) ("[A]ll persons and authorities within the state, whether public or private, should be bound by . . . laws publicly made, taking effect (generally) in the future and publicly administered by the courts."); William Neukom, *What is the Rule of Law?* WORLD JUSTICE PROJECT, available at: https://worldjusticeproject.org/about-us/overview/what-rule-law ("The government as well as private actors are accountable under the law.") (last visited May, 6, 2020); *see generally* Robert A. Stein, THE RULE OF LAW IN THE 21ST CENTURY 11–17 (providing an overview of the history and meaning of the rule of law and citing to the quotations in this footnote). "The law must be superior. All persons are subject to the law whatever their station in life." *id.* at 13. "The law must be applied equally to all persons in like circumstances." *Id.*

[6] *See supra* note 5; *supra* text accompanying note 5.

[7] *See* Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, UN CHRON., https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law (last visited May 6, 2020); Catherine Powell,

in the international collective security regime, some states "are more equal than others."[8]

B. Moscow Declaration on Atrocities

The Moscow Declaration on Atrocities was signed by President Franklin D. Roosevelt, Winston Churchill, and Joseph Stalin on November 1, 1943.[9] It established, in no uncertain terms, the intent of the Allied Powers to try and punish Germans guilty of atrocities; with no mention of any potential Allied offenses.[10] The Declaration stated: "[l]et those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty, for most assuredly the three allied Powers will pursue them . . . and will deliver them to their accusers in order that justice may be done."[11] This document intended to lay the foundation for the subsequent international military tribunals in Nuremberg and Tokyo.[12]

C. UN Charter

The UN Charter was signed on June 26, 1945, and went into effect on October 24, 1945.[13] The underlying basis for the Charter was the presumed desire of the states' parties to avoid war.[14] This principle

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Opinion, *International Criminal Court Plays Important Role in Global Rule of Law*, THE HILL (Sept. 11, 2018, 4:00 PM) https://www.cfr.org/article/international-criminal-court-plays-important-role-global-rule-law.

[8] George Orwell, ANIMAL FARM 126 (1945).

[9] *See generally*, Declaration of German Atrocities, Jan. 1, 1943 [hereinafter Moscow Declaration]; *The Moscow Declaration on Atrocities,* JEWISH VIRTUAL LIBRARY, available at https://www.jewishvirtuallibrary.org/the-moscow-declaration-on-atrocities.

[10] *See id.* (declaring that "those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished . . . .").

[11] *Id.*

[12] *See id.* (clarifying that the Moscow Declaration was made "without prejudice to the case of the major criminals, whose offences have no particular geographical localisation and who will be punished by the joint decision of the Governments of the Allies.").

[13] United Nations, *Charter of the United Nations*, https://www.un.org/en/charter-united-nations/ (last visited May, 6, 2020) ("The Charter of the United Nations was signed on 26 June 1945, in San Francisco, at the conclusion of the United Nations Conference on International Organization, and came into force on 24 October 1945.").

[14] *See* Ronald Kramer et al., *"The Supreme International Crime:" How the U.S. War in Iraq Threatens the Rule of Law*, 32 SOC. JUST.52, 56 (2005) ("At the heart of the U.N. Charter is the prohibition against war."); Boris Kondoch, *Aggression, the*

was given effect through Article 2(4) of the Charter, which states that "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."[15] This prohibition is central to the Charter and is almost universally considered to be a *jus cogens*[16] norm under customary international law.[17] Additionally, Article 2(4) prohibits the "narrower concept of . . . aggression."[18]

There are only two exceptions to the prohibition in Article 2(4).[19] These exceptions include a state's "inherent right to individual or collective self-defense" under Article 51[20] or UN Security Council authorization under Chapter VII of the Charter.[21] Self-defense is

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Prohibition of the Use of Force, and Northeast Asia, THE LEGALITY AND LEGITIMACY OF THE USE OF FORCE IN NORTHEAST ASIA 5, 25–26 (Boris Kondoch & Brendan Howe eds.) (2013) ("In order to prevent aggression, breaches of or threats to peace, the United Nations established a new system of collective security . . . . The collective security system of the UN Charter rests on four main pillars: (1) the prohibition against the threat or use force between states (see Art. 2(4)); (2) the legal obligation of member states to settle their disputes by peaceful means (see Art. 2(3)) . . . . [T]he United Nations undertakes to prevent aggression by eliminating the causes of conflict, by facilitating the peaceful settlement of disputes, and by promoting disarmament measures."); *see also* Peter Daniel DiPaola, *A Noble Sacrifice? Jus ad Bellum and the International Community's Gamble in Chechnya*, 4 INDIANA J. GLOB. LEGAL STUD. 435, 444 (1997) ("According to international legal scholar Louis Henkin, '[w]ar inflicted the greatest injustice, the most serious violations of human rights, and the most violence to self-determination and to economic and social development.'")

[15] U.N. Charter art. 2, ¶ 4.

[16] Antonio Cassese, *A Plea for a Global Community Grounded in the Core of Human Rights in Realizing Utopia: The Future of International Law*, REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW 137, 139 (2012) (defining *Jus cogens* has been defined as "a core of fundamental values which must be common to all nations, states, and individuals and may not, therefore, be derogated from" and "a set of peremptory norms that may not be derogated from.").

[17] *See* Kondoch, *supra* note 14, at 26.

[18] *Id.*

[19] *See* U.N. Charter, *supra* note 15.

[20] U.N. Charter, *supra* note 15 at art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.")

[21] U.N. Charter, *supra* note 15 at arts. 39–42 ("The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall . . . decide what measures shall be taken in accordance with Articles 41 and 42,

available as a justification for the use of force only when: (1) an armed attack is launched, or is immediately threatened; (2) there is an urgent necessity for defensive action against that attack; (3) there is no practicable alternative to action in self-defense; and (4) the action taken by way of self-defense is limited to what is necessary to stop or prevent the infringement.[22] The Security Council is one of the six principal organs created by the UN Charter.[23] It is made up of fifteen members: five permanent (P-5) and ten non-permanent elected by the General Assembly for two-year non-renewable terms.[24] The P-5 includes the People's Republic of China, France, the Russian Federation, the United Kingdom, and the United States.[25] The Security Council is the UN organ with the "primary responsibility for the maintenance of international peace and security."[26] It "acts on behalf of the entire UN" and can make decisions that bind all members of the UN.[27] In order to pass, Security Council decisions require "the affirmative vote of nine members of the Council and no negative votes from permanent members."[28] The requirement of no negative votes from the P-5 is referred to as the veto.[29] The veto can "stifle Council action" and was the P-5's "way of ensuring that no decision related to international peace and security would be taken without their collective support, or at least their acquiescence."[30]

The Security Council's ability to authorize the use of force is based on "the concept that the Security Council has the primary responsibility for the maintenance of international peace and security."[31] In order to authorize the use of force, the Security Council

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to maintain or restore international peace and security."); *Id.* at art. 39 ("Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."); *Id.*at art. 42.

[22] Ronald Kramer et al., *"The Supreme International Crime:" How the U.S. War in Iraq Threatens the Rule of Law*, 32 SOC. JUST.52, 58-59 (2005).

[23] SECURITY COUNCIL REPORT, THE UN SECURITY COUNCIL HANDBOOK: A USER'S GUIDE TO PRACTICE AND PROCEDURE 1 (2019).

[24] *Id.* (citing U.N. Charter art. 23).

[25] U.N. Charter, *supra* note 15 at art. 23, ¶ 1.

[26] U.N. Charter, *supra* note 15 at art. 24; SECURITY COUNCIL REPORT, *supra* note 23, at 3.

[27] SECURITY COUNCIL REPORT, *supra* note 23, at 5 (citing U.N. Charter arts. 24–25).

[28] *Id.* at 20 (citing U.N. Charter art. 27, ¶ 3).

[29] *Id.* at 20–21 (citing U.N. Charter art. 27, ¶ 3).

[30] *Id.* at 21.

[31] Kondoch, *supra* note 14, at 25 (citing U.N. Charter art. 24).

must first determine "the existence of any threat to the peace, breach of the peace, or act of aggression,"[32] and that it "consider[s] that measures provided for in Article 41 would be inadequate or have proved to be inadequate . . . ."[33] Because the Security Council is the only body that can authorize the use of force outside of self-defense and because any member of the P-5 can veto a resolution authorizing or condemning the use of force, the members of the P-5 are effectively unconstrained by the UN Charter's general prohibition on the use of force. This has led to the P-5's ability to flout the most fundamental aspects of the post-WWII international legal order.

D. The Potsdam Declaration

Adopted by China, Great Britain, and the United States on July 26, 1945, the Potsdam Declaration called for Japan's unconditional surrender in WWII.[34] The Allied powers declared that they, "insist that a new order of peace, security and justice will be impossible until irresponsible militarism is driven from the world[],"[35] and that "stern justice shall be meted out to all war criminals, including those who have visited cruelties upon . . . prisoners."[36] The Potsdam Declaration therefore represents one of the earliest examples of the hypocrisy and victor's justice of three of the members of the P-5.[37]

[32] U.N. Charter, *supra* note 15 at art. 39.
[33] *Id.* art. 42.
[34] Proclamation Defining Terms for Japanese Surrender, China-Gr. Brit.-U.S., July 26, 1945 [hereinafter Potsdam Declaration]; Potsdam Declaration, ENCYCLOPEDIA BRITANNICA (Oct. 25, 2023, 9:48 PM), https://www.britannica.com/topic/Potsdam-Declaration.
[35] Potsdam Declaration, *supra* note 34 at ¶ 6.
[36] *Id.* at ¶ 10.
[37] *See* discussion *infra* pp. 11–33 at ¶ pp. II.

E. Nuremberg and Tokyo Charters

The Nuremberg and Tokyo Charters were selective[38]—and therefore problematic from a rule of law perspective[39]—at the very outset. The crimes within the jurisdiction of the Tribunals included crimes against peace, war crimes, and crimes against humanity.[40] The Nuremberg Charter defined crimes against peace as "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing."[41] The Tokyo Charter's definition was nearly identical but added "waging of a declared or undeclared war of aggression, or a war in violation of international law" to the list of offenses.[42]

Both Charters defined war crimes as "violations of the laws or customs of war,"[43] but the Nuremberg Charter also provided a non-exhaustive list of conduct amounting to war crimes.[44] This list included:

> murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war [POW] or persons on the seas, killing of hostages, plunder of public or private property, wanton

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[38] Charter of the International Military Tribunal arts. 1, 6, Aug. 8, 1945, 82 U.N.T.S. 251 [hereinafter Nuremberg Charter] (stating that the purpose of the Tribunal was for "the just and prompt trial and punishment of the major war criminal of the European Axis" and that "[t]he Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes."); Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589 [hereinafter Tokyo Charter] (though not referring specifically and only to the Axis war criminals like the Nuremberg Charter, it was clear that only Japanese individuals would be tried).

[39] *See supra* notes 2, 4, 5 and accompanying text. *See also* CRYER ET AL., *supra* note 3 ("International criminal justice, and international tribunals, reflect inequalities in the selection of cases. Selective justice is a problem from the point of view of the rule of law, and it can undermine many of the justifications of punishment.").

[40] Nuremberg Charter art. 6, Aug. 8, 1945, 82 U.N.T.S. 251; Tokyo Charter art. 5, Jan. 19, 1946, T.I.A.S. No. 1589.

[41] Nuremberg Charter art. 6(a), Aug. 8, 1945, 82 U.N.T.S. 251.

[42] Tokyo Charter art. 5(a), Jan. 19, 1946, T.I.A.S. No. 1589.

[43] Nuremberg Charter, *supra* note 41, at art. 6(b); Tokyo Charter *supra* note 42, at art. 5(b).

[44] Nuremberg Charter, *supra* note 41, at art. 6(b).

> destruction of cities, towns or villages, or devastation not justified by military necessity.[45]

The other offense listed in both Charters – crimes against humanity – included:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.[46]

The only difference between the Charters was the exclusion of religious persecution in the Tokyo Charter.[47] Importantly, the Charters also removed immunity for heads of state and the defense of following orders.[48] Though the Charters set the stage for the prosecution of heads of state for the crimes identified in them, they failed to provide accountability for the same or similar acts committed by the Allied Powers. The Nuremberg and Tokyo Charters also paved the way for future UN resolutions. Adopted on December 11, 1946, General Assembly Resolution 95(I) represented a democratic affirmation by the current UN members regarding the principles of international law in the Nuremberg and Tokyo Charters.[49]

F. Geneva Conventions of 1949

The Geneva Conventions were signed on August 12, 1949.[50] The Geneva Conventions were drafted and adopted after WWII to

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[45] *Id.*
[46] Nuremberg Charter, art. 6(c). Aug. 8, 1945, 82 U.N.T.S. 251.
[47] *See* Tokyo Charter, *supra* note 42, at art. 5(c).
[48] Nuremberg Charter, arts. 7, 8, Aug. 8, 1945, 82 U.N.T.S. 251; Tokyo Charter, art. 6, Jan. 19, 1946, T.I.A.S. No. 1589.
[49] *See generally,* G.A. Res. 95 (I), (Dec. 11, 1946).
[50] *See generally,* Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

"limit[] the barbarity of war[]" and constitute "the core of international humanitarian law . . . [which] regulates the conduct of armed conflict and seeks to limit its effect."[51] In the Preliminary Remarks of the Geneva Conventions, the drafters presciently stated that the articles pertaining to penal sanctions "will doubtless be an important contribution towards defining 'war crimes' in International Law."[52] In the words of the International Committee of the Red Cross, "[t]he Conventions . . . call for measures to be taken to prevent or put an end to all breaches. They contain stringent rules to deal with what are known as 'grave breaches.' Those responsible for grave breaches must be sought, tried or extradited, whatever nationality they may hold."[53] Additionally, the signatories to the Geneva Conventions, which the Conventions labeled as the High Contracting Parties, are prohibited from "absolv[ing] [themselves] or any other High Contracting Party of any liability incurred by [themselves] or by another High Contracting Party in respect of [grave] breaches . . . ."[54] The language of the "grave breaches articles" closely resemble the list of war crimes provided in the Nuremberg Charter,[55] showing the linear progression and close relationship between the crimes included in the Charter and then agreed to by all the Geneva Conventions signatories.

Grave breaches of Geneva Conventions I and II involve "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."[56] While Geneva Conventions III and IV were aimed at protecting prisoners of war and civilians, respectively, the language of their grave breaches articles differs slightly. Geneva Convention III

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[51] *The Geneva Conventions of 1949 and Their Additional Protocols*, INT'L COMM. OF THE RED CROSS (Jan. 1, 2014), https://www.icrc.org/en/document/geneva-conventions-1949-additional-protocol.

[52] Geneva Conventions of 1949, INT'L COMM. OF THE RED CROS 19, 22, (1955).

[53] *The Geneva Conventions of 1949 and Their Additional Protocols*, *supra* note 50.

[54] Geneva Convention I, art. 51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II, art. 52, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85; Geneva Convention III art. 131, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV art. 148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[55] *See* Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II art. 51 Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85; Geneva Convention III art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention IV art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Nuremberg Charter, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 251.

[56] Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention II, art. 51, Aug. 12, 1949, 6 U.S.T. 3216, 75 U.N.T.S. 85.

builds upon the list provided in Geneva Conventions I and II by including the language, "compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of air and regular trial prescribed in th[e] Convention."[57] Additionally, Geneva Convention IV adds "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention . . . " to the breaches already listed in Geneva Conventions I and II.[58]

Under the Geneva Conventions, to which all the High Contracting Parties—including the P-5—agreed, there could be no immunity for grave breaches. Despite this agreement, the following section provides numerous examples of potential grave breaches committed by the P-5 for which they have not faced accountability.

III. VIOLATIONS COMMITTED BY THE P-5

For all the ambitions surrounding justice and accountability following WWII, it was immediately apparent that the governments of the Allied powers intended to ignore any possible atrocities they may have committed during the war, and grant immunity to perpetrators of atrocities when they determined it to be in their interests. The defendants at Nuremberg were precluded from invoking *tu quoque*[59] arguments surrounding Allied war crimes.[60] However, some Allied offenses were apparently taken into account in the issuing of indictments, which resulted in no charges being brought against defendants for the Blitz over the UK and some German conduct in the

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[57] Geneva Convention III art. 130, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.
[58] Geneva Convention IV art. 147, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.
[59] Michael P. Scharf & Ahran Kang, *Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 CORNELL INT'L L.J. 911, 935 (2005) (discussing *tu quoque* as a legal argument, "rebuts the charges of the State by claiming that the State cannot prosecute him or her since the State behaved in a similar culpable manner as the accused" and meaning "you too" in Latin). *See also* Tu quoque, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/tu%20quoque (last visited Sept. 18, 2023) (defining tu quoque as "a retort charging an adversary with being or doing what the adversary criticizes in others.")
[60] CRYER ET AL., *supra* note 3, at 119; Heller, K.J.,*The Nuremberg Military Tribunals and the origins of International Criminal Law*, LEIDEN UNIVERSITY (June 16, 2011), https://hdl.handle.net/1887/17757.

Soviet Union, Poland, and Germany.[61] This trend continued throughout the second half of the twentieth century and continues into the present day.[62] The following are some of the most well-known of these violations for which no state or individual was held sufficiently accountable. These actions deprived countless victims of justice and destroyed the legitimacy that the post-Nuremberg international criminal system might have otherwise been entitled.

A. The United States

The U.S. government has perhaps been, though neck-and-neck with the former Soviet Union and its successor—the Russian Federation—the most frequent and flagrant violator of the post-WWII legal order, which it was instrumental in establishing.[63] This section analyzes how the United States has been involved in numerous major military conflicts since WWII; the legality of some of which have been, at best, legally suspect and, at worst, clearly constituted unlawful uses of force or acts of aggression. On top of the *jus ad bellum*[64] issues, U.S. conduct during the course of some of these conflicts has violated *jus in bello*[65] principles. Militating against total impunity for war crimes is the haphazard, infrequent, and ultimately unsatisfactory prosecution of individuals accused of war crimes.[66] Aside from conflict-related

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[61] CRYER ET AL., *supra* note 3, at 120 (stating that these charges were not brought because of the difficulty of avoiding *tu quoque* arguments on the devastation wrought by British bombing in Germany and Soviet conduct in the Soviet Union, Poland, and Germany, respectively); *The Influence of the Nuremberg Trial on International Criminal Law,* ROBERT JACKSON CENTER, https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law/ (last visited Oct. 26, 2023). .

[62] *See discussion* CRYER ET AL., *supra* note 3, at 43-44.

[63] *See* Kondoch, *supra* note 14, at 25-7; *See also* DiPaola*, supra* note 14, at 435, 437, 444, 461, 464, 469 (discussing Russia's violations of customary international law in the Chechen conflict).

[64] *What are jus ad bellum and jus in bello?*, INT'L COMM. OF THE RED CROSS , *What are jus ad bellum and jus in bello?* (Jan. 22, 2015), https://www.icrc.org/en/document/what-are-jus-ad-bellum-and-jus-bello-0%EF%BB%BF (defining *Jus ad bellum* as referring "to the conditions under which States may resort to war or to the use of armed force in general").

[65] *Id.* (defining "*Jus in bello* as regulating "the conduct of parties engaged in an armed conflict.").

[66] *See* CRYER ET AL., *supra* note 3, at 55 (citing the trial of Lieutenant William Calley, a perpetrator of the My Lai massacre in Vietnam, as a frequently invoked example of leniency in a State's war crimes prosecution against its own nationals); *see also*, Leo Shane III, Meghann Myers & Carl Prine, *Trump Grants Clemency to Troops in Three Controversial War Crimes Cases*, MIL. TIMES (Nov. 15, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/11/16/trump-grants-clemency-to-troops-in-three-controversial-war-crimes-cases/ (identifying three

offenses, the United States has engaged in other conduct for which the defeated Axis powers were or could have been punished, including human experimentation,[67] segregation,[68] and torture.[69]

i. Firebombing of Tokyo and Atomic Bombings of Hiroshima and Nagasaki

In March of 1945, the United States engaged in a firebombing campaign on Tokyo, the capital of Japan.[70] Some consider this attack to have been "more destructive than the bombings of Dresden, Hiroshima, or Nagasaki."[71] The officer in charge of the American air campaign in Japan was encouraged by his commanding officer "to adopt incendiary bombing against Japan's cities and abandon the policy of precision bombing."[72] This Tokyo firebombing destroyed nearly 16 square miles of Tokyo, killed at least 80,000 people, and displaced 1 million more.[73]

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cases of individual U.S. military members charged with war crimes for conduct in Iraq or Afghanistan who were subsequently pardoned or had their rank restored by President Trump). Peter Ross Range, *Only One Man Was Found Guilty for His Role in the My Lai Massacre. This Is What It Was Like to Cover His Trial*, TIME (Mar. 16, 2018, 11:00 AM), https://time.com/5202268/calley-trial-my-lai-massacre/ (describes William Calley as the only military member involved in the My Lai massacre who was found guilty and was sentenced to life in prison but, President Nixon commuted his sentence to house arrest and he only served about three years).

[67] *See generally*, Mike Stobbe, *Ugly Past of U.S. Human Experiments Uncovered*, NBC NEWS (last updated Feb. 27, 2011, 6:14 PM), http://www.nbcnews.com/id/41811750/ns/health-health_care/t/ugly-past-us-human-experiments-uncovered/#.XrWczKhKhhE (citing an Associated Press review of medical documents that revealed more than 40 studies involving human experimentation in the United States, most of which occurred between the 1940s and 1960s, that were reminiscent of Nazi experiments on Jews during WWII).

[68] *See generally*, Katie Nodjimbadem, *The Racial Segregation of American Cities Was Anything but Accidental*, SMITHSONIAN MAG. (May 30, 2017), https://www.smithsonianmag.com/history/how-federal-government-intentionally-racially-segregated-american-cities-180963494/ (identifying U.S. government policies that further entrenched segregation even after it was declared unconstitutional).

[69] *See generally*, Anthony Lewis, *Introduction* to KAREN J. GREENBERG & JOSHUA L. DRATEL,, THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) (compiling and examining U.S. government legal memorandum created to justify the use of torture throughout the War on Terror).

[70] R.G. Grant, Bombing of Tokyo, ENCYCLOPEDIA BRITANNICA (Sep. 17, 2023), https://www.britannica.com/event/Bombing-of-Tokyo.

[71] *Id.*

[72] *Id.*

[73] *Id.*

Claiming necessity to end the war, the United States dropped two atomic bombs on the Japanese cities of Hiroshima and Nagasaki.[74] By their very nature and use on civilian-populated cities, these weapons were indiscriminate. The bomb dropped on Hiroshima destroyed 90 percent of the city and immediately killed 80,000 people, with tens of thousands of delayed deaths from radiation poisoning.[75] The bomb dropped on Nagasaki three days later killed approximately 40,000 people.[76] Nagasaki was not the original target for the second atomic bomb, but was selected when there was too much cloud cover over the primary target.[77] The necessity of the bombings has been subject to debate because it has been argued that alternatives existed to dropping the bombs, including redefining what the Allied powers meant by "unconditional surrender" to preserve Japan's monarchy, and Russia's imminent entry into the war.[78] Those defending the bombings argued that the decision was based on political considerations and the United States' desire to emerge from WWII as the only global superpower over the Soviets.[79]

Under the language of the war crimes provision of the Nuremberg and Tokyo Charters, these acts almost certainly constituted "wanton destruction of cities . . . or devastation not justified by military necessity."[80] However, no investigation into the legality of these acts or prosecutions ever occurred; not least in part because "the Allied powers . . . eliminated strategic bombings from the category of war crimes[] [s]o that [] atomic bombing would not be addressed in war trials."[81] By drafting the Tokyo Charter to exclude strategic bombings so that the firebombing of Tokyo and the atomic bombings of Hiroshima and Nagasaki, the United States evaded accountability for the destruction of these cities.

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[74] *Bombing of Hiroshima and Nagasaki*, HIST. (Nov. 18, 2009), https://www.history.com/topics/world-war-ii/bombing-of-hiroshima-and-nagasaki
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *See* Hibiki Yamaguchi, Fumihiko Yoshidaa & Radomir Compel, *Can the Atomic Bombings on Japan Be Justified? A Conversation with Dr. Tsuyoshi Hasegawa*, 2 J. PEACE & NUCLEAR DISARMAMENT 19, 22–23 (2019).
[79] *See id.* at 23–24.
[80] Nuremberg Charter, art. 5(b), Aug. 8, 1945, 82 U.N.T.S. 251.
[81] Yamaguchia et al., *supra* note 78, at 32.

ii. Operation Paperclip and Immunity for Unit 731

Immediately problematic, from a rule of law perspective, was the U.S. government's decision to provide immunity to former Nazi and Japanese perpetrators of war crimes or crimes against humanity under "Operation Paperclip."[82] Additionally, the non-prosecution of members of Unit 731, the unit of the Japanese army engaged in human experimentation, violated rule of law principles.[83]

Operation Paperclip entailed the recruitment of hundreds of Nazi scientists by the United States—the most famous of whom was Wernher von Braun—and the whitewashing of their war criminal pasts.[84] Von Braun developed the V-2 rocket that was used by the Nazis to devastating effect in Great Britain, and he had knowledge of what was occurring in concentration camps.[85] However, neither von Braun nor any of the other Nazi scientists recruited under Operation Paperclip stood trial for their crimes; they were instead rewarded with gainful employment by one of the victorious powers.[86]

Like the Nazi scientists recruited under Operation Paperclip, the United States rewarded members of Japan's Unit 731 with immunity from prosecution and stipends.[87] These "doctors" were guilty of some of the worst atrocities in WWII, including the use of biological and chemical weapons against thousands of civilians and prisoners of war.[88] Yet, instead of standing trial with potential execution, as many other Axis war criminals endured, members of Unit 731 went on to become "Governor of Tokyo, President of the Japan Medical Association[,] and head of the Japan Olympic Committee."[89]

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[82] *See* Danny Lewis, *Why the U.S. Government Brought Nazi Scientists to America after World War II*, SMITHSONIAN MAG. (Nov. 16, 2016) https://www.smithsonianmag.com/smart-news/why-us-government-brought-nazi-scientists-america-after-world-war-ii-180961110/; Laura Schumm, *What Was Operation Paperclip*, HIST. (June 2, 2014), https://www.history.com/news/what-was-operation-paperclip.

[83] See Jing-Bao Nie, *The United States Cover-up of Japanese Wartime Medical Atrocities: Complicity Committed in the National Interest and Two Proposals for Contemporary Action*, 6 AM. J. BIOETHICS 21, 23-4 (2006); Nicholas D. Kristof, *Unmaking Horror—A Special Report; Japan Confronting Gruesome War Atrocity*, NEW YORK TIMES (Mar. 17, 1995).

[84] *See* Lewis, *supra* note 82; *see also* Schumm, *supra* note 82.

[85] Lewis, *supra* note 82.

[86] *See id.; see also* Schumm, *supra* note 82.

[87] Nicholas D. Kristof, *Unmaking Horror—A Special Report; Japan Confronting Gruesome War Atrocity*, NEW YORK TIMES (Mar. 17, 1995).

[88] *Id.*

[89] *Id.*

iii. Korean War

The legality of the entire Korean War is subject to legal debate. Although authorized by the UN Security Council, the Soviet Union abstained from the vote, and the People's Republic of China (PRC) was excluded.[90] As the UN forces advanced into North Korea, the PRC intervened on behalf of North Korea against the UN forces and forced them to retreat.[91]

During the Korean War, there was at least one instance where the United States should have been investigated and possibly tried for war crimes: the massacre at No Gun Ri.[92] The U.S. government engaged in a lackluster investigation of the incident half a century after it occurred, concluding that, "American troops killed an unknown number of refugees near the Korean village of No Gun Ri in the early weeks of the Korean War, but no orders were found directing such attacks."[93] The results of this investigation directly contradict the documentary and testamentary evidence used by the Associated Press (AP) when it first broke news of the killings in September 1999.[94] Since the release of the AP's report, numerous other allegations of indiscriminate targeting of civilians and refugees by U.S. forces in Korea have been raised.[95] Indiscriminate targeting or killing of civilians is a violation of Article 147 of the Geneva Conventions of 12 August 1949 because it constitutes wilful killing of persons protected by the Convention.[96] Because U.S. forces committed the massacre before the jurisdiction of the International Criminal Court began, and is a permanent member of the Security Council that could veto the creation of, or referral to, any international justice mechanism, the acts were excluded from international prosecution, so there will likely never be justice for the victims or their descendants.

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[90] *See* Kondoch, *supra* note 14, at 28–9.
[91] *Id.*, at 29.
[92] *See The Truth about No Gun Ri*, ECONOMIST (Feb. 17, 2000), https://www-economist-com.ezp3.lib.umn.edu/united-states/2000/02/17/the-truth-about-no-gun-ri.
[93] Public Release, William S. Cohen, Department of Defense, News Briefing on No Gun Ri at the Pentagon (Jan. 11, 2005), https://usinfo.org/wf-archive/2001/010112/epf503.htm.
[94] Jeremy Williams, *Kill 'em All': The American Military in Korea*, BBC HIST., http://www.bbc.co.uk/history/worldwars/coldwar/korea_usa_01.shtml (last updated Feb. 17, 2011).
[95] *Id.*
[96] Geneva Convention IV arts. 3–4, 146–147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

iv. Vietnam War

The Vietnam War stands as another—among many—stains on the reputation of the United States. Both the act of engaging in the armed conflict itself (*jus ad bellum*) and instances of U.S. conduct during the war (*jus in bello*) potentially violated international criminal law.[97] In 1966, before the Pentagon Papers were released showing the U.S. government lied about its involvement and conduct in escalating the war,[98] and before the declassified documents in 2005 revealed that the second Gulf of Tonkin incident giving rise to the Gulf of Tonkin Resolution that brought the United States into the war never occurred,[99] international law professor Richard Falk argued that the U.S. government's legal argument for military involvement in Vietnam did not constitute a valid justification under international law.[100] He additionally took note of the failure of the UN to subject the U.S. government's action to legal scrutiny.[101] Even if U.S. involvement were legal, Falk argued that the U.S. military's conduct during the war was disproportionate to the objectives sought.[102] Despite violating the prohibition on the use of force in the UN Charter—and lying to create a justification—and committing violations of *jus in bello* rules like "strategic area bombing against dispersed targets of little military value"[103] among others,[104] it is likely that the U.S. government never faced accountability in the international legal arena because of its position in the P-5.

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[97] *See generally*, TELFORD TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970) (juxtaposing U.S. involvement and conduct in the Vietnam War with that of the Nazis the author tried as Chief Prosecutor at Nuremberg); Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 YALE L.J. 1122, 1138 (1966) (arguing that U.S. involvement and conduct in the Vietnam War runs counter to principles of international law).

[98] *See Pentagon Papers*, HIST. (Aug. 2, 2011), https://www.history.com/topics/vietnam-war/pentagon-papers.

[99] *See* Jesse Greenspan, *The Gulf of Tonkin Incident, 50 Years Ago*, HIST. https://www.history.com/news/the-gulf-of-tonkin-incident-50-years-ago (last updated June 16, 2023).

[100] *See* Falk, *supra* note 93, at 1132–1136.

[101] *Id.* at 1141.

[102] *Id.* at 1144–1146.

[103] *Id.* at 1144.

[104] *See* TAYLOR, *supra* note 97.

v. "Highway of Death"

The Highway of Death is the name given to Highway 80, which connects Kuwait to Iraq, following the U.S. and coalitionbombing of Iraqi forces retreating from Kuwait.[105] In 1991, U.S. planes dropped cluster bombs on the front and rear of the withdrawing Iraqi convoy to prevent the withdrawal and thereafter continued bombing and strafing the stopped vehicles for at least ten hours.[106] The attack killed hundreds, possibly thousands of retreating Iraqi soldiers.[107] Given that attacks, even against otherwise legitimate military targets, must be militarily necessary,[108] the U.S. bombing of the retreated Iraqi forces is highly problematic. There is also the issue of the scope of the use of force authorized by the Security Council in Resolution 678, which was to expel Iraqi forces from Kuwait.[109] Therefore, the United States may have violated the Geneva Conventions' requirement of military necessity, which constitutes a grave breach,[110] and may have also engaged in the use of force without clear legal authority. Because of the United States' membership in the P-5, there was no further investigation or move toward potential accountability for those responsible for ordering and carrying out the attack.

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[105] *See* Steve Coll & William Brannigan, *U.S. Scrambled to Shape View of 'Highway of Death'*, WASH. POST. (Mar. 11, 1991), https://www.washingtonpost.com/archive/politics/1991/03/11/us-scrambled-to-shape-view-of-highway-of-death/05899d9a-f304-441d-8078-59812cdacc5c/; Torie Rose DeGhett, *The Photo No One Would Publish*, ATLANTIC (Aug. 8, 2014), https://www.theatlantic.com/international/archive/2014/08/the-war-photo-no-one-would-publish/375762/; Ian Harvey, *The Highway of Death—First Gulf War*, WAR HIST. ONLINE (Feb. 7, 2016), https://www.warhistoryonline.com/war-articles/the-kuwait-highway-of-death.html.

[106] Coll et al., *supra* note 105; Harvey, *supra* note 105.

[107] *Id.*

[108] *See* Geneva Conventions I art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 (listing "extensive destruction . . . not justified by military necessity" as a grave breach).

[109] *See* Kramer et al., *supra* note 14, at 62 ("Resolution 678 authorized the use of force explicitly and exclusively to compel Iraq to withdraw from Kuwait. This authorization expired once Iraqi forces retreated behind their own border."); Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO. L.J. 173, 183 (2004) ("[A] mantra of the administration of George H.W. Bush was that U.S. forces in March 1991 could not go all the way to Baghdad in part because they lacked UN authorization to do so.").

[110] *See* Geneva Convention I art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31.

vi. Invasion and Occupation of Iraq

The U.S. and coalition invasion of Iraq has resulted in a death toll exceeding 100,000 people.[111] The United States asserted a variety of policy reasons as justifications for its invasion of Iraq, and in the months leading up to the invasion, began developing the theory of preemptive self-defense.[112] However, that was not the legal justification ultimately adopted by the United States. The United States claimed that the invasion was authorized by Security Council 678, which had been adopted in 1990—thirteen years prior and regarding a completely separate incident.[113] This same theory was also adopted by the other nations that joined the U.S. coalition.[114]

One scholar, Sean Murphy, argues that this legal justification is unpersuasive[115] because the U.S. interpretation of Resolution 678 ignores Resolution 686, which laid out eight specific demands, which until met, would cause the authorization to use force to remain in effect.[116] After Iraq claimed to have met these demands, the Security Council passed Resolution 687, formally establishing a cease-fire to definitively end hostilities.[117] Additionally, even if Iraq had not complied with the eight demands in Resolution 686 at the time of the U.S.-led coalition invasion in 2003, the United States did not use this as justification but cited to a purported breach of Resolution 687, which had its own measures for non-compliance.[118] Far short of authorizing the use of force, Resolution 687 provided for economic sanctions and further Security Council action.[119] Murphy lastly argues that even if Resolution 678 could be revived for a serious breach of Resolution 687, such revival would only authorize measures that were necessary and proportionate to address the breach, which would fall short of a full-scale coalition invasion and subsequent overthrow of the Iraqi government.[120] Regardless, the United States invaded Iraq without explicit Security Council authorization when it became apparent that explicit authorization would not be forthcoming.[121]

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[111] Kramer et al., *supra* note 14, at 66.
[112] Murphy, *supra* note 109, at 173–175.
[113] *Id.* at 175–176
[114] *Id.* at 176.
[115] *Id.* at 177, 179.
[116] *Id.* at 189.
[117] *Id.* at 192.
[118] *Id.* at 193–194.
[119] *Id.* at 194, 202–203.
[120] *Id.* at 196–197.
[121] *Id.* at 244, 252; Kramer et al., *supra* note 14, at 61–62.

Neither was the United States clearly acting in legitimate self-defense because Iraq posed no imminent threat to it.[122] The U.S. government's arguments that Iraq had connections to the 9/11 attacks and had weapons of mass destruction as grounds for invoking self-defense both proved to be at best the result of faulty intelligence that should have been subjected to greater scrutiny and at worst deliberately false and misleading.[123] On top of its violation of *jus ad bellum*, the U.S. invasion and occupation resulted in numerous violations of *jus in bello* principles as well.[124] Despite these violations, the U.S. officials responsible for them never faced accountability thanks, at least in large part, to the United States' membership in the P-5.

B. The Soviet Union and the Russian Federation

Like the United States, the Soviet Union and its recognized successor state, the Russian Federation, committed large-scale violations of international law during and after WWII. Most recently and blatantly, Russia invaded and subsequently annexed parts of Ukraine.[125] Thanks to its status as a member of the victorious Allied Powers and subsequent membership in the P-5, Russia has engaged in these violations with virtual impunity.

i. Katyn Massacre

During the Soviet occupation of eastern Poland in WWII, thousands of Polish military officers were imprisoned in Russian concentration camps.[126] At some point in early 1940, Russian forces executed up to 20,000 of these Polish prisoners and buried them in mass graves.[127] Murder of prisoners of war constituted a war crime under the Nuremberg Charter.[128] Though the Russian government in 2010 declared Joseph Stalin and the Soviet government responsible for

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[122] Kramer et al., *supra* note 14, at 53, 58.
[123] *Id.* at 58.
[124] *See id.* at 67–73.
[125] *See* Center for Preventive Action, *War in Ukraine*, COUNCIL ON FOREIGN RELS. (last updated Aug. 15, 2023), https://www.cfr.org/global-conflict-tracker/conflict/conflict-ukraine.
[126] *See Records Relating to the Katyn Forest Massacre at the National Archives*, NAT'L ARCHIVES, https://www.archives.gov/research/foreign-policy/katyn-massacre (last visited May 6, 2020); *Katyn Massacre*, ENCYCLOPÆDIA BRITANNICA (Apr. 28, 2017), https://www.britannica.com/event/Katyn-Massacre.
[127] *See Records Relating to the Katyn Forest Massacre at the National Archives*, *supra* note 126.
[128] Nuremberg Charter, art. 6(b), Aug. 8, 1945, 82 U.N.T.S. 251.

the massacre,[129] and the U.S. government determined that the Soviets were responsible for the deaths,[130] there were no prosecutions. If the Soviet Union were not a member of the Allied Powers during WWII or a member of the P-5 after the creation of the UN, those responsible for the massacre would have stood trial like some of the Nazi and Japanese perpetrators of similar crimes.

ii. Invasion and Occupation of Afghanistan

Despite initial international opposition to the Soviet invasion of Afghanistan in December of 1979—when it became apparent the Soviet occupation was going to be prolonged—the debate shifted from the legality of the invasion and use of force to the legality of the Soviet military's conduct.[131] Soviet military advisers and military aid were sent to Afghanistan throughout the late 1970s and were involved in atrocities committed by Afghan forces.[132] The Soviets, just like the Americans in Vietnam, were heavily subsidizing an unpopular and brutal regime that they claimed to be the legitimate government of Afghanistan.[133] The full-scale Soviet invasion began on December 24, 1979.[134] Following a confusing chain of assassinations and successions, a new President of Afghanistan was declared on December 28, 1979, who called for Soviet military aid.[135] The Soviet Union also engaged in what amounted to annexation of part of Afghanistan and population transfer.[136] Under Professors Reisman and Silk's scholarly legal analysis, the conflict in Afghanistan was an international armed conflict because the consent given to Soviet forces did not come from the Afghan government and was extended after the invasion began.[137] The consequence of this was that the Geneva Conventions were applicable

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[129] *See Records Relating to the Katyn Forest Massacre at the National Archives*, *supra* note 126.
[130] *Id.*
[131] W. Michael Reisman & James Silk, *Which Law Applies to the Afghan Conflict?*, 82 AM. J. INT'L L. 459, 459 (1988).
[132] *Id.* at 469–470.
[133] *See id.* at 469–471.
[134] *Id.* at 472.
[135] *Id.* at 473.
[136] *Id.* at 478–479.
[137] *Id.* 481–482 ("The factual record indicates that the alleged invitation issued to the Soviet Union to enter Afghanistan did not emanate from the Government of Afghanistan at that time. On the contrary, it was issued within the Soviet Union by an Afghan who had no official position in the Government. On the basis of this 'invitation,' Soviet forces invaded Afghanistan, attacked the presidential palace, killed the President, and installed in his place the person who had "invited" them in the first place.").

to the conflict in their entirety as opposed to the more narrow requirements for a non-international armed conflict.[138]

The issue of whether the Soviet Union breached Article 2(4) of the UN Charter and engaged in an act of aggression aside, some the Soviets' conduct during the nine-year war clearly amounted to war crimes.[139] From reports of executions of civilians[140] to the wholesale destruction of villages,[141] numerous violations of the post-Nuremberg principles occurred during the Soviet occupation of Afghanistan, for which there was no justice. The Soviet Union's membership in the P-5 ensured that the international community could not hold it accountable for its acts.

iii. First and Second Invasions of Chechnya

After the fall of the Soviet Union, the Russian Federation continued to engage in conduct that was legally questionable or illegal under international law. The Russian invasions of Chechnya in 1994 and 1999 should both have been subjected to independent investigations regarding their legality, at a minimum. However, the international community essentially ignored any *jus ad bellum* issues with regard to Russia's invasion of Chechnya in 1994 and merely condemned loss of civilian life.[142] In addition to the possible illegality of the 1994 invasion itself, Russia likely violated principles of *jus in bello* by relying on largely indiscriminate air and heavy artillery attacks that resulted in significant civilian casualties.[143] It has been argued that the international community's decision to ignore Russian crimes in Chechnya was based on a desire not to alienate the Russian government and to maintain stability.[144]

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[138] *Id.* at 485.
[139] *See* Vincent J. Schodolski, *Soviets Reveal Afghan Atrocities*, CHI. TRIB. (Feb. 16, 1989), https://www.chicagotribune.com/news/ct-xpm-1989-02-16-8903050824-story.html.
[140] *Id.*
[141] Alan Taylor, *The Soviet War in Afghanistan, 1979–1989*, THE ATLANTIC (Aug. 4, 2014), https://www.theatlantic.com/photo/2014/08/the-soviet-war-in-afghanistan-1979-1989/100786/.
[142] *See* DiPaola, *supra* note 14, at 436–437.
[143] *Id.* at 442–444; Gail W. Lapidus, *Contested Sovereignty: The Tragedy of Chechnya*, 23 INT'L SECURITY 5, 6 (1998) (Estimating that Russian military action in Chechnya before the 1999 invasion had resulted in nearly 100,000 deaths, hundreds of thousands of homeless and refugees, and the near-complete destruction of Chechnya's capital and many other towns).
[144] *See* DiPaola, *supra* note 14, at 464–469; *see also* Lapidus, *supra* note 143, at 6–7.

Two years after its 1994 invasion began, Russia withdrew its forces from Chechnya only to return again in 1999.[145] Instead of justifying the second invasion as it had the first by claiming it was an internal matter of maintaining territorial integrity,[146] Russia framed this invasion and subsequent occupation as a counter-terrorism operation in response to a series of bombings blamed on Chechnyans.[147] However, some evidence seems to suggest that at least one—possibly all—of the apartment bombings were part of a plot carried out by the Russian security agency.[148] The Chechnyans denied responsibility, and there was no independent investigation into the attacks.[149] Not only could the Russian government have committed a crime against humanity on its own population, but it may also have used that crime as justification to begin an illegal war and occupation in Chechnya. Again, the Russian Federation's membership in the P-5 prevented the international community from stopping or holding the Russian Federation accountable for its acts.

iv. Annexation of Crimea and Invasion of Ukraine

On March 21, 2014, the Russian Federation annexed the autonomous region of Crimea in Ukraine.[150] This followed Russia's

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[145] *See Chechnya Profile—Timeline*, BBC (Jan. 17, 2018), https://www.bbc.com/news/world-europe-18190473.

[146] *See generally*, DiPaola, *supra* note 14; Lapidus, *supra* note 143.

[147] *See Chechnya Profile—Timeline*, *supra* note 145; *Russian Forces Enter Chechnya*, HIST. (July 20, 2010), https://www.history.com/this-day-in-history/yeltsin-orders-russian-forces-into-chechnya.

[148] *See* Scott Anderson, *None Dare Call It a Conspiracy*, GQ (Mar. 31, 2017), https://www.gq.com/story/moscow-bombings-mikhail-trepashkin-and-putin; F. Joseph Dresen, *Foiled Attack or Failed Exercise? A Look at Ryazan 1999*, https://www.wilsoncenter.org/publication/foiled-attack-or-failed-exercise-look-ryazan-1999 (last visited Oct. 19, 2023; Gregory Feifer, *Ten Year on, Troubling Questions Linger over Russian Apartment Bombings*, RADIO FREE EUR. RADIO LIBERTY (Sept. 9, 2009), https://www.rferl.org/a/Ten_Years_On_Troubling_Questions_Linger_Over_Russian_Apartment_Bombings/1818652.html; Lamar Salter, Linette Lopez & Alana Kakoyiannis, *How a Series of Deadly Russian Apartment Bombings in 1999 Led to Putin's Rise to Power*, BUS. INSIDER (Mar. 22, 2018), https://www.businessinsider.com/how-the-1999-russian-apartment-bombings-led-to-putins-rise-to-power-2018-3.

[149] *See* Anderson, *supra* note 148.

[150] Hiruni Alwishewa, Revisiting Crimea and the Utility of International Law, OPINIO JURIS (Aug. 3, 2022), http://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law/; Thomas D. Grant, *Annexation of Crimea*, 109 AM J. INT'L L. 68, 71 (2017); Archive of By International Law, Crimea is Ukraine, EUR. UNION EXTERNAL ACTION (Mar. 16,

armed intervention in Crimea.[151] The Russian Federation made no claim that Crimea or Ukraine had engaged in, nor were imminently going to engage in, an armed attack against Russia, which could have triggered Russia's right to self-defense. The Security Council also did not authorize the use of force.[152] Instead, the Russian Federation claimed that its armed intervention was aimed at protecting Russian nationals and that it had been invited by the Ukrainian government.[153] Even if Russia's alleged reasons for armed intervention were legitimate, the subsequent forcible annexation of Crimea was not, since such acquisitions are prohibited under international law.[154] Since its invasion and annexation of Crimea, Russia has committed numerous human rights and international humanitarian law violations in Crimea including conscription, enforced disappearances, unlawful transfer of prisoners, and restrictions of fundamental rights and has faced allegations of torture and ill-treatment of detainees.[155]

On February 24, 2022, the Russian Federation engaged in the crime of aggression and violated the territorial integrity of Ukraine by conducting a full-scale invasion of Ukraine.[156] Russia attempted to confer legitimacy to its actions by claiming, without providing evidence, that Russian-speaking Ukrainians were being subjected to genocide.[157] As it did with the draft Security Council resolution declaring invalid the referendum in Crimea to accede to Russia, Russia vetoed the Security Council's attempt to condemn Russia's aggression

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2018),http://opiniojuris.org/2022/03/08/revisiting-crimea-and-the-utility-of-international-law/; https://www.eeas.europa.eu/node/41530_en.

[151] Grant, *supra* note 150, at 68.

[152] In fact, the Security Council voted on a draft resolution declaring the referendum in Crimea to accede to Russia invalid, but Russia vetoed the resolution. Juergen Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 N.Y.U. J. INT'L L. & POL. 747, 756, 776–777 (citing S.C. Draft Res. 2014/189 (Mar. 15, 2014)).

[153] Grant, *supra* note 150, at 80–83; Robin Geib, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly But They Do Grind*, 91 INT'L L. STUD. 425, 431–432.

[154] Geib, *supra* note 147, at 432–437; Grant, *supra* note 150, at 77.

[155] Statement on the Human Rights Situation in the Autonomous Republic of Crimea and the City of Sevastopol, Ukraine by Assistant Secretary-General for Human Rights at the Arria Formula Meeting of the Security Council, UNITED NATIONS HUM. RTS., (Mar. 6, 2020), https://www.ohchr.org/en/statements/2020/03/human-rights-situation-autonomous-republic-crimea-and-city-sevastopol-ukraine.

[156] Ingrid Brunk & Monica Hakimi, *Russia, Ukraine and The Future World Order*, 116 AM. J. INT'L L., 687, 688, (2022).

[157] Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order on Provisional Measures, 2022 I.C.J. ¶ 37, 59 (Mar. 16); Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russia Federation Wields Veto, U.N. Press Release SC/14808 (Feb. 25, 2022).

in this invasion.[158] Russia further attempted to legitimize its invasion and occupation by holding referendums in occupied Ukrainian territories and then annexing those areas.[159] The human toll of Russia's invasion has been staggering, with nearly 18 million people requiring humanitarian assistance, 8,000 non-combatant deaths, 13,300 non-combatant injuries, 487 child deaths, more than 100 cases of conflict-related sexual violence,[160] and potentially tens or hundreds of thousands of combatant deaths.[161] Given Russia's permanent seat on the Security Council as a member of the P-5 and refusal to withdraw from Ukraine, there is no clear end to the conflict in sight.

C. Great Britain

i. Fire-Bombing of Dresden

The Allied firebombing of Dresden began on February 13, 1945, at the tail-end of the war with Germany.[162] The subsequent conflagration killed 25,000 people and destroyed much of the city.[163] Even if the stated Allied goal of the attack—to disrupt German communications and industry—was legitimate, it is far from clear that the indiscriminate firebombing of an entire historic city full of refugees was proportionate to that goal.[164] This firebombing campaign likely constituted a grave breach of the Geneva Conventions as "wilful killing . . . and extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly."[165] Great Britain's

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[158] Brunk , *supra* note 156, at 693; Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russia Federation Wields Veto, *supra* note 157.

[159] Pavel Polityuk, *Russia Holds Annexation Votes; Ukraine Says Residents Coerced*, REUTERS, (Sept. 24., 2022), https://www.reuters.com/world/europe/ukraine-marches-farther-into-liberated-lands-separatist-calls-urgent-referendum-2022-09-19/.

[160] *UN Rights Chief Deplores Ukraine Death Toll One Year After Russian Invasion*, UN NEWS (Feb. 21, 2023), https://news.un.org/en/story/2023/02/1133737.

[161] Julia Mueller, *Russian Deaths in Ukraine Surpass All Its War Fatalities Since WWII Combined: Study*, THE HILL (Feb. 28, 2023), https://thehill.com/policy/international/3877727-russian-deaths-in-ukraine-surpass-all-its-war-fatalities-since-wwii-combined-study/; Guy Faulconbridge, *Blood and Billions: The cost of Russia's was in Ukraine*, REUTERS (Aug. 23, 2023), https://www.reuters.com/world/europe/blood-billions-cost-russias-war-ukraine-2023-08-23/.

[162] *Firebombing of Dresden*, HIST. (Nov. 5, 2009), https://www.history.com/this-day-in-history/firebombing-of-dresden; Toby Luckhurst, *Dresden: The World War Two Bombing 75 Years on*, BBC (Feb. 13, 2020), https://www.bbc.com/news/world-europe-51448486.

[163] *See Firebombing of Dresden*, *supra* note 162; Luckhurst, *supra* note 162.

[164] *See Firebombing of Dresden*, *supra* note 162.

[165] *See* Geneva Convention I, art. 50.

role as an Allied Power and member of the P-5 ensured that it would not have to answer for the firebombing of Dresden.

ii. Mau Mau Uprising

The Mau Mau Uprising is the name given to the anti-colonial struggle of Kenyans against British rule in the 1950s.[166] In response to the armed uprising, the British colonial authorities placed tens of thousands of Kenyans in concentration camps and engaged in torture and other inhuman treatment of detainees.[167] It was not until 2009 that Kenyan victims of British atrocities gained the right to sue British authorities.[168] Then, in 2013, the British government announced it would pay $30 million as compensation to the thousands of victims of abuse in Kenya.[169] However, the government did not issue a full apology and "continue[d] to deny liability on behalf of the government . . . for the actions of the colonial administration."[170] Though some paltry compensation for victims of war crimes or crimes against humanity is preferable to nothing, this is not justice. Justice would require full accounting of, and admission of responsibility and liability, on the part of the British government.[171] Because the officials responsible for these acts are gone, justice can never be fulfilled.[172] The United Kingdom's membership in the P-5 guaranteed that it could freely engage in these acts without fear of reprisal in the Security Council or anywhere else on the international stage.

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[166] *See Mau Mau Uprising: Bloody History of Kenya Conflict*, BBC (Apr. 7, 2011), https://www.bbc.com/news/uk-12997138.
[167] *Id.*
[168] Alan Cowell, *Britain to Compensate Kenyan Victims of Colonial-Era Torture*, N.Y. TIMES, (June 7, 2013), https://www.nytimes.com/2013/06/07/world/europe/britain-colonial-torture-kenya.html.
[169] *Id.*
[170] *Id.*
[171] *See Justice*, BLACK'S LAW DICTIONARY (11th ed. 2019) (providing a definition of justice as "[t]he legal system by which people and their causes are judged; esp., the system used to punish people who have committed crimes.")
[172] *See id.*

D. China

i. Tibet

Prior to 1951, Tibet was an independent state.[173] In 1950, the army of the People's Republic of China invaded Tibet.[174] On May 23, 1951, Tibetan officials, under duress, signed the "Agreement of the Central People's Government and the Local Government of Tibet on Measures for the Peaceful Liberation of Tibet," also known as the Seventeen Point Agreement.[175] China therefore acquired the territory of Tibet through the use of force and attempted to make its acquisition legitimate by coercing representatives of the Tibetan government to sign an agreement. Since its annexation of Tibet, the Chinese government has engaged in, and continues to engage in, violations of human rights and humanitarian law such as repressing religious freedom, violating the rights of children, transferring its population to the occupied territory of Tibet, discriminating against people of Tibetan descent, torture, and arbitrary arrest and detention.[176] In response to a letter from several UN Special Rapporteurs expressing concerns about China's "labor transfer" and "vocational training" programs in Tibet,[177] China's Foreign Ministry spokesperson said that "China's Tibet Autonomous Region enjoys social stability, economic development, ethnic solidarity and religious harmony" and called the experts'

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[173] Carole McGranahan, *Empire out of Bounds Tibet in the Era of Decolonization*, IMPERIAL FORMATIONS 177, 178; Regina M. Clarke, *China's Unlawful Control Over Tibet: The Tibetan People's Entitlement to Self-Determination*, 12 IND. INT'L & COMP. L. REV. 293, 296–298 (2002); Robert D. Sloane, 16 EMORY INT'L L. REV. 107, 131–132 (2002); BBC, *Tibet Profile – Timeline*, BBC, https://www.bbc.com/news/world-asia-pacific-17046222 (last updated Nov. 13, 2014).

[174] McGranahan, *supra* note 173, at 178; Clark, *supra* note 173, at 297; Sloane, *supra* note 173, at 140

[175] McGranahan, *supra* note 173, at 178; Clark, *supra* note 173, at 297–298, 300–301; Sloane, *supra* note 173, at 145, 152–154.

[176] *See* Clarke, *supra* note 173, at 312–322; Press Release, Office of the High Commissioner for Human Rights, China: UN Experts Alarmed by Separation of 1 Million Tibetan Children from Families and Forced Assimilation at Residential Schools (Feb. 6, 2023), https://www.ohchr.org/en/press-releases/2023/02/china-un-experts-alarmed-separation-1-million-tibetan-children-families-and; *Tibet Profile – Timeline*, *supra* note 173.

[177] *See* Press Release, Office of the High Commissioner for Human Rights, China: "Vocational training" Programmes Threaten Tibetan Identity, Carry Risk of Forced Labour, say UN experts, (Apr. 27, 2023), https://www.ohchr.org/en/press-releases/2023/04/china-vocational-training-programmes-threaten-tibetan-identity-carry-risk.

concerns "completely unfounded."[178] The PRC's membership in the P-5 has precluded accountability for its acts in, and continued occupation of, Tibet.

ii. North Korea

Assuming that the Security Council authorization for military force against North Korea was legitimate,[179] China's intervention against the UN forces could be seen as a breach of Article 2(4) of the Charter and potentially as an act of aggression.[180] Additionally, during the conflict, the U.S. established a War Crimes Division to investigate possible North Korean and Chinese war crimes, and this investigation concluded that when POWs were not immediately executed upon or shortly after capture, they were tortured, abused, and subjected to other inhuman treatment.[181] The Senate Report of the findings of the investigation documents a number of massacres of captured U.S. troops and torture while in captivity.[182] Despite these violations, the PRC officials responsible for them never faced accountability because of China's position in the Security Council.

iii. Tiananmen Square Massacre

Between June 3 and 5, 1989, the Chinese government responded to democracy protests in Tiananmen with a brutal crackdown.[183] The protesters had swelled to one million by the time of the intervention.[184] On June 4, Chinese police and soldiers began firing live ammunition into the protesters which resulted in the deaths of hundreds and potentially thousands of protesters, and the arrest of 10,000 others.[185] The government of China has since sought to suppress

[178] William Yang, *Analysts Say China Violates Human Rights in Tibet*, VOICE OF AMERICA, (Aug. 2, 2023, 12:30 AM), https://www.voanews.com/a/analysts-say-china-violating-human-rights-in-tibet-/7207984.html.
[179] *See* Kondoch, *supra* note 14, at 28–30.
[180] *Id.*
[181] *See* S. REP. NO. 83-848, at 3 (1954).
[182] *Id.* at 4.
[183] *See Tiananmen Square: What Happened in the Protests of 1989?*, BBC (June 4, 2019), https://www.bbc.com/news/world-asia-48445934; *Tiananmen Square Incident*, ENCYCLOPAEDIA BRITANNICA (Apr. 20, 2020), https://www.britannica.com/event/Tiananmen-Square-incident; *Tiananmen Square Protests*, HIST. (May 31, 2019), https://www.history.com/topics/china/tiananmen-square.
[184] *See Tiananmen Square Protests*, *supra* note 183.
[185] *Id.*

discussion of the incident and to downplay its severity.[186] China's membership in the P-5 has insulated it from accountability for the mass murder of its own citizens.

iv. Uighur Detention

For the past several years, the Chinese government has gone to extreme lengths to monitor and repress its Uighur Muslim minority in Xinjiang.[187] It is estimated one million or more people are detained in concentration camps that the Chinese government calls voluntary job training centers.[188] Chinese officials have declared that released documents showing the true purpose of the camps as re-education centers are fake news and that anything going on in Xinjiang constitutes an internal affair.[189] It appears that the decisions to send individuals to these camps are arbitrary, and once there, the detainees are subjected to torture and other inhuman treatment.[190] These crimes against humanity have so far gone unpunished and continued unabated despite widespread international awareness. Even in the face of allegations of genocide,[191] the PRC's position in the P-5 has ensured that it can continue to act with impunity against its Uighur minority.

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[186] *See id.*

[187] *See Secret Documents Reveal How China Mass Detention Camps Work*, ASSOCIATED PRESS (Nov. 25, 2019), https://apnews.com/4ab0b341a4ec4e648423f2ec47ea5c47; *Data Leak Reveals How China "Brainwashes" Uighurs in Prison Camps*, BBC (Nov. 24, 2019), https://www.bbc.com/news/world-asia-china-50511063; *see* Ewelina U. Ochab, *The Fate of Uighur Muslims in China: From Re-education Camps to Forced Labor*, FORBES (Apr. 4, 2020, 8:30 AM), https://www.forbes.com/sites/ewelinaochab/2020/04/04/the-fate-of-uighur-muslims-in-china-from-re-education-camps-to-forced-labor/#6e8ddb722f73.

[188] *See Secret Documents Reveal How China Mass Detention Camps Work*, *supra* note 187; *Data Leak Reveals How China "Brainwashes" Uighurs in Prison Camps, supra* note 187; *The Fate of Uighur Muslims in China: From Re-education Camps to Forced Labor*, *supra* note 187.

[189] *Secret Documents Reveal How China Mass Detention Camps Work*, *supra* note 187.

[190] *See id.*

[191] *See* Press Statement, Antony J. Blinken, U.S. Secretary of State, UN Office of the High Commissioner for Human Rights Report on the Human Rights Situation in Xinjiang (Sept. 1, 2022), https://geneva.usmission.gov/2022/09/01/statement-on-un-human-rights-office-report-on-xinjiang/; Press Statement, Michael R. Pompeo, U.S. Secretary of State, Determination of the Secretary of State on Atrocities in Xinjiang (Jan. 19, 2021), https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/.

E. France

i. Vietnam/Indochina

Immediately following WWII, the French government attempted to regain control of its former colony in Vietnam, despite the clear efforts of its people to establish their own nation.[192] The French used torture, napalm, and frequently killed civilians in their attacks, though it is clear that violations of the law of armed conflict were perpetrated by both sides.[193] Somewhere between 150,000 and 250,000 civilians were killed between 1945 and 1956.[194] Torture and the targeting of civilians are considered grave breaches of the Geneva Conventions.[195] Because of its membership in the P-5, France—and the French officials responsible for its conduct in Vietnam/Indochina—never faced accountability.

ii. Algeria

The French government's atrocities in Algeria are far more well-known than those in Vietnam. In the last days of WWII in Europe, nationalist sentiment in Algeria led to demonstrations against French occupation.[196] Thousands of unarmed protesters were killed and French forces were ordered to begin killing civilians and bombing villages as reprisals which resulted in tens of thousands more civilian deaths.[197] At the onset of the full-scale insurgency in 1954, French forces began bombing villages and continued arresting and torturing Algerians.[198] French forces relied "heavily on helicopter bombing of opposition territory."[199] The conflict continued until 1962, when Algeria gained its

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[192] *See Indochina: First Indochina War*, WORLD PEACE FOUND. (Aug. 7, 2015), https://sites.tufts.edu/atrocityendings/2015/08/07/indochina-1st-indochina-war/.
[193] *Id.*
[194] *Id.*
[195] *See* Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *see* Geneva Convention IV, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[196] *See* Yasmina Allouche, *Remembering the Massacre of 45,000 Algerians*, MIDDLE E. MONITOR (May 8, 2017, 8:00 AM), https://www.middleeastmonitor.com/20170508-remembering-the-massacre-of-45000-algerians/; *see also* Tony Todd, *France Commemorates Algerian Massacres for First Time*, Fr. 24 (Apr. 19, 2015, 12:34 PM), https://www.france24.com/en/20150419-france-commemorates-1945-algerian-massacre-first-time.
[197] *See* Allouche, *supra* note 196.
[198] *See Algeria: War of Independence*, WORLD PEACE FOUND. (Aug. 7, 2015), https://sites.tufts.edu/atrocityendings/2015/08/07/algeria-war-of-independence/.
[199] *Id.*

independence, and claimed the lives of 1.5 million Algerians.[200] France has never officially apologized or taken responsibility for the massacres, but in 2005, recognized that they had occurred.[201] France's targeting of civilians and use of torture violated the Geneva Conventions.[202] Again, because of its membership in the P-5, France—and the French officials responsible for its conduct in Algeria—never faced accountability.

IV. CONCLUSION

The post-Nuremberg world has shown that—far from subjecting all perpetrating states and leaders to the law—international criminal justice has been selectively applied and therefore does not comport with one of the most basic principles of the rule of law. If one of the purposes of international criminal law is putting an end to impunity, it has failed spectacularly. While the importance of providing some semblance of justice to the victims of atrocities in places like the former Yugoslavia, Rwanda, Sierra Leone, Lebanon, Cambodia, the Democratic Republic of the Congo, and Sudan cannot be discounted, it must be pared by the countless millions of other victims of the illegal acts of the major powers during and after WWII for whom justice may never come.

It is inconceivable that any member, much less all, of the P-5 would agree to amend the UN Charter to remove the veto power so that is hardly an option toward ensuring accountability. As long as the members of the P-5 remain outside the jurisdiction of the International Criminal Court, it also cannot guarantee justice for crimes they commit absent amendment.[203] A ray of hope, though partially symbolic, is the ICC arrest warrant issued for Vladimir Putin, the President of the Russian Federation, for "the war crime of unlawful deportation of population (children) and that of unlawful transfer of population (children) from occupied areas of Ukraine to the Russian

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[200] Allouche, *supra* note 196.
[201] *See* Todd, *supra* note 196.
[202] *See* Geneva Convention I, art. 50, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *see* Geneva Convention IV, art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[203] *See* Shane Darcy, *Aggression by P5 Security Council Members: Time for ICC Referrals by the General Assembly*, JUST. SEC. (Mar. 16, 2022), https://www.justsecurity.org/80686/aggression-by-p5-security-council-members-time-for-icc-referrals-by-the-general-assembly/.

Federation."[204] However, President Putin would likely have to leave Russia and any country friendly to Russia for there to be any chance of his arrest. Members of the P-5's disdain for, or recalcitrance to join, the ICC[205] appears to have also emboldened other nations to oppose the ICC or threaten withdrawal from the Rome Statute that established the Court.[206] With the current international systems incapable of holding the most powerful accountable, they must be amended or altered to provide justice to the victims of the P-5's international crimes. Aside from amending these systems—though not discussed in this article—is the possibility of a state exercising universal jurisdiction over P-5 officials alleged to have violated international criminal law.[207] This would, however, require the P-5 officials' presence in the arresting state and the arresting state's political will to detain an official from the most powerful and influential countries.

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[204] *See* Press Release, International Criminal Court, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and#:~:text=Mr%20Vladimir%20Vladimirovich%20Putin%2C%20born,articles%208(2).

[205] *See Russia Indicts ICC prosecutor, Judge Who Issued War Crimes Warrant for Putin*, ASSOCIATED PRESS (May 21, 2023), https://apnews.com/article/russia-indictment-icc-prosecutor-judge-putin-260100f9ba533e15ebee3084dba74ff4; *see generally The International Criminal Court and the United States*, HUM. RTS. WATCH, https://www.coalitionfortheicc.org/country/united-states#:~:text=2.,Is%20the%20US%20a%20member%20of%20the%20ICC%3F,voted%20against%20the%20Rome%20Statute (last visited Sept. 11, 2023).

[206] *See* THE GUARDIAN, *Philippines: Duterte threatens to arrest International Criminal Court prosecutor* (Apr. 13, 2018), https://www.theguardian.com/world/2018/apr/13/philippines-duterte-threatens-to-arrest-international-criminal-court-prosecutor; Franck Kuwonu, *ICC: Beyond the threats of withdrawal*, U.N. AFRICA RENEWAL (July 2017), https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal.

[207] *See generally* CRYER ET AL., *supra* note 3, at 56–68 (providing an overview of the concept of universal jurisdiction).

THE HOPE ACT AND SUPREME COURT'S EPIC VIOLATION OF INTERNATIONAL HUMAN RIGHTS LAW

Haley Brechwald

I. INTRODUCTION

There have been 2,453,457 evictions in just 10 U.S. states since March 2020.[1] Low-income and minority populations who receive federal housing assistance are the most frequent targets of these evictions.[2] Due to a lack of availability and an intensive screening process for federal housing applicants, many individuals and families never have the opportunity to obtain assistance.[3] Therefore, there is a dual problem: the lack of availability to obtain housing assistance and retaining those benefits once obtained.[4] One of the obstacles to retaining housing assistance includes the Housing Opportunity Program Extension Act of 1996 (HOPE Act), which encourages Public Housing Agencies (PHAs) to use their discretion to exclude applicants who have a criminal record.[5] The Supreme Court of the United States upheld this policy in *Department of Housing v. Rucker*.[6] Further, PHAs are obligated to exclude applicants and evict tenants who live in the same household as someone who has a criminal record, even if the tenant had no knowledge of the criminal activity that led to the arrest, charge, or conviction.[7] These "tough-on-crime" policies adopted by the U.S. Congress and government agencies target innocent renters and strip them of their international right to adequate housing under the Universal Declaration

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[1] EVICTION LAB, https://evictionlab.org/eviction-tracking/ (last visited Aug. 7, 2023).

[2] *See* Alicia Mazzara & Brian Knudsen, *Where Families With Children Use Housing Vouchers*
A Comparative Look at the 50 Largest Metropolitan Areas, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 3, 2019), https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers.

[3] *See Housing Choice Vouchers Fact Sheet*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, https://www.hud.gov/topics/housing_choice_voucher_program_section_8#hcv01.

[4] *See id.*; Wendy J. Kaplan & David Rossman, *Called "Out" At Home: The One Strike Eviction Policy and Juvenile Court*, 3 DUKE FORUM FOR L. & SOC. CHANGE 109, 112 (2011); *see also* Housing Opportunity Program Extension Act of 1996, 1996 Enacted S. 1494, 104 Enacted S. 1494, 110 Stat. 834.

[5] Kaplan & Rossman, *supra* note 4, at 112; *see also* Housing Opportunity Program Extension Act of 1996, 1996 Enacted S. 1494, 104 Enacted S. 1494, 110 Stat. 834.

[6] Dep't of Hous. v. Rucker, 535 U.S. 125, 136 (2002).

[7] Erica V. Rodarte Costa, *Reframing the "Deserving" Tenant: The Abolition of a Policed Public Housing*, 170 U. PA. L. REV. 811, 826.

of Human Rights (UDHR).[8] Furthermore, the disparate impact these evictions have on tenants violates the International Covenant on the Elimination of all Forms of Racial Discrimination (CERD).[9]

The UDHR is a resolution adopted in "customary" international law.[10] Many international law scholars interpret customary international law to mean that states are bound by customary rules, unless they explicitly object to their formation.[11] International law scholars posit that "if the amount of positive state practice reaches a specific threshold, the emerging customary norm does not only bind all affirming and abstaining states, but even those that are opposed to the formation of the norm."[12] Critics of this thought process may argue that states cannot be bound to international law against their will, and they would still be correct.[13] Under this framework of customary international law, if states explicitly reject the principles of customary law, they are not bound by it, but they must take affirmative action to reject it.[14] However, there is unsettled international debate about how much action must be taken to disaffirm customary international law.[15]

Regardless of this threshold debate, the U.S. has historically affirmed the principles in the UDHR.[16] For example, the U.S. was instrumental in the creation of the UDHR, leading the charge on the bulk of the UDHR's drafting, and the U.S. has since taken no affirmative steps to reject the principles laid out in the UDHR.[17] Therefore, the U.S. is customarily bound to adhere to the UDHR. In contrast, CERD is a treaty the U.S. has signed and ratified and is therefore bound to follow.[18]

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[8] *See* G.A. Res. 217 (III) A, U.N. Doc. A/810 at 71 (Dec. 10, 1948).
[9] *See* S. Exec. Doc. C, 95-2 (1978); S. Treaty Doc. 95-18; 660 U.N.T.S. 195, 212.
[10] GUDMUNDUR ALFREDSSON & ASBJORN EIDE, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS A COMMON STANDARD OF ACHIEVEMENT, (1999) (ebook).
[11] *See generally* Niels Petersen, *The Role of Consent and Uncertainty in the Formation of Customary International Law*, MAX PLANCK INST. FOR RSCH. ON COLLECTIVE GOODS, 1 (2011).
[12] *Id.* at 1.
[13] *Id.* at 2.
[14] *Id.* at 1.
[15] *Id.* at 2.
[16] *Id.* at 1; *History of the Declaration*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/history-of-the-declaration.
[17] *History of the Declaration*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/history-of-the-declaration.
[18] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

The HOPE Act violates Article 25 of the UDHR, which guarantees adequate housing,[19] and also violates the CERD, which binds the U.S. to eliminate all forms of racial discrimination.[20] Therefore, the HOPE Act violates international human rights laws (Article 25 of the UDHR and CERD) by evicting family members from their homes, solely based on the criminal record of a person also living in that home. To combat these human rights violations, the "innocent owner defense" should apply to family members living in the same home as someone with a criminal conviction, decreasing the disparate impact the HOPE Act has on low-income and minority populations. The innocent owner defense is rooted in civil asset forfeiture proceedings.[21] This defense allows a defendant in a civil asset forfeiture proceeding the opportunity to prove by a preponderance of the evidence that he or she did not know of the criminal conduct that occurred on his or her property, or upon learning of the conduct, he or she did all that reasonably could be expected under the circumstances.[22] If the defendant can satisfy this burden, then his or her property will not be seized by law enforcement.[23] This defense should apply to prevent family members or roommates from being evicted when they had no knowledge that someone they live with engaged in criminal activity, whether the criminal activity occurred on the property or not.

Section II of this comment details the background of forced evictions and their disparate impact on minorities. It will further explain how PHA leases and the Section 8 Housing Choice Voucher Program work, followed by a description of the legislative history and case law on public housing programs in the U.S. Section II further explains the standard of strict liability and the history of the innocent owner defense, and lastly, details the United Nations agreements that are being violated. Section III argues that the HOPE Act violates international human rights law, specifically the right to adequate housing guaranteed by Article 25 of the UDHR and the elimination of racial discrimination guaranteed in CERD. Finally, Section IV proposes that the U.S. should revise the HOPE Act, or judicially decide to allow an innocent owner defense instead of applying a strict liability standard in determining family evictions based on one person's criminal record.

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[19] Universal Declaration of Human Rights, *supra* note 8.

[20] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

[21] Luis Suarez*, Guilty Until Proven Innocent: Rethinking Civil Asset Forfeiture and the Innocent Owner Defense*, 5 TEX. A&M J. PROP. L. 1001, 1003 (2019).

[22] *Id.*

[23] *Id.*

II. BACKGROUND

A. Evictions and the Legal Ramifications

According to the United Nations Human Rights Office of the High Commissioner, forced evictions are defined as the "permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[24] Millions of people are forcibly evicted from their homes every year in the U.S.[25] Evictions not only affect one's housing stability, but also have a substantial impact on many facets of an individual's well-being and socioeconomic opportunities.[26] For example, evictions often result in homelessness, acceptance of unfair rental agreements, difficulty securing a new rental or housing assistance benefits, job loss, disruption in education, and additional long-term psychological effects.[27] In cities across the U.S., it is estimated that eighty percent of individuals who are evicted are people of color.[28] Further, forced evictions have a disparate impact both nationally and globally on women, children, the elderly, and minorities.[29]

Forced evictions are not limited to certain countries or regions of the world, and the practice often creates violations of other human, civil, and political rights.[30] Forced evictions are also not limited to densely populated urban areas, but also occur because of political upheaval, armed conflicts, communal or ethnic violence, or urban development.[31]

Low-income and minority populations that receive federal housing assistance are the most frequent targets of these evictions in the

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[24] *Forced Evictions Special Rapporteur on the Right to Adequate Housing*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/special-procedures/sr-housing/forced-evictions.

[25] Deena Greenberg, Carl Gershenson & Matthew Desmond, *Discrimination in Evictions: Empirical Evidence and Legal Challenges*, 51 HARV. C.R.-C.L. L. REV 115, 116-117.

[26] *See id.* at 117.

[27] *Id.* at 117-118.

[28] *Id.* at 120.

[29] ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 20 May 1997.

[30] *Id.*

[31] *Id.*

U.S.[32] In 1986, Congress passed the Anti-Drug Abuse Act, which required that public housing tenants or guests engaged in criminal activity on or near public housing property be evicted.[33] In 1996, President Clinton signed the HOPE Act, "which required PHA leases to include a provision that subjected a tenant to eviction for certain criminal activities."[34] The statute authorized eviction for, "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants or drug-related criminal activity on or off such premises, engaged in by a public housing tenant, any member of the tenant's household, or any guest or other person under the tenant's control. . . ."[35]

The U.S. Department of Housing and Urban Development (HUD) furthered this initiative through the "One Strike" policy by encouraging increased discretion of PHAs to look into criminal history of potential housing voucher recipients before they have obtained housing as a prerequisite to being eligible for a voucher.[36] The HUD developed this policy in an attempt to reduce crime in public housing.[37] This policy mandated that the PHAs should use a case-by-case review with more stringent background checks for applicants and all household members.[38] The policy additionally suggested changing tenant's leases so that "any violation of a lease's criminal activity terms, including activity by guests 'under [a tenant's] control' was a serious lease violation and thus, grounds for eviction."[39] The phrase "under a tenant's control" referred to a mere showing that the tenant was a renter on the lease.[40] The One Strike policy gave PHAs wide discretion to police tenants and allowed PHAs to begin eviction proceedings based on the mere suspicion of criminal activity.[41] Furthermore, HUD incentivized

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[32] *See* Alicia Mazzara & Brian Knudsen, *Where Families With Children Use Housing Vouchers*
A Comparative Look at the 50 Largest Metropolitan Areas, CENTER ON BUDGET AND POLICY PRIORITIES (Jan. 3, 2019), https://www.cbpp.org/research/housing/where-families-with-children-use-housing-vouchers.
[33] Lena M. Lundgren, Marah A. Curtis & Catherine Oettinger, *Postincarceration Policies for those with Criminal Drug Convictions: A National Policy Review*, 91 FAMS. IN SOC'Y: THE J. OF CONTEMP. SOC. SERS. 31, 35 (January 2010).
[34] Kaplan & Rossman*, supra* note 4, at 112; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996).
[35] *Id.*
[36] Lundgren, Curtis & Oettinger, *supra note* 33, at 35.
[37] *Id.*
[38] *Id.*
[39] Costa, *supra* note 7, at 826.
[40] *Id.*
[41] *Id.* at 827.

PHAs to implement the One Strike policy by giving PHAs that did not implement the One Strike policy a lower Public Housing Management Assessment Program (PHMAP) score.[42] A PHA's PHMAP score guarantees a PHA's funding and continuity in its management.[43]

The One Strike policy further increased the disparate impact of evictions, considering fifty-eight percent of federal housing assistance tenants are Black, Latinx, Native American, or Asian.[44] In 2015, the Obama administration attempted to limit the One Strike policy by urging "PHAs to be more lenient in their administration and eviction determinations."[45] Further, HUD clarified that tenants have due process rights, including the right to "'dispute the accuracy and relevance of a criminal record before admission or assistance is denied on the basis of such record,'" as well as a "'right to request an informal hearing or review after an application for housing assistance is denied.'"[46] The most notable change to the One Strike policy was the rule preventing PHAs from evicting tenants based on mere suspicion of criminal activity, absent charges or convictions.[47] However, PHAs could still use police reports, records, and other evidence associated with an arrest to determine an applicant's housing eligibility.[48]

Despite these attempts to weaken the One Strike policy, the policy has effectively remained untouched.[49] The HUD has led the charge to continue to encourage the policy by urging PHAs to implement it by providing budget incentives to comply with the policy.[50] For example, PHAs only retain funding through satisfactory performance scores.[51] The factors that contribute to the performance score include the number of vacancies within a PHA's housing stock, the amount of rent uncollected, the condition of the unit, and the implementation of the One Strike policy.[52] If a PHA receives a "failing" score, it can lose its funding and result in HUD taking over the local PHA.[53]

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[42] *Id.*
[43] *Id.*
[44] *Id.* at 828.
[45] Costa, *supra* note 7, at 828.
[46] *Id.* at 828-29.
[47] *Id.* at 829.
[48] *Id.* at 829.
[49] *Id.* at 828.
[50] *Id.* at 827.
[51] Costa, *supra* note 7, at 827.
[52] *Id.*
[53] *Id.*

In 1998, two years after the One Strike policy went into effect, Congress continued its tough-on-crime agenda and enforcement of controlled substances in housing by passing Title V of the Quality Housing and Work Responsibility Act of 1998 (QHWRA).[54] The QHWRA recommended that PHAs use data from the National Crime Information Center to screen applicants and gave PHAs guidance to evict or deny a lease to anyone who has used or is using controlled substances.[55] Despite the legalization of marijuana in some states, in 2014, HUD released a memorandum clarifying that "owners must deny admission to assisted housing for any household with a member determined to be illegally using a controlled substance, e.g., marijuana."[56]

Four years later, the Supreme Court addressed the question of whether tenants living in the same household as someone using a controlled substance could be evicted along with the alleged user.[57] The Court upheld strict liability for non-offending tenants *in Department of Housing v. Rucker*, even when the eviction was based solely on someone else in the household engaging in drug-related criminal activity.[58] In that case, Rucker was evicted by the Oakland Housing Authority because her granddaughter was found in possession of cocaine three blocks from their shared apartment.[59] Rucker's attorney argued the innocent owner defense, claiming that she had no knowledge of the drug activity, and therefore should not be evicted from her home.[60]

The Court determined that the One Strike policy required Rucker's eviction.[61] The Court reasoned that the statutory language, "unambiguously requires lease terms that vest local public housing authorities with the discretion to evict tenants for the drug-related activity of household members and guests whether or not the tenant knew, or should have known, about the activity."[62] The Court further stated that "Congress' decision not to impose any qualification in the

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[54] Lundgren, Curtis & Oettinger, *supra note* 33, at 35.
[55] *Id.*
[56] Memorandum from Benjamin T. Metcalf, Assistant Sec'y for Mutifamily Hous. Programs, U.S. Dep't of Hous. and Urb. Dev., to All Mutifamily Regional Center Directors et al. (Dec. 29, 2014).
[57] Dep't of Hous., 535 U.S. at 136.
[58] *Id.*at 134.
[59] Sarah N. Kelly, *Separating the Criminals from the Community: Procedural Remedies for "Innocent Owners" in Public Housing Authorities*, 51 N.Y.L. SCH. L. REV. 379, 388-89 (2006).
[60] *Id.* at 389.
[61] *Id.* at 382.
[62] Dep't of Hous., 535 U.S. at 130.

statute, combined with its use of the term '-any' to modify 'drug-related criminal activity,' precludes any knowledge requirement."[63] The Court also acknowledged that Congress had previously included an innocent owner defense in civil asset forfeiture statutes, and therefore knew how to implement the defense, but instead specifically chose not to implement it here.[64] The Court also rejected the Court of Appeals' concern about Due Process, reasoning that the "government is not attempting to criminally punish or civilly regulate respondents as members of the general populace," but instead is enforcing lease provisions as a landlord.[65]

The Supreme Court expanded this holding in 2015 with *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, stating that federal housing assistance policies can have a disparate-impact of discrimination if "they can prove it is necessary to achieve a valid interest."[66] The Supreme Court considered whether the Fair Housing Act (FHA) could be interpreted to allow disparate impacts in housing.[67] The HUD and the Supreme Court determined that the burden is on the plaintiff "prevail[ing] upon proving that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[68] It is much easier for a defendant to show that the practice serves a valid interest compared to the plaintiff's burden to identify a creative and nonburdensome solution that would produce a less discriminatory result.[69]

Such legislative and judicial history shows that qualifying for PHA leases continues to become more stringent as the Supreme Court and Congress push for crime-free housing environments.[70] These policies not only affect the applicant or tenant engaged in criminal activity but apply to anyone who may be applying to live or already lives in the same home as the person engaged in the illegal conduct, regardless

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[63] *Id.* at 130-31.
[64] *Id.* at 132.
[65] *Id.* at 135.
[66] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015).
[67] *Id.* at 525.
[68] *Id.* at 527.
[69] CONG. RSCH. SERV., R44203, DISPARATE IMPACT CLAIMS UNDER THE FAIR HOUSING ACT 12 (2015).
[70] Dep't of Hous. v. Rucker, 535 U.S. 125, 136 (2002); Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015); Lundgren, Curtis & Oettinger, *supra note* 33, at 35.

of their knowledge of the conduct.[71] This practice is referred to as a type of "strict liability."[72]

B. Housing Choice Vouchers

There are three main types of federal rental assistance programs: public housing, Housing Choice Vouchers (Section 8 Vouchers), and Project-Based Rental Assistance.[73] The Housing Choice Voucher program is the federal government's largest rental assistance program for low-income families, the disabled, and the elderly.[74] Local PHAs administer Housing Choice Vouchers from federal funds received through the HUD.[75] Through this voucher program, families are able to search for and secure housing of the family's choice.[76] Under this program, families are free to choose any housing option if it is within the parameters of the program, including that the owner must be willing to rent under the program, and the rental unit must meet minimum health and safety standards as set by local PHAs.[77] Families are not required to choose units that are part of subsidized housing projects.[78]

PHAs operate locally by administering housing vouchers, but they also receive federal funds from the HUD.[79] PHAs are state-created entities governed by state law.[80] Although PHAs are not federal agencies, HUD has regulatory oversight over many PHA programs.[81] The PHA pays the housing subsidy directly to the landlord, and the family pays the difference between the rent and the amount subsidized by the voucher.[82]

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[71] Kaplan & Rossman, *supra* note 4, at 112; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-20, § 1494, 110 Stat. 834 (1996).
[72] *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Falt and the Fault in Strict Liability*, 85 Fordham L. Rev. 743, 745 (2016); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM CH. 4 SCOPE NOTE (AM. L. INST. 2010).
[73] *Policy Basics: Public Housing*, CENTER ON BUDGET AND POL'Y PRIORITIES (June 16, 2021), https://www.cbpp.org/research/public-housing.
[74] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 3.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *The PHAs Role in the Housing Choice Voucher Program,* U.S. DEP'T OF HOUS. AND URB. DEV. (Dec. 3, 2022), https://files.hudexchange.info/resources/documents/PIH-HCV-Landlord-The-PHA-Role-in-the-Housing-Choice-Voucher-Program.pdf.
[80] *Id.*
[81] *Id.*
[82] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 3.

Determinations regarding who may receive a voucher is split between federal regulations and local PHA discretion.[83] For example, "eligibility for a housing voucher is determined by the PHA based on the total annual gross income and family size and is limited to U.S. citizens and specified categories of non-citizens who have eligible immigration status.[84] In general, the family's income may not exceed fifty percent of the median income for the county or metropolitan area where the family chooses to live.[85] Federal law requires that PHAs provide seventy-five percent of its available vouchers to applicants whose income is not above thirty percent of the area income.[86]

Despite a degree of federal regulation regarding one's eligibility to receive a voucher, local PHAs have wide discretion to determine what type of assistance families will receive.[87] For example, PHAs have the discretion to set payment standards that determine the maximum amount of rental assistance a PHA may pay to the landlord for the assisted tenant.[88] Additionally, PHAs may establish local preferences that are consistent with local housing needs in its community.[89] Some of these preferences include "a preference to a family who is (1) homeless or living in substandard housing[;] (2) paying more than 50% of its income for rent[;] or (3) involuntarily displaced."[90] The PHA has the discretion to move families up on the waitlist that qualify for any local preferences.[91] Additionally, local PHAs may offer "distinct or special purpose" vouchers that give preference for groups they determine are "high need."[92] Finally, PHAs set different inspection standards and vary the frequency of those inspections.[93]

Applicants for the voucher program apply through their local PHA.[94] The application process through the local PHA includes collecting information regarding family composition, income, and

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[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 3.
[88] *Id.*
[89] *Id.*
[90] *Id*.
[91] *The PHA's Role in the Hous. Choice Voucher Program,* U.S. DEP'T OF HOUS. AND URB. DEV., https://files.hudexchange.info/resources/documents/PIH-HCV-Landlord-The-PHA-Role-in-the-Housing-Choice-Voucher-Program.pdf.
[92] U.S. DEP'T OF HOUS. AND URB. DEV., *supra* note 3.
[93] *Id.*
[94] *Id*

assets.[95] The PHA then verifies the information with the applicant's employer(s), bank(s), and local agencies to confirm if the applicant is eligible for the program.[96] If the PHA decides that a family is eligible, the PHA will put the family on a waitlist with priority given to those identified with the criteria set out above.[97]

C. Strict Liability and the Innocent Owner Defense

Strict liability means "liability without wrongdoing,"[98] or "liability imposed without regard to the defendant's negligence or intent to cause harm."[99] When courts apply strict liability, the "plaintiff need not prove the defendant's negligence or intent, and the defendant cannot escape liability by proving a lack of negligence or intent."[100] In the housing context, this means that someone in the home could have no knowledge or intent, and has not committed a negligent act in regard to another tenant's criminal activity to be found liable.[101] HUD argues that strict liability in these cases motivates tenants to "to avoid behavior which can lead to eviction," and alternative standards "would allow a variety of excuses" and would "undercut the tenant's motivation to prevent criminal activity by household members."[102] All occupants of the home can therefore be evicted, despite lacking the requisite knowledge, intent, or negligence of the conduct that resulted in eviction.[103]

The idea that a person should lose possession of property because of a criminal conviction is rooted in English common law.[104] At English common law, once a person was convicted of a crime, all of their land and property was turned over to the Crown.[105] It was understood that a person's criminal conviction "resulted in the corruption of blood,

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[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] Goldberg & Zipursky, *supra* note 72, at 745 (2016); RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, *supra* note 71.
[99] RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM, *supra* note 72.
[100] *Id.*
[101] *See* Dep't of Hous. and Urb. Dev. v. Rucker, 535 U.S. at 134.
[102] Barclay Thomas Johnson, *The Severest Justice Is Not the Best Policy: The One-Strike Policy in Public Housing*, 10 J. OF AFFORDABLE HOUS. & CMTY. DEV. L. 234, 246 (2001).
[103] *See id.*
[104] M Fourie & GJ Pienaar, *Tracing the Roots of Forfeiture and the Loss of Property in English and American Law,* 23 FUNDAMINA 20, 24 (2017).
[105] *Id.*

with the consequences that the bloodline of any person convicted and attained became stained or blackened and his descendants or family were prohibited from inheriting."[106] Other countries have employed a similar theory to justify evictions and property loss based on criminal conduct.[107] In South Africa, property has been seized to disgorge the "fruits of illegal conduct," and was primarily used as a deterrent.[108] In the U.S., there are two main justifications for civil forfeiture, namely that the property is guilty of the offense and the "owner may be held accountable for the wrongs of others to whom he entrusts his property."[109]

Ireland employed a similar tactic.[110] However, it specified that residents who shared property with someone guilty of a criminal conviction must prove that they were unaware of the criminal activity to retain possession of the shared property.[111] Thus, Ireland essentially added a knowledge requirement to evict someone for the criminal activity of another.[112] This is known as the innocent owner defense.[113] Ireland's justification for this defense is that the criminal defendant should be punished, but the punishment should not extend to the innocent resident in addition to the guilty defendant.[114]

The innocent owner defense is also used in the U.S. in civil forfeiture cases.[115] A property interest that would otherwise be forfeited due to criminal activity is not forfeited if the owner "(1) did not know of the conduct giving rise to forfeiture; or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could be expected under the circumstances to terminate such use of the property."[116] Until *Rucker*, tenants' lawyers attempted to assert the innocent owner defense in One Strike policy cases.[117] However, in *Rucker*, the Court determined that Congress intended to include the innocent owner defense in the civil forfeiture statute but not in the One Strike policy.[118] The Court concluded

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[106] *Id.* at 21.
[107] *See id.* at 23; Liz Campbell, *Theorising Asset Forfeiture in Ireland*, 71 J. CRIM. L., 441 (2007).
[108] Fourie & Pienaar, *supra* note 104, at 33.
[109] *Id.* at 31.
[110] *See* Liz Campbell, *Theorising Asset Forfeiture in Ireland*, 71 J. CRIM. L., 441 (2007).
[111] *Id.*
[112] *See id.*
[113] *Id.*
[114] *Id.*
[115] 37 C.J.S. Forfeitures § 30.
[116] 18 U.S.C.A. § 983 (2022).
[117] Kelly, *supra* note 44, at 390; *see also* Dep't of Hous. 535 at 136.
[118] Kelly, *supra* note 44, at 390; *see also* Dep't of Hous. 535 at 136.

that Congress knew how to create the defense because they had done so previously, so they, therefore, had intentionally excluded it in the One Strike policy.[119] The Court further found that Congress later "amended the civil forfeiture portion of the statute to explicitly include leaseholds."[120] In drafting the amendment, Congress again explicitly chose not to include an innocent owner defense for Section 8 tenants.[121]

Moreover, the Asset Forfeiture Act's innocent owner defense does not require that an objectively reasonable person in their position should have known about the criminal activity, but rather that the owner did not actually know.[122] However, willful blindness will not suffice for the innocent owner defense.[123] Willful blindness is a legal doctrine in criminal law that does not relieve someone of liability who purposefully avoids knowledge of that criminal activity.[124] The innocent owner defense is a potential solution to violations of UN law on adequate housing that will be discussed further in the next section.

D. United Nations Law on Adequate Housing

The UDHR sets out fundamental human rights to be universally protected.[125] World War II inspired the international community to adopt new guidelines and standards of human rights.[126] The UDHR was adopted as a resolution of the UN General Assembly and is therefore not subject to ratification or accession like other UN treaties.[127] However, the UDHR carries more legal weight than an ordinary resolution.[128] The UN General Assembly uses the UDHR to interpret provisions of the UN Charter, interpret other instruments and resolutions, interpret statements made by the Secretary-General and other international and national governmental settings, and set international standards.[129] Additionally, states have used the UDHR to create legislation and as a model for their constitutions.[130] Finally, the International Court of Justice uses the

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[119] Dep't of Hous., 535 U.S. at 132.
[120] Kelly, *supra* note 44, at 390; *see also* Dep't of Hous. 535 at 136.
[121] *See* Dep't of Hous. 535 at 136.
[122] 18 U.S.C.A. § 983 (2022).
[123] *Id.*
[124] Gregory M. Gilchrist, *Willful Blindness as Mere Evidence*, 54 LOY. OF L.A. LAW REV. 405, 407 (2021).
[125] Universal Declaration of Human Rights, *supra* note 8.
[126] THE UNIVERSAL DECLARATION OF HUMAN RIGHTS A COMMON STANDARD OF ACHIEVEMENT, *supra* note 10, at 27.
[127] *Id.* at 30.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 31.

UDHR as an interpretive tool, but also as a measure of international custom.[131] The UDHR was designed to outline the minimum standard of international human rights to be recognized by the member states.[132] One of these rights was the right to adequate housing.[133] Article 25 of the UDHR addresses the right to adequate housing by stating that:

> everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, [and] housing . . . in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.[134]

There are some instances that justify legal evictions that do not violate human rights, including when there is compulsory land acquisition for initiating large-scale development projects, urban renewal, or housing renovation programs.[135] Additionally, some may argue that eviction does not deprive someone of the right to housing, in the same way that denying someone's lease application or mortgage loan does not deprive someone of their right to housing. However, there are limitations to these justified evictions.[136] For example, evictions, just like lease application decisions and mortgage loans, must not be discriminatory; they must comply with reasonable standards, and they must have judicially enforced procedural safeguards before, during, and after eviction.[137]

The UN further attempted to define "reasonable standards," but offered little guidance on how to implement its broad definitions.[138] In the UN's Guidelines for the Implementation of the Right to Adequate Housing stated, "States must recognize the right to adequate housing as

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[131] *The Universal Declaration of Human Rights and its relevance for the European Union*, at 1 (Nov. 2018), https://www.europarl.europa.eu/RegData/etudes/ATAG/2018/628295/EPRS_ATA(2018)628295_EN.pdf.
[132] ALFREDSSON & EIDE, *supra* note 10.
[133] Universal Declaration of Human Rights, *supra* note 8, at Art. 25 (Dec. 10, 1948).
[134] *Id.*
[135] S M Atia Naznin, *Researching the Right to Housing*, HAUSER GLOBAL LAW SCHOOL PROGRAM (Nov./Dec. 2018), https://nyulawglobal.org/globalex/Housing_Rights.html#_3._Forced_Eviction.
[136] *Id.*
[137] *Id.*
[138] Guidelines for the Implementation of the Right to Adequate Housing, *To the Human Rights Council at its 43rd session,* U.N. Doc. A/HRC/43/43 (24 Feb. – 20 Mar. 2020).

a legal obligation under domestic law."[139] Reasonable standards were further defined as deliberate, concrete, and targeted measures "taken towards the fulfilment of the right to housing within a reasonable time frame."[140] Further, the UN stated that states must allocate sufficient resources and prioritize the needs of disadvantaged and marginalized individuals or groups living in poor housing conditions.[141]

In 2000, the Constitutional Court of South Africa heard a case to define the scope of the reasonableness standard of adequate housing.[142] In *Government of the Republic of South Africa v. Grootboom*, Mrs. Grootboom was evicted and left homeless while waiting for low-income housing.[143] Mrs. Grootboom lived temporarily in a squatter's settlement with no water, sewage, or refuse removal services, and only five percent of the shacks had electricity.[144] She waited for low-income housing for at least seven years.[145] South Africa adopted a provision in Section 26 of its Constitution that mirrors that of Article 25 of the UDHR.[146] The Court considered whether the state violated Section 26 (South Africa's constitutional right to adequate housing) by failing to provide reasonable housing accommodations upon Mrs. Grootboom's eviction.[147]

The Constitutional Court considered several factors in its reasonableness inquiry, including whether the state took reasonable legislative measures within its available resources, reasonably implemented those measures with adequate budgetary support by the national government, and satisfied the "minimum core of the right."[148] The court also considered the availability of land, level of poverty in the state, the difference between city and rural communities, the economic and social history of a country, whether the housing program accommodates immediate circumstances of those in crises, and the scale of the overall housing crisis within a state.[149] The court ultimately

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[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Government of the Republic of South Africa v. Grootboom* 2000 (1) SA 46 (CC) at 1 (S. Afr.).
[143] *Id.* at 2.
[144] *Id.* at 7.
[145] *Id.*
[146] *Id.* at 10.
[147] *Id.* at 33.
[148] See *Government of the Republic of South Africa* 2000 (1) SA at 26, 33 (S. Afr.). (the minimum core right is typically determined by the needs of the most vulnerable groups that are entitled to the protection of the right in question).
[149] *Id.* at 27.

determined that South Africa was in breach of its constitutional obligation to provide adequate housing because it did not meet this reasonableness standard.[150] Most importantly, South Africa's national low-income housing program failed to provide any form of relief to those desperately in need of access to housing.[151] To fulfill this obligation, the court determined that the state must "devise, fund, implement, and supervise measures to provide relief to those in desperate need."[152] Although the court ultimately did not define "desperate need," the case provides one perspective that considers multiple factors about how member states should implement a "reasonableness standard" to enforce its international obligation of the right to adequate housing.[153]

The International Covenant on Economic, Social and Cultural Rights (ICESCR) also informs states on how to comply with Article 25 of the UDHR.[154] In 1977, President Jimmy Carter signed the ICESCR.[155] In October 1977, President Carter sent the Covenant to the Senate, which subsequently sent it to the Senate Committee on Foreign Relations.[156] In November 1979, the Senate held hearings on the ICESCR, but no resolution or ratification was passed.[157] However, the ICESCR was also not returned to the president to signal a rejection of the treaty.[158] Therefore, the Senate still has the power to ratify the ICESCR, and no president has taken steps to revoke signatory status.[159] Since the U.S. has signed but not ratified the ICESCR, it is not binding on the U.S.[160] However, the U.S. is customarily encouraged to follow it, because similar to the UDHR, the U.S. has taken steps (signing the treaty) to affirm the principles laid out in the ICESCR, and has taken no steps to reject its principles.[161]

According to General Comment No. 7 of ICESCR, even in justified cases, evictions are capable of violating a person's human

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[150] *Id.* at 66.
[151] *Id.*
[152] *Id.*
[153] *Government of the Republic of South Africa* 2000 SA 1 CC at 1 para. 53 (S. Afr.).
[154] Jeffrey L. Roberg, *The Importance of International Treaties: Is Ratification Necessary*, 169 WORLD AFFS. 182 (2007).
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See generally* Medellin v. Texas, 552 U.S. 491 (2008).
[161] Petersen, *supra* note 11, at 1.

rights.[162] The ICESCR further states that even in such justified cases, an eviction should not cause a person to become homeless, and the state is responsible for providing an adequate alternative for shelter.[163] Adequate housing, as defined by the ICESCR, requires a living standard that includes dignity, peace, security, availability of services, materials, facilities and infrastructure, affordability, habitability, accessibility, location, and cultural adequacy.[164] The requirement for accessibility goes beyond being physically accessible to occupants.[165] The ICESCR requires that "suitable accommodation should be available to other disadvantaged groups."[166]

Additionally, international law explicitly rejects discrimination in housing.[167] The U.S. has signed and ratified the CERD.[168] The CERD defines the requirements to combat discriminatory practices as promoting and encouraging universal respect for and observance of human rights and fundamental freedoms for all, without distinction, [exclusion, restriction or preference] based on race, colour, language or religion, [descent, or national/ethnic or ethnic origin].[169] More specifically, Article 5(d)(i) of the CERD requires "the right to freedom of movement and residence within the border of the State."[170] In signing CERD in 1966 and ratifying it in 1994, the U.S. must ensure that all people, regardless of race, have the right to housing and to own property.[171] Further, CERD protects not only overt acts of discrimination but also discriminatory effects.[172] CERD states in Article 1:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect* of

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[162] ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997.
[163] *Id.*
[164] 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); S. Treaty Doc. No. 95-19; 6 I.L.M. 360 (1967).
[165] *Id.*
[166] *Id.*
[167] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] Michael B. de Leeuw et al., *The Current State of Residential Segregation and Housing Discrimination: The United States' Obligations Under the International Convention on the Elimination of all Forms of Racial Discrimination*, 13 MICH. J. RACE & L. 337, 342-43 (2008).
[172] *Id.* at 339.

> nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.[173]

The violation is not dependent on whether the action was taken with a discriminatory purpose or unintentionally created a discriminatory impact evidenced by the language, "purpose or effect."[174] This obligation requires the federal government to "rectify or invalidate federal, state, and local policies and laws that have racially disparate impacts, not just those that were developed or passed with discriminatory intent." [175] The counterargument here is that usually disparate impact challenges are cured when there is a justifiable reason for the disproportionate impact.[176] Here, that justifiable reason could be to create crime-free housing environments and safer communities.[177]

However, the U.S. Department of Justice Civil Rights Division (DOJ CRT) recently secured a consent order against Hesperia, California after alleging that the crime-free ordinances were a pretext for racial discrimination.[178] DOJ CRT is investigating crime-free housing programs across the country, suing city governments and police departments, claiming their crime-free ordinances violate the Fair Housing Act.[179] Assistant U.S. Attorney General Kristen Clarke stated, "[s]o-called 'crime-free' ordinances are often fueled by racially discriminatory objectives, destabilize communities and promote modern-day racial segregation."[180] Therefore, it may be difficult for PHAs to continue to sidestep the disparate impact of implementing the

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[173] International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

[174] Gay McDougall, *International Convention on the Elimination of All Forms of Racial Discrimination*, AUDIOVISUAL LIBR. OF INT'L L., (Dec. 21, 1965), https://legal.un.org/avl/ha/cerd/cerd.html.

[175] Leeuw et al., *supra* note 171, at 344.

[176] McDougall, (quoting Comm. on the Elimination of Racial Discrimination, General Recommendation No. 14, U.N. Doc. A/48/18 (Sept. 15, 1993), *supra* note 174.

[177] *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 541 (2015); Dep't of Hous. v. Rucker, 535 U.S. 125, 136 (2002); Lundgren, Curtis, & Oettinger, *supra* note 33, at 35.

[178] *Justice Department Secures Landmark Agreement with City and Police Department Ending "Crime-Free" Rental Housing Program in Hesperia, California*, OFF. OF PUB. AFF. U.S. DEP'T OF JUST., (Dec. 14, 2022), https://www.justice.gov/opa/pr/justice-department-secures-landmark-agreement-city-and-police-department-ending-crime-free.

[179] *See id.*

[180] *Id.*

One Strike policy and their violations of CERD as arguments continue to be made that these policies are pretext for unjustifiable discrimination.

III. APPLYING THE INNOCENT OWNER DEFENSE TO U.S. HOUSING PROGRAMS WILL ASSIST IN FURTHER COMPLIANCE WITH INTERNATIONAL OBLIGATIONS

The HOPE Act and subsequent Supreme Court decisions are in violation of the Article 25 of the UDHR and the CERD.[181] Therefore, family members should not be evicted solely based on the criminal record of a person living in their home. *Rucker* must be overturned through a judicial act or legislation, and an innocent owner defense, akin to the defense for civil forfeiture, should be implemented as an alternative to evicting innocent tenants with no knowledge of criminal activity. This change would allow the U.S. to achieve compliance with UN human rights obligations.

A. U.S. Violations of UDHR Article 25

Article 25 of the UDHR has become customary international law with a presumption against forced evictions, and thus binding on nations.[182] States have independently and collectively adopted the UDHR into domestic constitutions, laws, regulations, and policies.[183] In the international realm, the UDHR has been recognized as customary law "by states in intergovernmental and diplomatic settings, in arguments submitted to judicial tribunals, by the actions of intergovernmental organizations, and in the writings of legal scholars."[184] "[C]ustom is created by the practice of States and continues to exist and operate as a norm based on the practice."[185] However, customary international law must go beyond being "a norm" for it to be

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[181] *See* Universal Declaration of Human Rights, *supra* note 8; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.

[182] *See* ICESCR, General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions), 16th Sess., adopted 1997); Ionel Zamfir, *The Universal Declaration of Human Rights and its Relevance for the European Union*, EUROPEAN PARLIAMENTARY RES. SERV. (Nov. 2018), https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2018)628295 .

[183] *See* Hurst Hannum, *The UDHR in National and International Law,* 3 HEALTH AND HUM. RTS., 145, 145-152 (1998).

[184] *Id.* at 145.

[185] Gennady M. Danilenko, *The Theory of International Customary Law,* 31 GERMAN YB INT'L L 9, 10 (1988).

legally enforceable.[186] Nations must accept common rules of conduct as law to become legally binding norms.[187] To do so, courts look to the collective actions of different state practices to determine whether continuous, uniform, and precedential actions were taken.[188] Customary international law requires that an "agreement is reached through the repetition of similar acts that under certain conditions assume precedent value."[189] States act with the belief that its actions can affect the formation and content of general customary law, as well as its mutual legal relations with other actors.[190] Because of this, states that "participate in international practice usually express through their actions or official statements a certain legal position."[191]

Almost every state accepts the principles laid out in the UDHR, and the instrument is widely accepted as the International Bill of Human Rights.[192] At least 90 national constitutions created since 1948 contain statements of fundamental rights inspired by the UDHR.[193] Many countries in Africa have included explicit references to the UDHR, and Indian courts have stated that the Indian Constitution has embodied most of the articles.[194] Further international human rights treaties have expanded the provisions of the UDHR including Article 12 of the ICESCR, which specifically expands Articles 23 through 25 of the UDHR.[195] This collective realization across states' domestic constitutions, legislation, and regulations, as well as international recognition through language of additional human rights treaties and judicial and diplomatic affairs, shows that the UDHR should be recognized as customary international law.

Despite differing opinions from scholars on the enforceability of customary international law, a prevailing viewpoint is that customary international law binds UN member states unless they explicitly object to its formation, at the time of its formation.[196] This approach does not eliminate the free will of nations by binding member states that explicitly

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[186] *Id.*
[187] *See id.* at 11.
[188] *Id.*
[189] *Id.* at 13.
[190] *Id.*
[191] Gennady M. Danilenko, *The Theory of International Customary Law,* 31 GERMAN Y.B. INT'L L 9, 13 (1988).
[192] Hurst Hannum, *The UDHR in National and International Law,* 3 HEALTH AND HUMAN RIGHTS 145-146-47 (1998).
[193] *Id.* at 150.
[194] *Id.* at 150-51.
[195] *Id.* at 152-53.
[196] Petersen, *supra* note 11, at 1-2.

reject the principles laid out in customary international law.[197] However, under this model of customary international law, nations that affirm, abstain, or oppose the formation of a norm are bound to the customary law unless it takes affirmative steps to reject the norm.[198] Other interpretations of customary international law point out that there is no quantifiable threshold of participating nations to create the norm or a quantifiable amount of disaffirming action to unbind a disavowing nation.[199] Regardless, although the U.S. has done a poor job of affirmatively adhering to the provisions of the UDHR, the U.S. has taken no affirmative steps to reject the principles laid out in the UDHR.[200] Therefore, the U.S. is customarily bound to adhere to the UDHR.

Article 25 of the UDHR has become customary international law with a presumption against forced evictions, and thus binding on nation behaviors.[201] Evictions in the U.S. because of someone's criminal record do not comply with these current international laws and limitations.[202] More specifically, the U.S. falls outside UDHR Article 25 when it evicts innocent tenants by failing to provide adequate housing under the "reasonableness standard."[203] The ICESCR informs our inquiry about what constitutes adequate housing.[204] As previously mentioned, as a part of the reasonableness inquiry, evictions must not be discriminatory, tenants must have judicial procedural safeguards before, during, and after eviction, and there must be an adequate alternative provided by the state.[205] Judicial safeguards include allowing tenants to have an adequate defense to unlawful evictions and discriminatory practices when an action is brought against them in an eviction proceeding.[206] The impact of discriminatory housing practices will be expanded on in the following section.

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[197] *Id.* at 2.
[198] *Id.*
[199] *Id.* at 2-3.
[200] *See generally History of the Declaration*, UNITED NATIONS, https://www.un.org/en/about-us/udhr/history-of-the-declaration.
[201] ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997; ALFREDSSON & EIDE, *supra* note 10, at 305.
[202] Universal Declaration of Human Rights, *supra* note 8, at Art. 3; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 9.
[203] Universal Declaration of Human Rights, *supra* note 8, at Art. 25.
[204] *See* ICESCR, *General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions)*, 16th Sess., adopted 1997.
[205] Naznin, *supra* note 135.
[206] *Id.*

As to judicial safeguards, the U.S. judicial system is not designed to provide safeguards to Housing Voucher tenants. Section 8 tenants face frequent barriers in obtaining legal counsel.[207] Representation of these clients is frequently carried out through free legal services for qualifying clients, and many tenants go unrepresented.[208] Furthermore, these low-income tenants frequently "face the landlord's lawyer in a court proceeding that involves a complex web of federal, state, and local laws that she is ill-equipped to utilize."[209] Therefore, PHAs will continue to use overly discretionary tactics in looking into criminal records and history, and Section 8 tenants will continue to be over-policed. The result is, and will continue to be, that Section 8 tenants will be dissuaded and discouraged from fighting discriminatory practices, even those that are overt.[210] Consequently, U.S. judicial safeguards for evicted tenants do not meet the reasonableness standard laid out in the UN's 2019 Special Rapporteur on Adequate Housing because the U.S. has not allocated sufficient judicial and legal resources to provide appropriate judicial recourse for Section 8 tenants.[211] The innocent owner defense would be a step in the right direction to provide tenants with adequate judicial safeguards.

Furthermore, allowing a strict scrutiny standard for evictions gives innocent tenants essentially no judicial recourse, unless they can overcome the immense hurdle of proving a civil rights violation.[212] However, any judicial remedy is stacked against the non-offending tenant, as landlords can simply argue they have a justified and legitimate interest in promoting drug and crime-free housing.[213] There is also no recourse for innocent tenants who may be denied future federal housing assistance benefits or private rentals because they have an eviction record. The HOPE Act, the subsequent decision in *Rucker*, and HUD guidance allows for PHAs to be the judge and jury in granting future Section 8 Vouchers to previously evicted tenants, taking away any judicial safeguards before, during, or after an eviction of an innocent tenant.[214]

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[207] Nelson H. Mock, *Punishing the Innocent: No-Fault Eviction of Public Housing Tenants for the Actions of Third Partiest*, 76 TEX. L. REV. 1495, 1506 (1997-1998).
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *See generally* U.N. Hum. Rts. Off. of the High Comm'r, *supra* note 138.
[212] Johnson, *supra* note 102, at 246.
[213] *See* Dep't of Hous., 535 U.S. at 125.
[214] *See* Housing Opportunity Program Extension Act of 1996, 104 Enacted S. 1494, 110 Stat. 834; *see* Dep't of Hous., 535 U.S. at 125.

Since tenants have the right to pursue their limited remedies in court, it seems that the reasonableness standard for judicial safeguards is met. However, as addressed by South Africa's Constitutional Court, it is not enough to have legislation or a remedy alone to satisfy granting the right.[215] The effective and reasonable implementation of that right is also required.[216] Although an innocent tenant may be heard in court, the strict scrutiny standard violates the reasonableness standard by barring the implementation of judicial recourse for an innocent tenant.[217] Therefore, allowing an innocent owner defense would bring the U.S. closer to achieving compliance with Article 25 of the UDHR.

The third responsibility under Article 25 to fulfill the obligation to providing adequate housing includes providing an adequate alternative for shelter if a person loses the right to their home or their current home is inadequate.[218] The U.S. starkly ignores this obligation by evicting innocent tenants from federally subsidized housing. The essence of the federal housing programs is to provide low-income tenants with an adequate alternative to the unaffordable private housing rental market.[219] By evicting these residents, especially those that are innocent, the U.S. takes the adequate alternative to affordable housing and makes it nearly impossible to obtain again. Federal housing assistance programs were set up to combat a shortage of affordable, safe, and attainable housing alternatives to ensure that individuals could have the right to adequate housing.[220] By evicting the innocent, the U.S. is stripping people of that right. Therefore, the U.S. also fails under the 2019 UN Special Rapporteur on Adequate Housing reasonableness standard by failing to use all its available resources to provide an adequate alternative to those in desperate need.[221]

Aside from the U.S. uprooting the established adequate alternative by evicting innocent tenants, when Housing Voucher tenants are evicted, the U.S. makes few attempts to secure a different adequate

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[215] Government of the Republic of South Africa, 2000 (1) SA 1 (CC) at 27 para. 33 (S. Afr.).
[216] *Id.* at 26-27 para. 31-32.
[217] *Id.* at 27 para. 33.
[218] ICESCR, General Comment No. 7: Article 11(1) (Right to Adequate Housing: Forced Evictions), 16th Sess., adopted 1997.
[219] *Housing Choice Vouchers Fact Sheet*, *supra* note 3.
[220] *Id.*
[221] *See* U.N. Hum. Rts. Off. of the High Comm'r, *supra* note 138.

alternative. Instead, the result is most often homelessness.[222] Some EU member states work to combat this problem by implementing the "staircase approach," which creates a transitional housing program from hostels and shelters to permanent housing.[223]However, with current U.S. policies and the tough-on-crime agenda that the U.S. has adopted, it seems difficult to imagine a U.S. policy that gives support to formerly evicted families due to criminal activity, regardless of their culpability. Instead, to reduce discrimination, enforce judicial safeguards before, during, and after eviction, and provide an adequate alternative to housing, the U.S. should adopt an innocent owner defense in Section 8 cases for innocent tenants.

B. Violations of CERD

Perhaps the most troubling and pervasive human rights violation the U.S. has perpetuated with the passage and implementation of the HOPE Act, and the decisions in *Rucker* and *Texas Department of Housing*, is the U.S.'s flagrant abandonment of its commitment to CERD. Under CERD, the U.S. is required to ensure freedom of movement and residence, the right to housing without distinction as to race, cease discriminatory actions, and invalidate policies and laws with discriminatory effects regardless of intent.[224] The HOPE Act, and the *Rucker* and *Texas Department of Housing* decisions squarely violate these provisions.

Forced evictions generally perpetuate "inequality, social conflict, segregation, and ghettoization" and have a disparate impact on the poor.[225] For example, the HOPE Act authorized evictions of Section 8 tenants engaged in criminal activity or any member of the tenant's household.[226] This eviction practice perpetuates disparate impacts by evicting tenants who are inevitably poor and marginalized because they

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[222] Linda Wood-Boyle, *Facing Eviction: Homelessness Prevention for Low-Income Tenant Households,* FEDERAL RESERVE BANK OF BOSTON, https://www.bostonfed.org/publications/communities-and-banking/2015/winter/facing-eviction-homelessness-prevention-for-low-income-tenant-households.aspx.

[223] Volker Busch-Geertsema, *Housing First Europe Final Report*, EUROPEAN UNION PROGRAMME FOR EMPLOYMENT AND SOCIAL SECURITY at 15 (2013).

[224] Leeuw et al., *supra* note 171, at 345.

[225] Naznin, *supra* note 135.

[226] Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 837-38 (1996).

are in a federal housing assistance program.[227] Then, the practice worsens evicted tenants' inequality, socioeconomic status, and poverty when they are forcibly removed from their homes by making it more difficult to have economic and social stability, creating a cycle of poverty for marginalized groups.[228]

Furthermore, the incentive program that followed from the HOPE Act as outlined in HUD's One Strike policy encourages discriminatory PHA practices. By giving PHAs lower PHMAP scores if they do not implement the One Strike policy,[229] it encourages PHAs to over-police minority communities. Since fifty-eight percent of public housing tenants are minorities,[230] PHAs constructively target minorities by over-screening and over-punishing. This causes an increase in eviction rates for minorities and produces discriminatory effects.[231] Furthermore, since *Rucker* only requires strict liability for innocent tenants,[232] innocent tenants are essentially being punished for being impoverished. These innocent tenants are more likely to live in higher drug and crime areas by the implications of their socioeconomic status.[233] Under *Texas Department of Housing*, the Supreme Court has deemed these disparate impacts constitutional since these policies are "necessary to achieve a valid interest."[234]

However, as previously mentioned, CERD explicitly requires the U.S. to review policies, and amend, rescind, or nullify laws that have the effects of perpetuating racial discrimination, even those that have disparate impacts.[235] The U.S. has failed to do so. The U.S. has specifically come under international scrutiny for its violations of CERD by requiring that a plaintiff prove a perpetrator's intent, known as the Intent Doctrine, to discriminate to win an equal protection claim.[236]

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[227] *See Evictions: A Vicious Cycle for People in Poverty*, COMMUNITY AND ECONOMIC DEVELOPMENT IN NORTH CAROLINA AND BEYOND (Aug. 17, 2023), https://ced.sog.unc.edu/2016/08/evictions-a-vicious-cycle-for-people-in-poverty/.
[228] *Id.*
[229] Costa, *supra* note 7, at 827.
[230] *Id.* at 828.
[231] *Id.* at 827-28.
[232] Dep't of Hous. & Urb. Dev., 535 U.S. at 134.
[233] U.S. DEP'T OF JUST., OFF. OF JUST. PROGRAMS, NAT'L INST. OF JUST., RSCH REP., 145329, DRUGS AND CRIME IN PUBLIC HOUSING: A THREE CITY ANALYSIS (1994).
[234] Tex. Dep't of Hous. & Cmty. Aff., 576 U.S. at 541.
[235] International Covenant on the Elimination of all Forms of Racial Discrimination, *supra* note 9 at 5.
[236] Audrey Daniel, *The Intent Doctrine and CERD: How the United States Fails to Meet Its International Obligations in Racial Discrimination Jurisprudence,* 4 DEPAUL J. SOC. JUST. 263, 263 (2011).

CERD distinctly focuses on a disparate impact analysis that contemplates whether an action resulted in discrimination, rather than if racial discrimination was intended.[237] The UN adopted this "effects" framework to combat modern discrimination that is often not overt or explicit, but is rather subconscious and institutional.[238] However, the U.S. has refused to comply with the CERD framework and instead requires that a plaintiff prove that a defendant had a specific intent to discriminate against them to have a claim.[239]

Further, the Obama administration attempted to review these policies, but the outcomes were minimal because local PHAs retained broad discretion to implement the One Strike policy, and the law has remained unchanged since 2002.[240] Instead, HUD and the Supreme Court have continued to give PHAs more discretion and continue to encourage evictions of innocent tenants regardless of the discriminatory impact.[241] Therefore, the U.S. remains in violation of CERD. Adopting an innocent owner defense will not completely solve the systemic problem of forced evictions in public housing, but it will get the U.S. started in the right direction of reducing discriminatory housing practices in violation of CERD.

C. Implementing an Innocent Owner Defense for Innocent Section 8 Tenants

To illustrate how the innocent owner defense would work, take this hypothetical example: a mother is renting an apartment on a Section 8/PHA voucher. The landlord of her apartment catches the mother's son with marijuana. Before the eviction of the mother can take place, she would be entitled to a court hearing. This hearing would allow the mother to elect to be represented by counsel and prepare a defense. The burden would be on the landlord to prove that: (1) a breach of the lease agreement occurred due to drug possession and (2) that the party the landlord is trying to evict had knowledge of the criminal activity. The mother and her counsel could then assert the innocent owner defense. The defense would be asserted in an analogous way to civil forfeiture proceedings. More specifically, the mother would have to prove by a

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[237] *Id.* at 264.
[238] *Id.*
[239] *Id.* at 264-66.
[240] *See* Costa, *supra* note 7, at 828.
[241] Lundgren, Curtis, & Oettinger, *supra* note 33, at 35; Dep't of Hous. & Urb. Dev., 535 U.S. at 136; Kaplan & Rossman, *supra* note 4, at 112-13; *see also* Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, § 9, 110 Stat. 834, 837-38 (1996).

preponderance of the evidence that she did not know of the criminal conduct, or upon learning of the conduct she did all that reasonably could be expected under the circumstances.[242] If the mother can satisfy this burden, she will not be evicted.

An innocent owner defense will allow for innocent tenants to have judicial recourse in compliance with Article 25. Although the innocent owner defense was previously rejected for Section 8 Voucher recipients in *Rucker* because the Court argued that recipients were not entitled to the same protection as private lessees, the Court did not consider or address the international implications of denying such a defense.[243] The innocent owner defense will reduce discriminatory practices by reducing the number of low-income, minority tenants that are being evicted, moving the U.S. in the direction of compliance with CERD. If the U.S. continues to disregard its international obligations, the U.S. will continue to lose international credibility. The U.S. should tread carefully when disregarding violations of international human rights that it has chosen to obligate itself to.

IV. CONCLUSION

The U.S. is in violation of international human rights law when it forcibly evicts families from federal housing assistance programs based on the criminal record in someone's home. Forced evictions disproportionately affect minority communities. The HOPE Act and the *Rucker* decision have perpetuated this problem specifically by allowing for innocent tenants to be evicted despite no knowledge or contribution to the criminal activity. These policies and decisions violate UDHR Article 25, the right to adequate housing, and CERD. To become compliant with Article 25 and CERD, the U.S. should adopt an innocent owner defense in Section 8 cases for innocent tenants. Adopting an innocent owner defense will not remove all discrimination in federal housing assistance programs. However, adopting this defense will be a big step in bringing the U.S. closer in compliance with UDHR customary international law, and CERD, which the U.S. is domestically and internationally bound to follow.

[242] Suarez, *supra* note 21, at 1003.
[243] *See generally* Dep't of Hous. v. Rucker, 535 U.S. at 125, 127, 135.

UP A RISING CREEK WITHOUT A PADDLE: A SURVEY OF LEGAL PROTECTION FOR CLIMATE MIGRANTS

Kaitlin Groundwater

I. INTRODUCTION

Society is eager to help refugees fleeing war-torn regions, but there is a growing group of migrants who do not illicit the same desire to provide aid or have similar legal protections: those forced to leave their homes due to the effects of climate change.[1] Climate change causes a host of problems, including extreme weather events, rising sea levels, diminished food sources, degradation of natural resources, and increased frequency of disease.[2] Humans naturally respond to such vicissitudes in their natural environment by migration.[3] They leave their homes in search of viable food sources, clean water, and/or available housing, which is no longer available to them due to extreme weather events or the slow-onset effects of climate change.[4]

The global community recognizes the occurrence of human movement in response to climate change and predicts such movement will continue to grow.[5] For example, the United Nations Office of the High Commissioner, an office charged with protecting human rights, highlighted in its April 2018 report the profound impact that climate change has on human mobility, stating "it is clear that climate change substantially contributes to human rights harms and related human movement."[6] The Intergovernmental Panel on Climate Change (IPCC), a body of the United Nations charged with collecting and analyzing all global science on climate change, made similar findings.[7] The IPCC

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[1] *See* John Podesta, *The Climate Crisis, Migration, and Refugees*, THE BROOKINGS INST., (Jul. 25, 2019), https://www.brookings.edu/research/the-climate-crisis-migration-and-refugees/.

[2] *Id.*

[3] Jane McAdam, *Climate Change Displacement and International Law: Complementary Protection Standards*, U.N. HIGH COMM'R FOR REFUGEES [UNHCR], at 4, PPLA/2011/03 (May 2011).

[4] *See* Podesta, *supra* note 1.

[5] *Id.*

[6] *See* U.N. Hum. Rts. Council [UNHRC], *Addressing Human Rights Protection Gaps in the Context of Migration and Displacement of Persons Across International Borders Resulting from the Adverse Effects of Climate Change and Supporting the Adaptation and Mitigation Plans of Developing Countries to Bridge the Protection Gaps*, at 4, U.N. Doc. A/HRC/38/21 (Apr. 23, 2018).

[7] *See* Pachauri et al., Intergovernmental Panel on Climate Change [IPCC], *Climate Change 2014 Synthesis Report*, at 71 (2015), https://www.ipcc.ch/site/assets/uploads/2018/02/SYR_AR5_FINAL_full.pdf.

report identified displacement associated with extreme weather events as a key global risk and predicted that "with increasing climate risks, displacement is more likely to involve permanent migration."[8]

The increased probability of migration due to climate change has also been recognized by the United States.[9] In 2021, President Biden signed Executive Order (E.O.) 14013, which called for a report on "climate change and its impact on migration."[10] The White House Report found that extreme weather events and weather-related conflicts are the top two causes of annual human migration, resulting in 30 million people leaving their home countries per year.[11]

The White House Report indicated that extreme weather and the resulting human movement will only get worse.[12] Natural disasters, for example, are already on the rise, with "the annual number of natural disasters growing from 200 to 400 over a 20 year stretch."[13] However, the White House Report revealed that "[e]xisting legal instruments to protect displaced individuals are limited in scope and do not readily lend themselves to protect those individuals displaced by the impacts of climate change."[14] International legal instruments equipped to handle climate migration are equally sparse.[15] The United Nations High Commission for Refugees has yet to grant refugee status to individuals "displaced by weather events stemming from climate change."[16]

Human migration due to climate change is likely to increase as natural disasters grow in frequency.[17] However, there is a significant legal void in the area of climate migration, both in the United States and globally.[18] Without legally enforceable provisions supporting those displaced as a result of climate change, people will be forced to migrate "with little legal protection."[19]

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[8] *Id.*
[9] *See generally* WHITE HOUSE, REPORT ON THE IMPACT OF CLIMATE CHANGE ON MIGRATION (Oct. 2021).
[10] *Id.* at 4.
[11] *Id.* at 7.
[12] *Id.* at 4.
[13] McAdam, *supra* note 3, at 46.
[14] WHITE HOUSE, *supra* note 9, at 6.
[15] *See* Podesta, *supra* note 1.
[16] *Id.*
[17] *See* WHITE HOUSE, *supra* note 9, at 4.
[18] *See* Podesta, *supra* note 1.
[19] *Id.*

This comment will, in Part II, explore climate change and how it impacts human migration. It will then survey the current international landscape of legal protections for cross-border climate migrants, a group of individuals that is growing in size around the world. Part III will navigate two avenues for legal protections under United States and international law for cross-border climate migrants. The first avenue utilizes an exception to the Immigration and Nationality Act that allows Temporary Protected Status (TPS) to apply to certain individuals that do not currently reside in the United States. The second avenue stems from international human rights law and requires the United States and other participating nations to change their interpretation of one's right to life under the International Covenant on Civil and Political Rights (ICCPR) to include protection from environmental threats. those forced from their homes due to the most severe effects of climate change. Finally, Part IV concludes that if the United States and the world wish to provide greater legal protection to those fleeing the effects of climate change, the existing pathways in United States and international human rights laws can be leveraged to do so.

II. BACKGROUND

A. Climate Change and Its Impact on Human Migration

The Earth is warming at a pace that is "unprecedented over decades to millennia."[20] These changes are clear, and their existence cannot be doubted.[21] Such a dramatic change in the global climate has created a host of environmental issues.[22] The ocean is acidifying due to increased uptake of carbon dioxide (CO_2), annual precipitation has increased in the Northern Hemisphere, global ice sheets and glaciers are melting at an increasing rate, and the sea level is rising at a rate "larger than the mean rate during the previous two millennia."[23] Accompanying these changes is a significant increase in extreme weather events, with the annual occurrences of natural disasters doubling over a recent 20 year period.[24]

With more frequent extreme weather events, warmer temperatures, and increased rainfall, come a number of problems that

[20] IPCC, *supra* note 7, at 2.
[21] *See* WHITE HOUSE, *supra* note 9, at 4.
[22] *See id.*
[23] IPCC, *supra* note 7, at 4.
[24] McAdam *supra*, note 3, at 46.

impact the habitability of a region or country.[25] Food insecurity is a likely result of climate change, especially in areas already threatened by hunger.[26] Warmer temperatures and increased rainfall make it more difficult to grow certain crops, meaning many farmers will struggle to produce their normal food sources.[27] Furthermore, "it can be anticipated that food access and utilization will be affected indirectly via collateral effects on household and individual incomes, and food utilization could be impaired by loss of access to drinking water and damage to health."[28] Diminished living conditions are also expected as global temperatures rise.[29] For example, in Southern Madagascar, Namibia, South Africa, and Angola, drought is already affecting cattle farms, causing agricultural losses.[30] These environmental changes are accompanied by numerous serious health risks.[31] The World Health Organization (WHO) identified many "climate-sensitive health risks," including water-borne illnesses, respiratory illnesses, vector-borne diseases, zoonoses, lack of access to safe drinking water, malnutrition, and more.[32]

With such threats to health and home, it is natural that individuals will migrate to avoid such harm, both within their home countries and across national borders.[33] Climate change and resulting extreme weather events mostly cause internal displacement.[34] Individuals leave their region and migrate to an area within their home country that is either less affected by a natural disaster or provides greater economic opportunity.[35] Internal displacement due to climate change is already occurring in massive quantities.[36] Between 2008 and 2016, an

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[25] *See* Tim Wheeler & Joachim Von Braum, *Climate Change Impacts on Global Food Security*, 341 SCIENCE 510, (Aug. 2, 2013), https://www.science.org/doi/full/10.1126/science.1239402#core-R15; *see* U.N. HUM. RTS. OFF. OF THE HIGH COMM'R [OHCHR],*"I lost friends, relatives, our house"*, (Jul. 26, 2022), https://www.ohchr.org/en/stories/2022/07/i-lost-friends-relatives-our-house.

[26] *See* Wheeler, *supra* note 25, at 508, 511.

[27] *Id.* at 511.

[28] *Id.* at 508.

[29] *See* OHCHR, *supra* note 25.

[30] *Id.*

[31] *See* Andy Craggs, *Climate Change and Health,* WORLD HEALTH ORG. (Oct. 30, 2021), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health.

[32] *Id.*

[33] *See* UNHRC, *supra* note 6, at 5.

[34] *See* WHITE HOUSE, *supra* note 9, at 4.

[35] *See* McAdam*, supra* note 3, at 11.

[36] *See* Podesta, *supra* note 1, at 3.

average of 21.7 million people per year were internally displaced following weather-related natural disasters.[37]

External migration is more difficult to track, and as a result, it remains unknown how many individuals migrate across borders each year because of climate change.[38] The lack of data is largely due to the relative complexity of cross-border migration related to movement within a single country, also including other factors such as political conflict and economic instability contributing to the decision to migrate.[39] For example, Haiti is particularly vulnerable to cross-border migration since it has experienced drastic weather events like hurricanes and earthquakes during a period of severe economic instability.[40] Central American countries such as Guatemala, Honduras, and El Salvador are also at risk of climate migration due to the threat of hurricanes and subsequent crop failures, combined with political and economic instability.[41] African nations that are experiencing crop failures due to the effects of climate change, including Namibia, Angola, and South Africa, are also vulnerable to cross-border migration, considering their accompanying civil instability.[42] In each case, it is difficult to determine the role climate factors play compared to the economic and political factors in one's decision to migrate.[43]

Ultimately, experts predict that an "accelerating trend of global displacement related to climate impacts is increasing cross-border movements, . . . particularly where climate change interacts with conflict and violence."[44] Though complex, a higher risk of climate-related migration can be inferred from the existence of environmental and civil instability, as seen in much of Central America, Caribbean Island nations, Pacific Islands, and many African nations.[45]

Migration due to climate change also happens at different speeds. Gradual changes to the environment spur "slow-onset

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[37] *See* UNHRC, *supra* note 6, at 3.
[38] *Id.*
[39] *See id. at* 4; *see generally* WHITE HOUSE, *supra* note 9, at 4.
[40] *See* Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,867 (Aug. 3, 2021).
[41] Mary Speck, *How Climate Change Catalyzes More Migration in Central America*, U.S. INSTITUTE FOR PEACE (Sept. 21, 2022), https://www.usip.org/publications/2022/09/how-climate-change-catalyzes-more-migration-central-america.
[42] OHCHR, *supra* note 25.
[43] *See* WHITE HOUSE, *supra* note 9, at 4.
[44] *Id.*
[45] *See generally* OHCHR, *supra* note 25.

movements."[46] This gradual build up to migration results from rising sea levels, increasing temperatures, ocean acidification, glacial retreat and related impacts, land and forest degradation, or loss of biodiversity and desertification.[47] Rapid migration, on the other hand, involves immediate evacuation caused by dramatic natural disasters like hurricanes, earthquakes, and floods.[48] These environmental changes initiate the movement of individuals to new areas where they inevitably face the legal implications of such movement.

B. International Legal Landscape of Climate Migration

International refugee law and international human rights law are each possible avenues for legal protection for environmental migrants.[49] International refugee law provides scant legal protection for cross-border climate migrants.[50] Climate migrants are fleeing some form of harm, such as disease, diminished living conditions, or loss of economic opportunity.[51] As a result, many call these individuals "climate refugees" and look to refugee law for a possible avenue for asylum.[52] However, migration due to climate change does not fit within the internationally accepted definition of "refugee."[53] The United Nations 1951 Refugee Convention and its 1967 Protocol ("Refugee Convention") outline the internationally agreed upon requirements for an individual to be legally considered a refugee.[54] 114 nations are bound by this Refugee Convention, including the United States.[55]

To be considered a refugee, the Refugee Convention requires that an individual: (1) has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion;" (2) has left his or her home country; and (3) is unwilling to return to that country because of this fear of persecution.[56]

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[46] McAdam, *supra* note 3, at 56.
[47] *See id.* at 16, 54.
[48] *Id.* at 11, 56.
[49] *See* Anxhela Mile, *Protecting Climate Migrants: A Gap in International Asylum Law*, EARTH REFUGE (Jan. 7, 2021), https://earthrefuge.org/protecting-climate-migrants-a-gap-in-international-asylum-law/.
[50] *Id.*
[51] *See generally* OHCHR, *supra* note 25.
[52] Mile, *supra* note 49.
[53] *See e.g. id.*
[54] McAdam, *supra* note 3, at 12.
[55] U.N. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 6.
[56] *Id.* at art. 1 (stating a refugee is someone who is unable or unwilling to return to their country of origin owing to a "well-founded fear of being persecuted for reasons

While the Refugee Convention does not define "well-founded fear," its application to specific circumstances where refugee status was granted provides context as to the term's meaning. For example, a well-found fear was recognized when an ethnic Kurd who was part of an Anti-Islamic regime feared torture if he or she returned to Iran.[57] Fear of persecution has been found in two additional instances. First, when a female child faced possible genital mutilation if she returned to Somalia, and second, when a child faced potential discrimination upon return to Russia due to his parents' sexual orientation.[58]

Cross-border migration due to climate change could, only under very rare and unique circumstances, be considered persecution by the United Nations.[59] Such a rare circumstance might arise based on migration resulting from a government's outright denial of protection from the effects of climate change.[60] A fear of persecution may also be derived from migration caused by an armed conflict deemed to stem from an effect of climate change, such as food shortages or land disputes due to local sea-level rise.[61]

While the possibility of migration stemming from a recognized form of persecution is rare, it is not impossible.[62] The IPCC recognizes a minor link between climate change and armed conflict.[63] The IPCC's

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of race, religion, nationality, membership of a particular social group, or political opinion…").

[57] U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 750/2016*,* **, ¶ 4.11, 8.8, U.N. Doc. CAT/C/63/D/750/2016 (May 25, 2018).

[58] U.N. Convention on the Rights of the Child, *Views adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 3/2016**,* ***, ¶11.3, 12, U.N. Doc. CRC/C/77/D/3/2016* (Mar. 8, 2018); U.N. Convention on the Rights of the Child, *Views adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure, concerning communication No. 51/2018**,* *** ¶ 8.4, 12.6, U.N. Doc. CRC/C/86/D/51/2018* (Mar. 12, 2021).

[59] *See* McAdam, *supra* note 3, at 13.

[60] *Id.*

[61] *See id.*

[62] *See* Christopher B. Field et. al., *Climate Change 2014: Impacts, Adaptation, Vulnerability Summary for Policymakers*, IPCC, at 20 (2014), https://www.ipcc.ch/site/assets/uploads/2018/03/ar5_wgII_spm_en-1.pdf.

[63] *Id.* (stating "[c]limate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented drivers of these conflicts such as poverty and economic shocks (medium confidence). Multiple lines of evidence relate climate variability to these forms of conflict.").

fifth assessment report (AR5) explains that "[c]limate change can indirectly increase risks of violent conflicts in the form of civil war and inter-group violence by amplifying well-documented sources of these conflicts, like poverty and economic shocks."[64]

The lack of a living persecutor is another factor that makes it difficult to define climate change effects as a form of persecution.[65] Typically, when an individual or group has refugee status, it is based on the identification of a persecutor in the form of a rival social group, a government, or other individual(s).[66] This was demonstrated in the case of the Kurd who was granted refugee status because of fear of persecution by a government controlled by a rival ethnic group.[67] Environmental or climate-related asylum seekers cannot point to a government, political leader, or social group as a potential persecutor.[68] Here, the fear of returning to their home country is caused by the physical environment.[69] It is often a drought, hurricane, lack of food, or other similar circumstance that is the driving force behind climate migration.[70] Without a persecutor, it will be difficult for a climate migrant seeking asylum to be granted relief under current international refugee law.[71]

International human rights law, while not a traditional avenue for climate-related asylum, provides greater promise for cross-border climate migrants.[72] The Refugee Convention, an international agreement on asylum and the rights of refugees, established the principle of non-refoulement, which could possibly be leveraged to aid climate migrants.[73] The term "refouler" means to return, and is used to describe the deportation of refugees to their home territories.[74] Article 33(1) of the Refugee Convention states that a country cannot return refugees to any territory where their "life or freedom" would be at risk as a result of "race, religion, nationality, membership of a particular social group, or

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[64] *Id.*
[65] McAdam, *supra* note 3, at 12.
[66] *See* U.N. Convention Relating to the Status of Refugees, *supra* note 55, at art. 1.
[67] McAdam, *supra* note 3, at 12.
[68] *Id.* at 12.
[69] *See id.*
[70] *See id.* at 11.
[71] *See id.* at 13–14.
[72] *See* Podesta, *supra* note 1.
[73] UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, ¶ 9 (Jan. 26, 2007) https://www.unhcr.org/4d9486929.pdf.
[74] *Id.* at ¶ 5.

political opinion."[75] Therefore, under the principle of non-refoulement, a country is prohibited from deporting an asylum seeker if he or she would be at risk of persecution upon return.[76]

Obligations to not extradite a refugee have also been inferred from other international treaties, like the United Nations Human Rights Committee's ICCPR.[77] Article 6 of the ICCPR states in subsection 1, "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."[78] The right to life under the ICCPR only protects individuals from circumstances that would cause early death or would inhibit one's ability to live with dignity but is not intended to be viewed narrowly.[79] Under the agreement, participating nations are required to refrain from any type of harm, either by act or omission, which would compromise this right to life.[80]

Additionally, Article 7 of the ICCPR asserts an individual's right to be free from torture or inhuman treatment.[81] The article states, "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[82] If one can show that return to their home country would lead to death or interfere with their right not to face torture or inhuman treatment, then they may be granted asylum under the ICCPR.[83]

Similar to refugee law, the principle of non-refoulement and the requirements under Articles 6 and 7 of the ICCPR mandate some

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[75] *Id.*
[76] *Id.* at ¶ 9.
[77] UNHRC, General Comment No. 31, UN Doc CCPR/C/21/Rev. 1/Add. 13, 29 March 2004.
[78] International Covenant on Civil and Political Rights, art. 6, Dec. 19, 1966, 999 U.N.T.S. 171, 174.
[79] UNHRC, General Comment No. 36 on the Right to Life (art. 6), UN Doc. CCPR/C/GC/36, 30 October 2018, online: https://digitallibrary.un.org/record/3884724?ln=en>. (stating "The right to life is a right that should not be interpreted narrowly. It concerns the entitlement of individuals to be free from acts and omissions that are intended or may be expected to cause their unnatural or premature death, as well as to enjoy a life with dignity. Article 6 of the Covenant guarantees this right for all human beings, without distinction of any kind, including for persons suspected or convicted of even the most serious crimes.").
[80] *See id.*
[81] International Covenant on Civil and Political Rights, *supra* note 78, at 175.
[82] *Id.*
[83] *See* G.A. Res. 39/46, at 2 (Dec. 10, 1984).

showing of persecution for an individual to be granted asylum.[84] This requirement provides a difficult hurdle for climate migrants to overcome.[85] Climate migrants are unlikely to be able to demonstrate persecution, because they are not being forced out of their country by an individual, but rather by a force of nature.[86]

The international community, however, is showing a greater willingness to stretch the boundaries of human rights law to possibly accept climate migrants facing severe consequences upon return to their home territory under the principle of non-refoulement and a right to life.[87] A recent case before the United Nations Human Rights Committee (UNHRC), *Ioane Teitiota v. New Zealand*, indicates the beginning of this shift.[88] In this 2020 case, Ioane Teitiota, a Kiribati national, sued New Zealand after the country denied him refugee status and ordered his removal to Kiribati.[89] Teitiota claimed that he was forced to leave his home on the island of Tarawa in Kiribati and migrate to New Zealand because of environmental degradation caused by climate change.[90] He detailed the scarcity of freshwater, the erosion of habitable land, and resulting overcrowding, concluding that the country is "an untenable and violent environment for the author and his family. . . [and that h]is right to life was violated."[91]

Testimony by Teitiota's wife and environmental experts painted a picture of the bleak outlook for the family upon return to Kiribati.[92] Teitiota's wife testified that she was worried for the "health

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[84] *Asylum & The Rights of Refugees*, INT'L JUST. RES. CTR., https://ijrcenter.org/refugee-law/.

[85] *See* McAdam, *supra* note 3, at 12.

[86] *Id*.

[87] *See* UNHRC, Views adopted by the Committee Under Article 5 (4) of the Optional Protocol, Concerning Communication No. 2728/2016, ¶ 2.1 (Jan. 7, 2020) https://www.unhcr.org/4d9486929.pdf (stating "The situation in Tarawa has become increasingly unstable and precarious due to sea level rise caused by global warming. Fresh water has become scarce because of saltwater contamination and overcrowding on Tarawa. Attempts to combat sea level rise have largely been ineffective. Inhabitable land on Tarawa has eroded, resulting in a housing crisis and land disputes that have caused numerous fatalities. Kiribati has thus become an untenable and violent environment for the author and his family. . . [and h]is right to life was violated.").

[88] Simon Behrman and Avidan Kent, *The Teitiota Case and the limitations of the Human Rights Framework*, 75 QIL 25 (2020).

[89] *See* UNHRC, *supra* note 87, at ¶ 1.1.

[90] *See Id.* at ¶ 2.1.

[91] *Id.*

[92] *Id.* at ¶ 2.4–2.6.

and well-being" of her family upon their return.[93] She indicated the "land was eroding due to the effects of sea level rise," that "the drinking water was contaminated with salt," and that "crops were dying."[94] She even relayed stories she heard about children dying from drinking contaminated drinking water, and her fear that her children could encounter the same fate.[95] Her assertions were supported by expert testimony.[96] For example, a doctoral candidate conducting research on the effect of climate change in Kiribati testified to the island nation's "poor and infertile" soil, lack of clean drinking water, submerging of previously habitable land, and frequent breaching of sea walls due to large, unprecedented storms.[97]

Teitiota ultimately did not win his case because the tribunal found that imminent death was unlikely under Teitiota's circumstances, but the UNHRC made an important holding that signifies an expansion of international notions of non-refoulement.[98] The UNHRC conclude[d] that the life-threatening effects of climate change could create conditions in which returning a migrant to such an environment would violate their right to life and trigger a non-refoulement obligation.[99] The tribunal also explained that in order for non-refoulement obligations to apply to a climate migrant, the threat to life must be imminent, meaning "the risk to life, must be, at least, likely to occur."[100] Therefore, if the tribunal found that under Teitiota's circumstances, death was imminent, it is likely it would have found non-refoulement obligations to apply.[101] While the requirement of an imminent threat to life excludes many climate migrants, especially those responding to gradual changes, this case marks an international shift towards recognizing non-refoulement obligations for a small group of climate migrants.[102]

Another international case signals the global shift in attitudes towards applying the principle of non-refoulement to grant asylum to climate migrants.[103] In 2020, a French court in Bordeaux upheld asylum for a Bangladeshi man on the grounds that his right to life would be

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[93] *Id.* at ¶ 2.6.
[94] *Id.*
[95] *Id*.
[96] *See* UNHRC, *supra* note 87, at ¶¶ 2.4–2.5.
[97] *Id.* at ¶ 2.4.
[98] UNHRC, *supra* note 87, at ¶ 2.9.
[99] *Id.* at ¶ 9.11.
[100] *Id.* at ¶ 2.9.
[101] *Id.*
[102] Podesta, *supra*, note 1.
[103] Coeur Administrative d'Appel [CAA] [Administrative Court of Appeal] Bordeaux, 2e chambre, Dec. 18, 2020, No. 20BX02193 (Fr.).

threatened by his removal from France to his home country.[104] The man entered France in 2011, and was denied asylum in 2013.[105] However, he obtained a temporary residence permit due to his health issues, which expired in 2017.[106] He was denied any additional residence time and ultimately appealed his removal to the Bordeaux court.[107]

The Bordeaux court ruled that deportation to Bangladesh, with its incredibly poor air quality, would put him at great risk of death due to respiratory failure caused by his preexisting asthma.[108] This condition was likely to be dangerously exacerbated by the air quality in Bangladesh, which is attributable to climate change.[109] The court applied the principle of non-refoulement to grant asylum to this man, who, because of the effects of climate change, faced an imminent threat to his life if he were sent back to his home country.[110] These two cases signify a shift in international human rights law towards including the direct causes of climate migration under the 1951 Refugee Convention's principle of non-refoulement and ICCPR's right to life.[111]

C. United States Legal Landscape of Climate Migration

While bodies such as the United Nations and countries like France are beginning to shift towards providing greater legal protections to climate migrants, the United States has made no such policy changes.[112] The United States has, over time, abandoned almost all of its policies allowing asylum for natural disaster victims and now offers minimal routes to asylum for climate migrants under both United States law and its international agreements.[113]

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *See id.*
[109] Coeur Administrative d'Appel, Bordeaux, 2e chambre, Dec. 18, 2020, No. 20BX02193 (Fr.).
[110] *Id.*
[111] United Nations High Commissioner for Refugees, *supra* note 74.
[112] *See* Refugee Relief Act of 1953, § 2(a) (expired 1956) (explaining that a refugee is "any person in a country or area which is neither Communist nor Communist-dominated, who because of persecution, fear of persecution, *natural calamity*, or military operations is out of his usual place of abode and unable to return thereto, who has not been firmly resettled, and who is in urgent need of assistance for the essentials of life or for transportation.").
[113] *See* Anya Howko-Johnson, *The Crisis of the Century: How the United States Can Protect Climate Migrants*, COUNCIL ON FOREIGN RELATIONS (Aug. 26, 2022) https://www.cfr.org/blog/crisis-century-how-united-states-can-protect-climate-migrants.

The United States previously provided a clear path to asylum for climate migrants.[114] One example is the Refugee Relief Act of 1953 ("the RRA"), which was passed to bring more southern European immigrants to the United States.[115] Section 2(a) of the RRA defined a refugee as a person who has left their home and is unable to return due to "persecution, fear of persecution, *natural calamity*, or military operations."[116] The RRA, therefore, provided asylum to individuals who were forced to migrate due to natural disasters and extreme weather events.[117] However, the natural calamities provision was short lived because the RRA was only intended to last from 1953 to 1956.[118] When the law expired in 1956, it was not renewed by Congress.[119]

The Immigration and Nationality Act also previously extended asylum to those fleeing natural disasters.[120] Prior to 1980, section 203(a)(7) of the Immigration and Nationality Act "provided a quota for persons fleeing persecution in certain countries or from natural calamities."[121] However, Congress eliminated the term "natural calamities" from the refugee definition with the Refugee Act of 1980 to align closer with the United Nations' definition, which similarly omits the term.[122]

TPS is a contemporary method to provide asylum to foreign nationals in emergency situations, like natural disasters, but it involves serious roadblocks for most climate migrants.[123] The Immigration Act of 1990 authorizes the Department of Homeland Security to provide "temporary immigration status . . . to nationals of specifically designated

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[114] Andrew Glass, Eisenhower signs Refugee Relief Act, Aug. 7, 1953, POLITICO (Aug. 7, 2018) https://www.politico.com/story/2018/08/07/this-day-in-politics-aug-7-1953-760670.

[115] *Frank Auerbach, The Refugee Relief Program: A Challenge to Voluntary Social Agencies,* 35 Families in Society, 337, 337 (1954).

[116] Refugee Relief Act of 1953, *supra* note 112.

[117] *See id.*

[118] U.S. Citizenship and Immigration Services, Refugee Timeline (2021), https://www.uscis.gov/about-us/our-history/history-office-and-library/featured-stories-from-the-uscis-history-office-and-library/refugee-timeline.

[119] *See* Janet L. Parker, *Victims of Natural Disasters in U.S. Refugee Law and Policy*, 3 Mich. J. Int'l L. 137, 138 (1982).

[120] *Id.* at 137.

[121] *Id.*

[122] *Id.*

[123] *See* American Immigration Council [AIC], Temporary Protected Status: An Overview (September 2022) https://www.americanimmigrationcouncil.org/sites/default/files/research/temporary_protected_status_an_overview_0.pdf.

countries."[124] These nationals are extended this status because of natural disasters, violent conflict, or other extreme circumstances that would prevent them from returning to their home countries.[125] However, TPS only applies to individuals already in the United States who "have continuously resided in the United States since a date specified by the Secretary of Homeland Security."[126]

The United States designated Haiti for TPS on August 3, 2021, to last for 18 months.[127] Under this designation, Haitian nationals and "individuals having no nationality who last habitually resided in Haiti," and who "have continuously resided in the United States since July 29, 2021, and who have been continuously physically present in the United States since August 2021" were authorized to apply for TPS.[128] The United States Citizenship and Immigration Services explained its decision to designate Haiti for TPS, stating "the effects of the COVID-19 pandemic—combined with economic instability, civil unrest, and recurring shocks linked to natural disasters including droughts, earthquakes, floods and hurricanes, have led to increased food insecurity and other humanitarian needs throughout the country."[129]

The Immigration Act of 1990's requirement that an individual is presently residing in the United States to qualify for TPS does not help most climate migrants.[130] This is especially true for those migrating due to rapid onset changes, who are often residing in their home country, rather than the United States, when a natural disaster triggers their migration.[131] For example, those in Haiti as of August 2021 who hoped to flee the unstable conditions in the aftermath of the hurricanes would not be provided asylum in the United States.[132]

However, a small exception exists that allows TPS eligibility for a select few individuals not currently residing in the United States.[133] A bill amending section 244(a) of the Immigration and Nationality Act, which provides for TPS in the United States, includes a small exception

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,868.
[128] *Id.* at 41,863.
[129] *Id.* at 41,867.
[130] *See id.*
[131] *See* McAdam, *supra* note 3, at 56.
[132] *See* Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,863.
[133] *See* H.R. 2064, 117th Cong. (1st Sess. 2021).

to provide status to those not currently in the United States.[134] Subsection 2 states that an alien is eligible for TPS if they meet three requirements:

> (1) they must apply from and currently reside outside of the United States; (2) they must have been continually present in the United States for a period of at least three years prior to the date of their removal from the United States; and (3) on the date of their removal from the United States they must have been eligible for TPS.[135]

As a result, a very narrow group of climate migrants who resided in the United States in the past could be eligible for TPS if their home country is designated for this status by the Department of Homeland Security.[136]

The United States' current interpretation of international refugee law and international human rights law does not offer legal protection for climate migrants.[137] As a member of the United Nations and a signatory of both the 1951 Refugee Convention and the ICCPR, the United States is encouraged to uphold the requirements of these international agreements.[138] The requirements of these agreements include: (1) designating individuals fleeing persecution as refugees; and (2) applying the principle of non-refoulement and the right to life to provide asylum to those who would be under threat of imminent persecution or death upon return to their home country.[139] However, the United States has adopted its own interpretation of how climate change fits within these rights.[140] The 2021 White House Report explained that

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[134] *See id.*

[135] *See id.* at 4 *(*stating in subsection 2 that "[A]n alien shall be eligible for adjustment of status if the alien was removed or voluntarily departed from the United States on or after September 25, 2016, if the alien, (A) applies from abroad; (B) was continuously physically present in the United States for a period of not less than 3 years before the date of removal or departure; (C) had temporary protected status on such date, or was otherwise eligible, on such date, for temporary protected status notwithstanding subsections (c)(1)(A)(iv) and (c)(3)(C) of section 244 of the Immigration and Nationality Act (8 U.S.C. 1254a). . . .").

[136] *See id.*

[137] *See* THE WHITE HOUSE*, supra* note 9 at 19; *see also* AMERICAN IMMIGRATION COUNCIL, *supra*, note 123, at 1.

[138] *See* International Covenant on Civil and Political Rights, 16 Dec. 1966, 104 Stat. 4978, 999 U.N.T.S 280. (The United States then incorporated the Refugee Convention into law with the 1990 Refugee Act),

[139] *See supra*, note 81, at ¶ 9; *see also supra*, note 55 at 3, 30.

[140] *See* THE WHITE HOUSE, *supra* note 9, at 19.

it would not apply the principles of non-refoulement under Articles 6 or 7 of ICCPR, but rather continue with the traditional treatment of refugees under the 1951 Refugee Convention, which only grants refugee status for fear of persecution.[141] The 2021 White House Report emphasized that it did not anticipate expanding its legal protections to reach those fleeing the effects of climate change.[142]

The United States has not engaged in a shift towards including the direst forms of climate migration under human rights law, as seen in other parts of the world.[143] Rather, the United States has focused its efforts on curbing the underlying cause of displacement, climate change, and the need for migration after extreme weather events.[144] The 2021 White House Report proscribed efforts such as increased forecasting of extreme weather events and crop conditions, resilience programming to help at-risk countries adapt to the possible effects of climate change, and humanitarian assistance following natural disasters.[145] Ultimately, the policy of the United States focuses on minimizing the need to grant asylum to climate migrants, rather than providing legal protections to such migrants, both through its own statutes and through its obligations under international agreements.[146]

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[141] *See id.*

[142] *See id.* (stating "The United States interprets its *non-refoulement* obligations strictly according to the relevant 1951 Refugee Convention (and its1967 Protocol) and Convention Against Torture (CAT) provisions. It does not accept that the International Covenant on Civil and Political Rights (ICCPR), to which the United States is party, includes obligations prohibiting *refoulement*, nor does it interpret the Article 6 prohibition on the arbitrary deprivation of life to encompass a positive duty to protect life in the face of all possible external threats. The United States does not consider its international human rights obligations to require extending international protection to individuals fleeing the impacts of climate change. However, as a matter of policy, the United States does have a national interest in creating a new legal pathway for individualized humanitarian protection in the United States for individuals who establish that they are fleeing serious, credible threats to their life or physical integrity, including as a result of the direct or indirect impacts of climate change. This new legal pathway should be additive to and in no way infringe upon or detract from existing protection pathways to the United States, including asylum and refugee resettlement.").

[143] *See id.*

[144] *See id.* at 12.

[145] *See id.*

[146] *See* THE WHITE HOUSE, *supra* note 9, at 5-6.

III. ARGUMENT

Climate change is not going away.[147] The effects of climate change are anticipated to worsen, increasing the likelihood of climate migration from countries experiencing civil and environmental instability.[148] Should the United States and other nations decide to expand legal protections for climate migrants in addition to curbing the causes of migration, avenues exist under current United States and international law to do so. Such frameworks would allow these nations to protect their interests in "safe, orderly, and humane migration management, regional stability, and sustainable economic growth and development" while also maintaining practical immigration levels.[149] One potential source of legal protection exists first in United States law, through leveraging current options for granting TPS to climate migrants. Another possible solution exists in international human rights law, through adopting a broader interpretation of the right to life under the IPCC.

A. Possible Legal Protections Under Current United States Law

A narrow route to asylum for cross-border migration already exists in United States immigration law. The exception under section 244(a) the Immigration Act to provide TPS to certain individuals not residing in the United States could be leveraged to aid those displaced by climate change.[150] Under this exception, individuals are eligible for TPS who apply from abroad, have resided in the United States for at least three years in the past, and who, at the time of leaving the United States, were eligible for TPS.[151] Technically, an individual who left the United States and returned to their home country that is designated for TPS, can then apply for TPS if a natural disaster or other drastic climate related event makes their home country uninhabitable.[152]

The TPS solution would require the Department of Homeland security to designate TPS to those countries vulnerable to the most drastic effects of climate change. Countries most vulnerable to migration from rapid onset climate migration are also experiencing other

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[147] *See generally* UNHRC, *supra* note 6.
[148] *See* Pachauri et al., *supra,* note 7, at 16,73.
[149] THE WHITE HOUSE, *supra* note 9, at 17.
[150] *See* H.R. 2064, *supra* note 133.
[151] *Id.*
[152] *See id.*

vulnerabilities that often contribute to a designation of TPS.[153] Experts observe that climate change "add[s] to existing problems and compound[s] existing threats."[154] One expert in Kiribati explained "climate change overlays pre-existing pressures—overcrowding, unemployment, environmental and development concerns— which means that it may provide a 'tipping point' that would not have been reached in its absence."[155] There is already evidence that countries such as Haiti, Guatemala, Honduras, El Salvador, and others are at risk of climate migration.[156] Risk of slow-onset effects of climate change combined with political, civil, or economic instability is a simple indicator that a country is at risk of climate migration.[157] As a result, the United States could identify countries nearing a tipping point and designate them for TPS before any extreme weather events that would initiate migration. Under this structure, should a natural disaster arise, those who already have ties in the United States through previous residency could return and avoid the negative impacts of the disaster.[158]

Leveraging TPS to accommodate certain climate migrants, however, is an incredibly narrow solution. It requires the Department of Homeland Security to adopt a proactive policy for TPS designations aimed at addressing climate migration before the need occurs. The 2021 White House Report emphasized this limitation, concluding that TPS is not a "permanent solution" for those who are displaced from their home as a result of climate change.[159] Should the effects of a natural disaster

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[153] *See* Designation of Haiti for Temporary Protected Status, *supra* note 40, at 41,864.
[154] McAdam, *supra* note 3, at 9.
[155] *Id.*
[156] Speck, *supra* note 41.
[157] *See* White House Report, *supra* note 9, at 4.
[158] *See* H.R. 2064, *supra* note 133.
[159] THE WHITE HOUSE, *supra* note 9, at 18-9 (stating "Following designation of a country for TPS, eligible nationals who are already in the United States when the designation goes into effect and apply for the status may be granted TPS, and as a result, temporary protection from removal. Although the TPS criteria may accommodate the provision of protection to foreign nationals facing the impacts of climate change-related events in their country of origin, this protection is limited. More specifically, TPS does not protect individuals who arrive after the date of designation, making it likely to exclude many of those forced to flee because of the disaster or event that is the basis for a TPS designation. The TPS statute also requires that a foreign government officially request TPS designation in cases of environmental disaster, which limits its application for nationals of countries without sufficient government will or capacity to request TPS. Furthermore, as a temporary status, the intent of TPS is not to provide a permanent solution for individuals

or other effects of climate change become less severe or resolved, the United States can revoke this status and climate migrants can safely return home.

B. Possible Legal Protections Utilizing a Different Interpretation of International Human Rights Law

Another solution addressing the lack of legal protections for climate migrants potentially lies in utilizing a different interpretation of obligations under international treaties and the "right to life." The United States and much of the world do not currently interpret the ICCPR to allow non-refoulement obligations to apply to climate migrants, nor do they interpret "the Article 6 prohibition on the arbitrary deprivation of life to encompass a positive duty to protect life" against climate threats.[160] The policy in the United States relies on a strict interpretation of the text of these international agreements.[161] Under this policy, the United States provides minimal legal protection for climate migrants, focusing rather on addressing the root cause of climate change and resulting migration.[162]

However, the 2021 White House Report indicates the Biden administration's desire to be part of the progress toward expanding legal protection to these individuals.[163] The administration recognizes climate change as a driving force of migration and stresses the need for greater support for climate migrants, stating:

> Migration can be a warranted adaptation strategy, yet little assistance is dedicated for planned and voluntary migration. Current assistance focuses on fixed locations, missing opportunities to invest in human capacity, assets and safety nets that are mobile and can support people when they migrate. Supporting migration and investing in mobile social protection and cash options are relatively nascent areas of work and the USG can become a technical leader by investing in pilot projects, research, and ultimately moving to scale.[164]

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unable to return home because of the long-term impacts of climate change.").

[160] *Id.* at 19.

[161] *Id.*

[162] *Id.* at 10.

[163] *Id.* at 4.

[164] *Id.* at 16.

Should the United States wish to change its policies to provide broader legal protection to climate migrants, it could adjust its interpretation of their obligations under international agreements such as the ICCPR. Article 6 of the ICCPR does not detail what this right to life entails, whether it is simply a right to biological life or the ability to conduct one's life with dignity.[165] As a result, nations are required to interpret the meaning of this clause.[166] One option is to read the right to life under the ICCPR to extend the right by applying a different canon of interpretation to the text of the agreement. It could replace a strict reading of the language of Article 6 of the ICCPR with an ordinary meaning interpretation. This canon of construction instructs that "unless otherwise defined, words will be interpreted taking their ordinary meaning."[167]

An example of the application of the ordinary meaning canon appears in the United States Supreme Court case *Perrin v. United States*, where the Court grappled with the meaning of the term "bribery" as used in a statute.[168] Bribery at common-law meant only public corruption-related crimes, however, over time the term came to be understood to also apply to private crimes.[169] The Court used the ordinary meaning canon to find that Congress intended the ordinary meaning of the term "bribery" to apply, rather than the common-law meaning that limited the term to only apply to public crimes.[170] To determine what the ordinary meaning of a term is, courts use several sources, such as contemporary dictionaries[171] and context given to a term from its "surroundings."[172]

Here, the ordinary meaning of the term *life* in Article 6 of the ICCPR includes a biological quality of life and a substantive quality of life.[173] Merriam-Webster defines *life* as both "the quality that distinguishes a vital and functional being from a dead body," and "the sequence of physical and mental experiences that make up the existence

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[165] White House Report, *supra* note 9.
[166] *Id.* at 9.
[167] Perrin v. United States, 444 U.S. 37, 42 (1979) (citing Burns v. Alcala, 420 U.S. 575, 580–81 (1975)).
[168] *See id.*
[169] *Id.* at 43.
[170] *Id.*
[171] Kouichi Taniguchi v. Kan Pac. Saipan, Ltd., 566 U.S. 560, 567–69 (2012).
[172] Mohamad v. Palestinian Auth., 566 U.S. 449, 457 (looking to both "domestic and international presumption[s] of organizational liability in tort actions" to evaluate the meaning of the term "individual").
[173] *See, e.g.,* Life, Merriam-Webster's Dictionary (11th ed. 2019); *see* Life, Black's Law Dictionary (11th ed. 2019).

of an individual."[174] Hence, to live means to both be biologically alive, but also to function: to eat, have shelter, and walk the earth.[175] Context also supports this dual notion of the term *life*.[176] For example, in the international context, the *Ioane Teitiota v. New Zealand* tribunal hinted at a right to life free from the negative effects of climate change on an individual's well-being, which indicates an accepted definition of *life* that extends beyond biological life.[177]

Thus, the ordinary meaning of *life* encompasses the notion that one cannot live if their home is under water, if their land provides them no food, or if toxicity cause by a weather event would cause death.[178] *Life* as interpreted by its ordinary meaning would allow nations that choose to apply principles of non-refoulement to a growing group of individuals who, as a result of sea level rise or an extreme weather event, simply cannot live in their home nation.

On the other hand, a United States court has not yet used the ordinary meaning canon to interpret any provision of the ICCPR. Applying the ordinary meaning cannon to interpret the right to life to apply to the principle of non-refoulement would, therefore, be a novel approach. Such an approach would likely need an underlying policy initiative to take hold. However, the current policy of the United States is to focus on curbing climate change itself, rather than manage any migration resulting from the effects of climate change.[179]

IV. CONCLUSION

Global warming, rising sea levels, extreme weather events, disease, and diminished living conditions are forcing individuals to migrate.[180] While migration caused by persecution affords significant international legal protection, individuals fleeing their homes because of the effects of climate change are afforded little to no legal protection.[181] The latter case is significantly more common since only under rare circumstances could one say their climate related migration is the result of persecution.[182] The persecutor driving climate migration is most often

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[174] Life, Merriam-Webster's Dictionary (11th ed. 2019).
[175] *Id*.
[176] *See* UNHRC, *supra* note 87, at ¶ 9.5.
[177] *Id.* at 9.11-.12.
[178] UNHRC, *supra* note 87, at ¶ 9.11.
[179] The White House Report, *supra* note 9, at 4.
[180] UNHRC, *supra* note 87.
[181] *Id.*
[182] The White House Report, *supra* note 9, at 17.

not a person, but rather an environmental occurrence.[183] International refugee law does not currently afford asylum protections to climate migrants, due to this lack of showing of a "well-founded fear of persecution."[184] However, there is a growing international trend indicating that human rights law, under the principle of non-refoulement, may be a growing avenue to asylum for climate migrants.[185]

United States law has equally minimal protections to provide asylum to migrants under both its ability to grant TPS to migrants and its obligations under international agreements.[186] Despite these current limitations, there is potential for the United States to leverage its ability to grant TPS to countries at the greatest risk of negative climate effects and migration. Additionally, the United States and other nations possess the ability under international agreements to reinterpret the right of life as it relates to the principle of non-refoulement.[187] By implementing these solutions, nations will be able to both address their humanitarian interests in assisting foreign nationals undergoing dire threats to their health and well-being, and also to safeguard their national security interests by helping manage migration.[188]

[183] *Id.*
[184] *Id.*
[185] *See* The White House Report, *supra* note 9.
[186] *Id.* at 19.
[187] *See id.*
[188] *Id.* at 16.