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## Background

The *UCLA Journal of International Law and Foreign Affairs (JILFA)* is published semi-annually by the Regents of the University of California and the graduate students of UCLA. *JILFA* is among the first student-produced publications that bridges the historical divide between international law and international relations. Its subject matter, therefore, is intentionally broad, linking such disciplines as international law, politics, and economics.

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## Manuscripts

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# UCLA

## JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS

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# PREFACE

The *UCLA Journal of International Law and Foreign Affairs* (JILFA) presents Volume Twenty-Four, Issue One. These five scholarly pieces span a wide range of timely and pressing issues. The result is unique and novel contribution to the international, foreign, and comparative law literature as well as contemporary foreign affairs policy debates.

This Volume opens with a Q&A with Prince Zeid bin Ra'ad Zeid al-Hussein, conducted after his keynote address discussing the state and future of international human rights law presented at the 2019 Symposium: *Critical Perspectives on Race and Human Rights: Transnational Re-Imaginations*.

Kristen Carpenter and Alexey Tsykarev's timely Article, considering the UN General Assembly's recent announcement of 2022-2032 as the International Decade of Indigenous Languages, explores the inadequacy of protections for indigenous language rights in light of the legacy of state suppression and contemporary discrimination. They argue that a more thoughtful approach to implementation of human rights as a legal and social concept could support indigenous peoples language rights, drawing from experiences of indigenous language speakers from the United States and Russia.

Catherine Powell considers how gender intersects with race in the contemporary construction of the immigration discourse. In particular, she considers how the tropes of 'welfare cheat' and 'criminal' to describe immigrants crossing the Southern Border of the United States shape nationhood and borders as raced and gendered legal constructs.

Janine Silga interrogates how a colonial development discourse impacts the contemporary policy debate, as it relates to the migration and development nexus. Specifically, she argues that the European Union and its Member States' discursive framing of the freedom of movement as a privilege preserves the North-South divide.

Kai Ambos offers insight into the question of whether comparative international law can make a meaningful contribution to improving citizens' security. He argues for movement of comparative criminal law as a discipline toward an international and transnational science of criminal law with an inclusive orientation of "open-minded criminal law theory and criminal justice in a dialogue-oriented procedure."



Mia Lattanzi contributes a timely Comment analyzing the recent cases over the legality of the Israeli Separation Wall before the International Court of Justice and Israeli High Court. She considers how these decisions' interpretation of the occupation's legality under customary international law may facilitate the practice of settler-colonial dispossession.

This Issue continues *JILFA*'s commitment to an interdisciplinary approach to the study of international law and foreign affairs. It is our hope that these works will stimulate dialogue among students, scholars, and practitioners alike. We thank you for your continued support.

—The Editorial Board

# CRITICAL PERSPECTIVES ON RACE AND HUMAN RIGHTS: TRANSNATIONAL RE-IMAGININGS\*

## Q&A with Keynote Speaker Prince Zeid bin Ra'ad Zeid al-Hussein\*\*

Following the 2019 Symposium “Critical Perspectives on Race and Human Rights: Transnational Re-Imaginings,” the staff of JILFA had the opportunity to conduct a Q&A session with the keynote speaker, Prince Zeid bin Ra'ad Zeid al-Hussein. The following is an edited transcript of a Q&A session which took place via telephone on April 5, 2019. The questions were asked by JILFA staff members Anjani Nadadur, Astghik Hairapetian, Eunice Kang, Luke Ward, Samuel Davies, and Seulgee Jung.

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\* This symposium was held on March 8, 2019, and was a collaboration between the UCLA Journal of International Law and Foreign Affairs, The Promise Institute for Human Rights, the UCLA Critical Race Studies Program, and the UCLA International & Comparative Law Program.

\*\* Prince Zeid Ra'ad Al Hussein is a former United Nations High Commissioner for Human Rights (2014–2018). He twice served as Jordan's Ambassador to the United Nations (2000–2007, 2010–2014) and once as Jordan's Ambassador to the United States (2007–2010). He also served as President of the UN Security Council in January 2014 and was elected the first president of the Assembly of States Parties to the Rome Statute of the International Criminal Court (ICC) in 2002. He chaired negotiations associated with the court's statute, in particular those relating to the elements of individual offences amounting to genocide, crimes against humanity, and war crimes. Further, he led the UN's efforts at eliminating sexual exploitation and abuse in UN peacekeeping operations. He represented Jordan twice before the International Court of Justice (ICJ). He has extensive knowledge of peacekeeping, serving as a political affairs officer in UNPROFOR. Prince Zeid holds a Bachelor of Arts from Johns Hopkins University and a Doctorate in Philosophy from Cambridge University. Currently, he is the Perry World House Professor of the Practice of Law and Human Rights at the University of Pennsylvania.

*Q: As a key player in the international human rights regime, the UN and its work can be in tension with a critical perspective of human rights and its limitations. Is there room for a perspective that is critical of the potential of human rights within the UN, or is this perspective antithetical to the UN?*

A: No, it's not antithetical. It's just that in a world of expediency, raising human rights concerns is often highly inconvenient or it's disruptive to what would otherwise seem to be the normal operations of relationships between states. And to keep reminding any state of its obligations is often not an experience that they would welcome because, quite frankly, there isn't a single state with a pristine human rights record. Indeed, the former foreign minister of Sri Lanka once referred to me as the "international community's principal nag" or "nagger." The rest of the UN meanwhile prioritizes having a good, workable relationship with the states. We, the human rights office, by contrast are an independent voice within the UN that holds states to their mark, to their responsibilities, to their obligations when it comes to human rights law. So there is often tension. But, as Kofi Annan once said—I think it was him who said that human rights are the sort of spiritual guide of the UN. Otherwise, for what purpose does the UN exist? Ultimately, it has to serve people through the member states, we the people. And when you are focused on the individual, you are focused on their rights. So human rights have a place, but in operational terms it can seem inconvenient or uncomfortable for others in the UN.

*Q: What can be done to ensure that an organization headquartered in the Global North is responsive to human rights violations in other parts of the world? What might be the role of more aggressive affirmative action in hiring practices in achieving greater responsiveness?*

A: I mean, it's a good question. Of course, the UN is an organization with headquarters in the Global South as well. The UN Environmental Program is headquartered in Nairobi. And it's true that we as an office are headquartered in Geneva, but we have a presence in over 65 countries around the world. I don't think it has that much of a bearing. If we had to create it all over again, maybe I'd put it in the Global South, or somewhere that straddles both, but thinking about it as I speak, I'm not sure ultimately it makes that much of a difference.

In terms of global hiring practices, yes, part of the problem we have out there is the perception that the work is guided by

the nationalities of those present. So if half the office is from the Global North, or let's say western Europe and others including the US, the perception is that the agenda is shaped in that direction. I don't believe it to be the case. But clearly, the perception needs to be changed. And just for the sake of geographic representation, we should have less staff from western Europe, the US, Australia, New Zealand, and Canada, and we should have greater representation from Asia. Particularly, when we look at the other vector, gender, we don't have enough Asian women, and this is something my old office needs to concentrate on.

The problem initially was that when the office expanded very quickly in 2005, it was easy for western Europeans to be hired simply because there was no problem in terms of the Schengen Agreement. It was easy for them to work in Switzerland. If you came from another country far away, it's quite a long process before you can get Swiss approval for a work visa or residency. For that reason, when you're trying to hire quickly, it's obviously easier to hire Europeans. Ultimately though, it creates a perception problem, even though as I said, I don't think it affects the work inside the office. It shouldn't be the case anyway; there should be equitable geographic distribution and representation.

***Q: During your keynote speech, you talked about the alarming silence at the level of heads of state and heads of government. In your role, you have interacted with people at these levels, you've been outspoken, and you challenged your colleagues by asking the hard questions. What, in your opinion, will it take for heads of states to take a stand and be vocal about human rights issues?***

A: I was alarmed both by the violence that some seem to promote, and by the silence of the others; the others are not saying anything. Well, my focus, by highlighting the issues—and I'm going to be speaking more to the media about this—is to encourage this second group to say something. But it is representative of the sort of types of leaders that we have now. They don't seem—no matter what they may say about human rights issues—they don't seem disposed to saying something if it affects other agenda. And I've seen this time and again. You can have a discussion about gender rights and everyone will say they support it, but then if advocacy of gender rights in a particular country affects the trade relationship or it affects arms sales or something else, suddenly it's no longer a priority—even though in a generic sense the government in question says it is. The

real measure of whether there is a commitment notwithstanding whatever else is on the agenda—from trade to weapons sales, or whatever it may be—is when the government still takes a vocal and a concerted line when it comes to the violation of others. Those who should be saying something may believe that these others are exercising the rights to freedom of expression—whether it be someone like Duterte or Orban or whoever it is. So it requires others to do the same, to exercise their rights of expression and to say that this is unacceptable what you're doing in your country. The rights of all human beings are the concern of all human beings.

*Q: In your speech, you spoke about transitioning from “high-lighting and exposing issues” to “agitating,” and the example you somewhat used was trying to shame heads of state in a way that they hadn’t been shamed before. Can you elaborate more on what you envision for “agitating”?*

A: Well, first of all, I have never said that I'd shame heads of state; in no statement did I ever say that. What I've always said is that they shame themselves. When you detain arbitrarily, when you torture your own people, when you deprive them of access to a dignified life by depriving them of their right to education and health and so forth, you have shamed yourself. The burden is not on the human rights person who is pointing this out to them; the burden has to fall squarely on the person who is violating the rights of their own people. And so, please don't refer to me as shaming anyone; they have shamed themselves. The shame is on them, not on me. And I think it's important, this reversal of where the responsibilities ought to lay. I can't even understand logically why this has crept into the vernacular, the “naming and shaming.” The “shaming” doesn't come from the “naming,”; it comes from the action! That's the point! They know what it is they've done, the people know what it is they've done, and so we have to be careful here.

The point that you're raising is one that . . . look, I'm persuaded by the argument that, for instance public demonstrations, marches on their own don't often yield the sort of results that you would want to have in terms of leaders paying deep attention to what their problems are. But if they're strategically done—if they're strategically sort of mapped out and thought through, as opposed to being a haphazard thing, “let us go out and march on Wednesday”—I think they can have quite a serious effect in terms of the perceptions of the leaders.

Look, most leaders—national leaders—are affected by two things: they're affected by domestic public opinion, and they're

affected by foreign direct investment and how they're perceived as a country more generally. And if you can work the first point by having people not just sit there and feel absolutely helpless but feel they need to say something and put them out into the streets, then you would have something worth encouraging. And I think that's the point. You know, we are a global population of 7.6 billion people, so what does it mean if you have a few hundred thousand marching here or there; it's negligible. What you'd like to see is a few hundred million, right? That'd still be a small percentage of the global population, but a percentage that would say "Enough!" I mean, enough of what it is that we see now, which is a world going adrift, leaders who are reneging on their responsibilities vis-à-vis their own people, a great rise of authoritarianism, populism, violent extremism, and the cage has been loosened.

Again, as I said in the speech, why do we have law in the first place? Why does it exist? Of course, we have natural law, and we have positive law, right? And we have legal tradition. And we have customary law. But why do we need it? I can't hypothesize that reason alone is sufficient for us—in an ideal sense. We need law because two world wars demonstrated the alternative to us. We need it because we're entirely unreliable and untrustworthy. And if these leaders across the world are loosening the legal cage, which we have to be in, then it all goes awry very quickly! And I think most people realize that and for that reason they need to animate themselves.

***Q: Nicholas Koumjian was obviously just appointed to lead the International Impartial and Independent Mechanism (IIIM) for Myanmar, and the IIIM's for Syria's work has recently submitted a report on its progress last month. What should advocates of accountability expect from these mechanisms moving forward? Has the international community become too content to help national courts build cases instead at the cost of neglecting international criminal tribunals?***

A: On the first question, I think we perceived some time ago, that unless we had universal adherence to the ICC, that unless we had a spurt in the number of accessions to the Rome Statute—and we were still suffering with the issue of a lack of cooperation by a number of state parties, or at least a lack of adequate cooperation, not to mention the major powers who have still yet to accede to the Statute—we would need to look at how to create something new to break the cycle we had in place on the human rights side. What we had in place was a large number of human

rights investigations being concluded, and then restarted again, and concluded, and restarted again. And, there seemed to be a lacuna in terms of taking human rights investigations, which fundamentally examine state conduct based as it is on state responsibility and connect it to the criminal investigations that ought to flow from them.

In other words, if we undertook our human rights investigations and we perceived there was organization and planning behind the violations, which also fall within the subject matter jurisdiction of the ICC, we needed to then begin to think of how we would move a human rights investigation into the early phase of a criminal investigation. And it is for that reason, we set this mechanism up—it would be there to connect the human rights work done in Geneva to the international criminal accountability work done in The Hague—or to any other jurisdiction where we may find that a particular authority is willing to exercise its criminal jurisdiction. Ultimately, the idea is that you begin with two or three of these mechanisms as the basis for subsequently launching a permanent IIIM. It would have a modular structure whereupon at a later stage you could detach each situation and move it separately either to the ICC or, if there's no appetite for that, it could become the OTP for an ad hoc tribunal.

The problem at the moment is that we don't see the sort of support for the ICC we need to see, and that has to be addressed. We just don't see the commitment to ending impunity that once existed, and again, it's representative of a world basically coming off its wheels. We don't have the criminal accountability we once hoped for at the international level. It's not good enough just to set institutions up; what we need is for states to back them to the hilt. It also needs performance at a very high level—on the part of the court officials as well. So, anyway, my hope is that the Myanmar IIIM will now begin to look in more detail at the work that the group of experts unearthed, and that should also be a signal to the Tatmadaw and Myanmar generally—that they shouldn't believe for a moment that they are not being examined, or not under a magnifying glass. So that is my view on that.

***Q: While you were at Office of the United Nations High Commissioner for Human Rights (OHCHR) as High Commissioner (2014–2018), the annual Forum on Business and Human Rights launched in 2012. What are some potential partnerships or movements that you see law firms and lawyers—both private and public—could make in order to leverage influence as legal advisors to corporations and governments in Business and Human Rights?***

A: It's very important, this. I think the more you have corporate lawyers aware of the Guiding Principles on Business and Human Rights, the more they will come to understand that ESG—environmental and social governance—should not just be some sort of window-dressing exercise for the sake of finding it placed in some glossy material that's put out for marketing purposes, but actually opens the door for the due diligence that's required. You just have to scan the newspaper and you see one scandal after another where a corporate entity or a financial backer were claiming that all the required due diligence was done when, manifestly, there was a massive failure when it came to assessing risk—a complete contradiction, it would seem. It is therefore one thing to have a corporation sign on to the Ruggie Principles—the UN Guiding Principles—but quite another when it comes to their taking their human rights commitments seriously, including developing a culture where they look at their global supply chains rigorously and also look at what they are investing into through a particular client. When you do your due diligence properly, you mitigate the abuses. The recent scandals are eyewatering in their audacity and the fact that they could think they could get away with it is amazing. So we have a long way to go, but you know I'm encouraged by what it is I see and it's well required very much I think lawyers who work within corporate entities not to find escape routes as a means of avoiding responsibility, but to try and anchor their work in due diligence that's done properly.

***Q: Do you have any final remarks?***

A: In this field of human rights, you can't relax for a moment, not a moment. It's like any contract between two individuals—whether it be some civil arrangement, a marriage contract, any partner that you spend your life with—having something written on paper formalizing the relationship is only the start of it then the hard work is required to ensure that the constitution is upheld, that the treaty law voluntarily entered into is abided by, that the resources are made available, and that we move away from thinking in just superficial terms and appearances. I think it's important that we don't do that. I've been invited to participate in a conference where I'm told that everything I need to do is choreographed ahead of time. They want to know every word I'm saying. They want to sort of construct it. It has to be six minutes long. I think that there's a sort of superficiality to it, which people realize because it seems like a marketing exercise. Everything then becomes a marketing exercise, including governance,



and no one wants that. They want to see governments that are genuine about their commitments and they want to see companies likewise. I think it's for a new generation of young lawyers to take a more serious approach about this. My hope is in all of you, basically. You need to come and rescue us.

***Q: Thank you so much, Prince Zeid.***

A: Thank you.

# (INDIGENOUS) LANGUAGE AS A HUMAN RIGHT

Kristen Carpenter and Alexey Tsykarev\*

## ABSTRACT

The United Nations General Assembly has proclaimed 2022–2032 as the International Decade of Indigenous Languages. Building on lessons of the International Year of Indigenous Languages of 2019, the Decade will “draw attention to the critical loss of indigenous languages and the urgent need to preserve, revitalize and promote indigenous languages.” These actions are necessary, in part, because existing laws and policies have proven inadequate to redress the legacy of state suppression of indigenous languages or ensure nondiscrimination in contemporary usage. In light of the International Year and Decade, this Article explores the rights of indigenous peoples to “use, revitalize, and transmit their languages,” as recognized in the UN Declaration on the Rights of Indigenous Peoples and other human rights instruments. The Article considers how a better understanding of the human rights dimensions of the problem—and especially a more thoughtful approach to the “implementation” of human rights in both law and society—could

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\* Kristen Carpenter is the Council Tree Professor and Director of the American Indian Law Program at the University of Colorado Law School, in Boulder, CO, USA. She is also Chair of the United Nations Expert Mechanism on the Rights of Indigenous Peoples. Alexey Tsykarev serves as Chair of the Center for Support of Indigenous Peoples and Civic Diplomacy «Young Karelia» in Karelia, Russia. He served on the UN Expert Mechanism on the Rights of Indigenous Peoples from 2013 to 2019, and joined the UN Permanent Forum on Indigenous Issues in 2020. The authors would like to thank Jim Anaya, Greg Bigler, Andy Cowell, Barbara Duncan, Ruslan Garipov, Angela Riley, Yoney Spencer, Pirjo Virtanen, Shannon Bischoff, and John Standingdeer for helpful comments and discussions on this topic, as well as the University of California, Los Angeles; University of Colorado; University of Purdue Fort Wayne; and Muscogee (Creek) Nation for opportunities to present this Article as a work-in-progress.

help to advance remedial and ongoing measures toward the realization of indigenous peoples language rights going forward.

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INTRODUCTION

In some of the world’s most wealthy and powerful countries, indigenous people are dying over language rights. Jakelin Caal Maquin was seven years old in late 2018 when she and her father crossed into the United States from Mexico.<sup>1</sup> After they were taken into custody by Customs and Border Protection Security, Jakelin’s father signed a form attesting to his daughter’s good health,<sup>2</sup> but the form was not translated into Kekchi, the Maya language that they spoke.<sup>3</sup> In reality, Jakelin

1. Amanda Covarrubias, *Guatemalan Girl Likely Died of ‘Septic Shock’ After Crossing Border, Hospital Officials Said*, NBCNews (Dec. 17, 2018), <https://www.nbcnews.com/news/us-news/guatemalan-girl-died-sepsis-shock-hospital-officials-said-n948666> [<https://perma.cc/QM7V-EVJQ>].

2. David Taylor, *Why Did a Little Guatemalan Girl Die?*, GUARDIAN (Dec. 17, 2018), <https://www.theguardian.com/us-news/2018/dec/17/guatemalan-girl-jakelin-caal-maquin-death-crossing-us-border> [<https://perma.cc/9WFD-ENLL>].

3. See Geoff Nunberg, *Migrant Girl’s Death Reveals a Need for More Interpreters Along the Border*, NPR (Jan. 3, 2019), <https://www.npr.org/2019/01/03/681942831/opinion-migrant-girls-death-reveals-a-need-for-more-interpreters-along-the-borde> [<https://perma.cc/9WFD-ENLL>].

was critically ill, with a high fever and infection, but her father could not communicate this in English or Spanish.<sup>4</sup> By the time authorities realized her condition, it was too late, and Jakelin died in U.S. custody.<sup>5</sup> The United States denied responsibility<sup>6</sup> and sent Jakelin's body home to her indigenous community in Guatemala.<sup>7</sup>

Nine months later, across the world in Russia, Albert Razin, a scholar and speaker of the Udmurt language, set himself on fire protesting a new law diminishing opportunities for indigenous language instruction in schools.<sup>8</sup> He carried a sign with a quote from the Avar

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cc/ZMK7-L4BT] ("Seven-year-old Jakelin Caal died in U.S. custody in December. Linguist Geoff Nunberg says her death might have been prevented had border agents spoken the Mayan language Q'eqchi'"); Aaron Montes, *Family of Migrant Girl Disputes Official Version of Her Death*, L.A. TIMES (Dec. 15, 2018), <https://www.latimes.com/nation/la-na-guatemala-mexico-migrant-girl-20181215-story.html> [https://perma.cc/KCE6-QMKF] ("Caal and his daughter came to the U.S. looking to seek asylum, but once in Customs and Border Protection custody, he quickly ran into a language barrier with the agents, the lawyers said. His first language is Q'eqch and Spanish is his second, but all the forms he was asked to sign were in English, the statement read. 'It is unacceptable for any government agency to have persons in custody sign documents in a language that they clearly do not understand,' it said.").

4. For other stories of immigrants to the US facing problems with indigenous language use, see Tom Jawetz, *Language Access Has Life-or-Death Consequences for Migrants*, CTR. FOR AM. PROGRESS (Feb. 20, 2019), <https://www.americanprogress.org/issues/immigration/reports/2019/02/20/466144/language-access-life-death-consequences-migrants> [https://perma.cc/8QBJ-SBZQ]; Shani Saxon, *Students Who Speak Indigenous Languages Disadvantaged in Schools*, COLORLINES (June 18, 2019), <https://www.colorlines.com/articles/students-who-speak-indigenous-languages-disadvantaged-schools> [https://perma.cc/3UTD-JH56].

5. See Nick Miroff, *Hours Before Her Collapse in U.S. Custody, a Dying Migrant's Condition Went Unnoticed*, WASH. POST (Dec. 18, 2019), <https://www.adn.com/nation-world/2018/12/15/for-hours-before-her-collapse-in-us-custody-a-dying-migrant-childs-condition-went-unnoticed> [https://perma.cc/2Z7G-EZPV].

6. For the government's account of these events, see *Statement by U.S. Customs and Border Protection on the Death of a Seven-Year-Old Female Child*, U.S. CUSTOMS & BORDER PROTECTION (Dec. 14, 2018), <https://www.cbp.gov/newsroom/speeches-and-statements/cbp-statement-death-custody-7-year-old-guatemalan-el-paso-tx> [https://perma.cc/PM2Z-XDTX].

7. Joshua Barajas, *Body of Jakelin Caal, 7 Year Old Migrant Girl Who Died in U.S. Custody Back in Guatemala*, PBSNEWS HOUR (Dec. 24, 2018), <https://www.pbs.org/news-hour/world/body-of-jakelin-caal-7-year-old-migrant-girl-who-died-in-u-s-detention-back-in-guatemala> [https://perma.cc/ZAY4-L2CN] ("The tiny white coffin with the body of the 7-year-old Guatemalan girl who died while in U.S. in the custody ended its heartbreaking journey home in the pre-dawn hours Monday in a tiny hamlet 220 miles north of the capital."); Sofia Menchu, *Guatemalan Girl's Christmas Funeral Too Much for Grieving Mother*, REUTERS (Dec. 25, 2018), <https://www.reuters.com/article/us-usa-immigration-border-guatemala/guatemalan-girls-christmas-funeral-too-much-for-grieving-mother-idUSKC-N1OP03A> [https://perma.cc/22TJ-4DEZ].

8. Volga Desk, *Hundreds Bid Farewell To Udmurt Scholar Who Immolated Himself Protesting Russia's Language Policies*, RADIO FREE EUR. RADIO LIBERTY (Sep. 12, 2019), <https://www.rferl.org/a/hundreds-bid-farewell-to-udmurt-scholar-who-immolated-himself>

poet Rasul Gamzatov reading: “If my language dies tomorrow then I’m ready to die today.”<sup>9</sup> Razin did, in fact, die that day from injuries caused by his burns. Local officials reportedly urged journalists “not to cover the farewell ceremony to avoid speculation.”<sup>10</sup> Yet hundreds attended Razin’s funeral and carried his message that Russia and the world must pay attention to the catastrophic situation of indigenous languages.<sup>11</sup>

These are among the most poignant examples of indigenous peoples’ recent experiences with the denial of language rights. Yet they reflect trends that are pervasive with respect to the discrimination, suffering, and struggle that indigenous peoples experience when they try to speak their languages or keep them alive.<sup>12</sup> In our view, the problem of indigenous languages has at least two main facets: the vulnerability of indigenous language speakers and the vulnerability of the languages themselves. Across the globe, indigenous peoples often cannot use their own languages—and are denied translation services—in legal processes as well as voting, education, employment, health, and media.<sup>13</sup> Language discrimination in these realms limits the ability of indigenous peoples to participate in government, express themselves, or receive services available to others. Beyond discrimination against speakers, the languages themselves are also at risk, such that approximately 40 percent of the estimated 6700 languages now spoken around the world are in danger of disappearing.<sup>14</sup> Of those, the languages spoken by indigenous peoples are the most vulnerable to death or dormancy,

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protesting-russia-s-language-policies/30160616.html [https://perma.cc/W3RT-HQER].

9. *Russian Scholar Dies From Self-Immolation While Protesting to Save Native Language*, MOSCOW TIMES (Sep. 10, 2019), <https://www.themoscowtimes.com/2019/09/10/russian-scholar-dies-from-self-immolation-during-protest-to-save-native-language-a67229> [https://perma.cc/NT7E-4ENR].

10. Desk *supra* at 8.

11. *Id.*

12. See Silvia Quattrini, *Celebrating Languages on Indigenous Peoples Day*, MINORITY RIGHTS GROUP INT’L (Aug. 9, 2019), <https://minorityrights.org/2019/08/09/celebrating-languages-on-indigenous-peoples-day-2019> [https://perma.cc/3YNV-M48L] (“[S]imply being a native speaker of a minority or indigenous language may lead to discrimination, pushing the speaker to think twice before using his or her language or to even develop a negative attitude towards it”).

13. See, e.g., Expert Mechanism on the Rights of Indigenous People, *Role of Languages and Culture in the Promotion and Protection of the Rights and Identity of Indigenous Peoples*, ¶¶ 36–44 U.N. Doc. A/HRC/21/53, ¶¶ 36–44 (2012).

14. *2019 Year of Indigenous Languages*, UNESCO (Jan. 14, 2019), <https://www.un.org/development/desa/indigenouspeoples/news/2019/01/iyl> [https://perma.cc/SH4V-S8LB] (“40 per cent of the world’s estimated 6,700 languages were in danger of disappearing—the majority belong to indigenous peoples”).

taking with them much of the knowledge, experience, and lifeways of the people themselves.<sup>15</sup>

Accordingly, in 2019, the United Nations General Assembly held the International Year of Indigenous Languages (the International Year, or IYIL2019), to address the “critical loss of indigenous languages and the urgent need to preserve, revitalize and promote” them through “urgent steps at the national and international levels.”<sup>16</sup> Acknowledging indigenous languages as a core component of human rights and fundamental freedoms, essential to realizing sustainable development, good governance, peace, and reconciliation,<sup>17</sup> participants in the International Year focused on international awareness, relationship building, and research.<sup>18</sup> At the end of 2019, the General Assembly proclaimed the International Decade of Indigenous Languages to continue these efforts in 2022–2032 (the International Decade, or IDIL2022–2032), inviting UNESCO again to serve as the lead agency for international efforts and for “[s]tates to consider establishing national mechanisms with adequate funding for the successful implementation” on the domestic level.<sup>19</sup>

The International Year and Decade of Indigenous Languages are not the first efforts to address the situation of indigenous peoples and their languages. Several international covenants, along with national legal regimes, recognize the rights of minorities and indigenous peoples to use, learn, and transmit their languages. Unfortunately, as the above stories, along with many more mundane daily occurrences suggest, the application of these laws has proven inadequate to protect indigenous peoples and their languages. This Article considers how a better understanding of the human rights dimensions of the situation of indigenous peoples and their languages could help to advance remedial and ongoing measures in both law and society. Guided by the standards set in the United Nations Declaration on the Rights of Indigenous Peoples and emerging insights regarding implementation of indigenous people’s human rights, we believe there is ample opportunity to improve and transform the situation of indigenous peoples and their languages.

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15. See *UNESCO Launches the Website for the International Year of Indigenous Languages (IYIL2019)*, UNESCO (Aug. 7, 2018), <https://en.unesco.org/news/unesco-launches-website-international-year-indigenous-languages-iyil2019> [https://perma.cc/YR4X-765H] (“There are some 6,000–7,000 languages in the world today. About 97% of the world’s population speaks only 4% of these languages, while only 3% of the world speak 96% of all remaining languages. A great majority of those languages, spoken mainly by indigenous peoples, will continue to disappear at an alarming rate.”).

18. See *2019 International Year of Indigenous Languages*, UNESCO <https://en.iyil2019.org> [https://perma.cc/4P4P-N6RE] (last visited Jan. 31, 2020).

If approached thoughtfully, these efforts of the United Nations will help provide the time, resources, attention, and commitment to inspire social and legal change toward realizing indigenous peoples' human rights in the realm of language. At the very least, it is time for the world community to ensure that indigenous peoples stop dying to protect their languages or because they cannot be understood in them. It may even be possible to ensure that indigenous peoples, like others, have the opportunity to think, speak, write, sing songs, be educated, receive medical treatment, raise their children, go to ceremonies, dream of better futures, and live fully and freely, all in their own languages.<sup>20</sup>

In this Article, we explore what it means to take a "human rights approach" to indigenous peoples' languages, as in the IYIL2019 and related advocacy efforts. Some scholars are deeply skeptical of a "linguistic human rights" approach to minority languages and language speakers. Alan Patten and Will Kymlicka, for example, have written that the myriad of linguistic needs and issues, such as between majority and minority populations, as well as immigrant and local groups across the world makes "it doubtful that international law will ever be able to do more than specify the most minimal of standards" for language rights.<sup>21</sup> Others query whether the phenomenon of language—with its expressive and cultural dynamics—is suited to the legal, statecentric interventions of human rights.<sup>22</sup> Some observers have said that individual ability to speak an indigenous language may be less about governmental permission than personal motivation and societal relevance.<sup>23</sup> A leading Russian ethnologist, Valery Tishkov, defends the

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20. See, e.g., Ry Moran, *Dreaming of a Day When Indigenous Languages are Protected and Honored*, VANCOUVER SUN (Aug. 18, 2016), <https://vancouversun.com/opinion/opinion-dreaming-of-a-day-when-indigenous-languages-are-protected-and-honoured> [https://perma.cc/57C3-4HZQ].

21. See Alan Patten & Will Kymlicka, *Introduction: Language Rights and Political Theory: Context, Issues, and Approaches*, in LANGUAGE RIGHTS & POL. THEORY 34 (2003).

23. Compare *Why Education Reform Alone Won't Save Bolivia's Indigenous Languages*, WORLD POL. REV. (Apr. 24, 2017), <https://www.worldpoliticsreview.com/trendlines/21941/why-education-reform-alone-won-t-save-bolivia-s-indigenous-languages> [https://perma.cc/7BEB-S4YN] (describing challenges to indigenous language instruction including resistance from parents and teachers, and lack of indigenous language support in public administration and mass media), with Daniel Openshaw, *Indigenous Languages Are Important But Are They Useful?*, MINORITYRIGHTS (May 2, 2012), <https://minorityrights.org/2012/05/02/part-2-indigenous-languages-are-important-but-are-they-useful> [https://perma.cc/Q99H-55DL] (describing that incentives, such as use of indigenous languages in universities, media, and courts, could help to combat current apathy toward learning them, and offering example of 1993 Mexican legislation that helped provide such incentives). For helpful material on the challenges, internal and external, faced by families that study "heritage languages," see LEANNE HINTON, BRINGING OUR LANGUAGES HOME, LANGUAGE REVITALIZATION FOR FAMILIES 225–55 (2013).

right of peoples to choose a language change for pragmatic reasons or as a historical choice of the entire group. Under this theory, the language is not a major marker of identity, and indigenous societies continue to exist after language shift.<sup>24</sup> Still others challenge linguistic human rights on empirical grounds, arguing that experience shows that such rights, as articulated in legal instruments, have been largely unenforceable in the courts.<sup>25</sup>

Without necessarily disagreeing with these scholarly critiques, we believe that the International Year and Decade present opportunities to reconsider human rights as a framework for the indigenous peoples' context. In this vein, we consider that previous critiques may be outdated or take too narrow of an approach to the question of implementing human rights, focusing on legal enforcement versus sociological change.

In this spirit, we offer several observations that have been lacking in previous analyses. First, and perhaps most simply, human rights law has evolved over the past decade. The Declaration on the Rights of Indigenous Peoples, adopted by the United Nations General Assembly in 2007, offers context and clarity for indigenous peoples' rights to revitalize, use, develop, and transmit indigenous languages to future generations, to understand and be understood in various public forums, and to use indigenous languages in education and media, as well as states' obligations in these realms. Moreover, studies and advice produced by UN bodies since the adoption of the Declaration have elaborated on the role of indigenous peoples' languages in guaranteeing human rights more broadly, such as the individual and collective right to culture and participation in the life of the state. Second, key norms in the indigenous peoples' human rights movement—namely the self-determination of peoples, individual and collective nature of indigenous experience, and the importance of identifying and remedying past harms—can help to inform language policy that is more responsible to indigenous people's needs and aspirations. Finally, implementing

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24. V. Tishkov, *Narod ne umiraet s iazykom* [*The People Do Not Die With the Tongue*], *IZVESTIA* (Sept. 2019), <https://iz.ru/920557/valerii-tishkov/narod-ne-umiraet-s-iazzykom> [<https://perma.cc/B2AE-MH5B>].

25. See generally Moria Paz, *The Failed Promise of Language Rights: A Critique of the International Language Rights Regime*, 54 *Harv. Int'l. L.J.* 157 (2013) (outcomes in 133 cases before the European Court of Human Rights, the U.N. Human Rights Committee, and the Inter-American Court of Human Rights on language rights in education, court proceedings, and communications with the government "have consistently favored linguistic assimilation, rather than the robust protection of linguistic diversity than is formally espoused.").



human rights is not only about legal enforcement in state-systems,<sup>26</sup> but also about sociological changes that have the power to transform realities on the ground, potentially including attitudes about indigenous peoples' languages.<sup>27</sup> The same is true in the language realm where we must look capaciously—and certainly beyond the courts—to see the mutually informative potential of indigenous, state, and international actions that inspire, create, and realize human rights norms.<sup>28</sup>

Perhaps most generally, we note that implementation of human rights is not purely a legal endeavor,<sup>29</sup> but rather, one that has societal

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26. Compare Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) (arguing that international human rights law wields influence through coercion, persuasion, and acculturation), with Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005) (focusing on the impact of international treaties on rule of law regimes within and among states).

27. See, e.g., Expert Mechanism on the Rights of Indigenous Peoples, Statement on the International Year of Indigenous Languages, 2019 (Jan. 28, 2019), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24122&LangID=E> [<https://perma.cc/U6RC-5YUB>] (“We strongly support the States that have encouraged the United Nations to Declare 2020–2030 the Decade of Indigenous Languages. This initial year is important to raise awareness among states and convene stakeholders, including universities, civil society, private sector, and other actors, in the movement for indigenous language revitalization. Yet it will take more time to reverse the dire situation of indigenous peoples’ language loss. Over the course of a decade, however, it would be possible to truly transform the situation of indigenous peoples’ languages, such that these languages could fully recover and flourish in the lives of indigenous peoples. Indigenous peoples must play a leading role and be fully consulted while these initiatives are being discussed.”).

28. Kristen A. Carpenter & Angela R. Riley, *Indigenous Peoples and the Jurisgenerative Moment in Human Rights*, 102 CAL. L. REV. 163, 163–77 (2014). Carpenter and Riley argue in this article that developments in the human rights movement, coinciding with decolonization theory, have created a juris generative or “law creating moment” in which indigenous peoples are influencing law and policy at various levels of advocacy, whether indigenous, national, or international. *Id.* Additionally, following theorists who note the importance of “sociological” approaches to human rights implementation (*see id.* at 215), the authors suggest that this dynamic moment of change and empowerment for indigenous peoples is occurring in realms both legal and nonlegal realms. *See id.* at 226–33 (offering example of Eastern Band of Cherokee Nation’s approach to addressing violence against women as including legal advocacy at all levels of government, as well as community health, education, and healing programs).

29. See *Law and Society*, Joachim J. Savelsberg and Lara L. Cleveland, OXFORD BIBLIOGRAPHIES, <https://www.oxfordbibliographies.com/view/document/obo-9780199756384/obo-9780199756384-0113.xml> [<https://perma.cc/6X57-QMNY>] (last visited Jan. 27, 2019) (“Law and society studies address the mutual relationship between law and society with its different actors, institutions, and processes. Law is created and put into practice through societal processes. Simultaneously law effects and affects social change. Beyond a causal relationship, law is further understood to constitute social institutions such as the polity, family, property, corporation, crime, even the individual. The study of law and other specializations in the social sciences are thus closely interwoven. Law and society studies represent a multi- and interdisciplinary field . . . . The field of law and society studies to which scholars from many disciplines such as anthropology, cultural studies, history, jurisprudence,

dimensions as well.<sup>30</sup> The effort to recognize and effectuate language rights must include acknowledgement of past wrongs, far-reaching vision, legal policy and reform, along with media and the arts, science and technology, religion and culture, and youth culture and music.

A human rights approach to indigenous languages could inspire, for example, awareness of the very existence of indigenous languages; renewed confidence in using one's language or asking for translation; understanding and healing from the shame of previous generations for whom the language was forbidden by governments; collective action and solidarity among indigenous peoples who seek to learn and transmit their languages to future generations; and a contemporary understanding that indigenous language is relevant not just to culture, but also to development, science, and governance. A human rights approach to indigenous language recognizes that these languages are vital rather than archaic, and that governments along with other institutions and actors must work to realize their potential for reasons of human dignity and societal wellbeing.

By calling on states to develop national action plans for language use, awareness, and revitalization consistent with the Declaration and in consultation with indigenous peoples themselves, the International Year and Decade offer the potential for a more capacious and holistic view of human rights than has been previously considered. UNESCO, for example, articulated wideranging objectives for IYIL2019, including raising global awareness of the risks to indigenous languages and their significance for contemporary activities; promotion of quality of life, intercultural dialogue, and linguistic continuity; and increasing the capacity of all stakeholders to take measures to support indigenous peoples' language rights.<sup>31</sup> In these regards, IYIL2019 embraced both the universal standard setting and pluralistic implementation approaches that characterize today's human rights movement, with an emphasis on remedies for past injuries and indigenous peoples' self-determination and aspirations for the future.<sup>32</sup>

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linguistics, philosophy, sociology, and political science contribute is large.”).

30. For scholarship considering “law and society” in the realm of “human rights,” see, e.g., Heinz Klug, *Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights*, 1 ANN. REV. L. & SOC. SCI. 85, 85 (2005) (arguing that “we must first look beyond the formal claims of human rights law and doctrine and consider how socio-legal approaches may help to produce a more deeply textured understanding of the relationship between human rights and law in the early twenty-first century”).

31. See 2019 *International Year of Indigenous Languages*, *supra* note 18 (stating “objectives” for IYIL2019).

32. As one example, see the work of the Muscogee (Creek) Nation to translate the Declaration into the Muscogee language and adopt it into tribal law. See Darren DeLaune,

In some places, examining language challenges through a human rights lens has already revealed best practices in language pedagogy (defer to the self-determination of peoples regarding instructional methods) and approaches to historical language oppression by states (recognize past injuries and foster reconciliation going forward). These lessons can inform debates and reforms in education, politics, and other contexts. The human rights approach can further amplify challenges including ongoing government concerns that minority languages will threaten national security or impede democratic processes, issues that can be addressed in part through diplomatic mechanisms that already have some basis for mitigating state sovereignty with the concerns of peoples.<sup>33</sup> In our view, these and other factors have been somewhat under-studied by critics of linguistic human rights and deserve consideration going forward.

The Article proceeds as follows. In Part I, we describe the situation of indigenous languages, as well as the protection for language rights articulated in international human rights instruments. In Part II, we offer two case studies, examining indigenous peoples' language issues in the United States and Russia. We choose these two countries in part because they are our homes and the places where we work on language issues.<sup>34</sup> The United States and Russia also offer an interesting, comparative basis for evaluating implementation of indigenous peoples' language rights across differences of geopolitics, histories, and aspirations among nations and peoples. The Article concludes with lessons learned from the case studies and reflections on the theory and practice of a human rights approach to indigenous peoples' languages. While the United Nations Declaration on the Rights of Indigenous Peoples sets universal baselines for indigenous peoples' language rights, these must be implemented with recognition of indigenous peoples'

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*Declaration in Process to be Translated into Muscogee*, MVSOCGEE MEDIA (FEB. 27, 2018), <https://mvskokemedia.com/declaration-in-process-to-be-translated-into-mvskoke> [<https://perma.cc/LH5D-2KAA>].

33. For example, the Expert Mechanism on the Rights of Indigenous Peoples, on which we both have served, is specifically charged by the Human Rights Council with helping states and indigenous peoples realize the aims of the Declaration, through dialogue and advice. G.A. Res. A/HRC/RES/33/25 (Oct. 5, 2016).

34. See, e.g., Kristen A. Carpenter, *General Assembly: High-level Plenary Meeting for the Global Launch of the International Year of Indigenous Languages*, UN Web TV 1:57:10 (Feb. 1, 2019), <http://webtv.un.org/watch/general-assembly-high-level-plenary-meeting-for-the-global-launch-of-the-international-year-of-indigenous-languages/5997504273001>; Periodic Videos, *Implementing the UN Declaration on the Rights of Indigenous Peoples in the United States Part 4*, YOUTUBE 42:17 (Mar. 16, 2019), <https://www.youtube.com/watch?v=evlMOfcghuU>.

self-determination and participation, toward specific plans and programs for realizing such rights in practice.

## I. REALITIES AND RIGHTS

### A. The Situation of Indigenous Languages

Indigenous peoples across the globe speak thousands of languages today. Some indigenous languages are vital and flourishing, such as Guarani in Paraguay or Quechua in Peru, each spoken by millions. But many indigenous languages are endangered, such as the Nawat language with an estimated 200 speakers in El Salvador, or Wiradjuri, with only thirty reported speakers in Australia.<sup>35</sup>

Even in locales where indigenous languages are in daily use, it is difficult for individuals to obtain education, health care, or other services in their mother tongues.<sup>36</sup> In Nunavut, Canada, the lack of availability of health care in the language of the Inuit people has shown to have negative effects on health care outcomes.<sup>37</sup> A representative of Botswana recently stated before the United Nations Permanent Forum on Indigenous Issues that in his country, education is not available in indigenous languages.<sup>38</sup> At the US border with Mexico, as suggested above, indigenous peoples are sometimes unable to obtain translation services in when they are detained and even in subsequent proceedings regarding child custody, asylum, deportation, and so on.<sup>39</sup>

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35. See Megan Townsend, *25 Languages You Need to Listen to Before They Disappear*, INDEPENDENT (MAR. 23, 2018), <https://www.independent.co.uk/news/science/endangered-languages-dead-listen-speakers-audio-belarusian-wiradjuri-cornish-a8268196.html> [<https://perma.cc/47TK-5SPN>].

36. Meetings Coverage and Press Release, Land Rights, Critical Need to Preserve Indigenous Languages Stressed by Speakers, as Permanent Forum Continues Debate, U.N. Press Release HR/5306 (May 19, 2016).

37. See OFFICE OF THE LANGUAGES COMMISSIONER OF NUNAVUT, INVESTIGATION INTO THE QIKIQTANI GENERAL HOSPITAL'S COMPLIANCE WITH THE OFFICIAL LANGUAGES ACT FINAL REPORT 1 (2015), <http://langcom.nu.ca/sites/langcom.nu.ca/files/QGH%20-%20Final%20Report%20EN.pdf> [<https://perma.cc/2A6Q-G3MA>]. The report counsels, "[i]f you cannot communicate with your patient, your patient is not safe . . . . Being able to speak in one's mother tongue when it concerns health is not asking a favour of health care professionals or organizations. On the contrary, it is a basic issue of accessibility, safety, quality and equality of services." *Id.*

38. Meetings Coverage and Press Release, *supra* note 36.

39. See, e.g., Rachel Nolan, *A Translation Crisis at the Border*, NEW YORKER (Dec. 30, 2019), <https://www.newyorker.com/magazine/2020/01/06/a-translation-crisis-at-the-border> [<https://perma.cc/R2HG-6BZS>]; J. Gielselman, *An Invisible Wall: How Language Barriers Block Indigenous Latin American Asylum Seekers*, 27 TRANSNAT'L L. & CONTEMP. PROBS. 451, 469 (2018) (describing the problems of language access in detention, deportation, and asylum).

By any measure, indigenous languages are on the decline world-wide, and many have died altogether.<sup>40</sup> Much of this loss is traceable to the period of European conquest and colonization. In Australia, for example, there may have been 250 languages before the arrival of Europeans, of which 150 survive today, and of these only fifteen are considered healthy, namely because they are being taught to children.<sup>41</sup> Some studies suggest that precontact there were 2000 languages spoken by 9 million people in South America and the Caribbean,<sup>42</sup> a figure that by the 2000s was down to 350 languages in South America and perhaps 20 in the Caribbean.<sup>43</sup>

In a number of regions, language loss went hand in hand with the early experiences of genocide, disease, slavery, and displacement associated with European conquest.<sup>44</sup> Later, and perhaps more pervasively, the policies of nation states were expressly designed to suppress indigenous languages in support of assimilation efforts. These policies, together with changing economics and other factors, have given rise to “language shifts” in which communities have adopted the languages of the dominant societies.<sup>45</sup> Even where indigenous languages survive, and current law and policy favors them, it is difficult to recover

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40. MARIANNE MITHUN, *NATIVE AMERICAN LANGUAGES* (1998), <http://www.linguistics.ucsb.edu/faculty/mithun/pdfs/1998%20Nat%20Am%20Lg%20Encarta.pdf> [<https://perma.cc/S6ZJ-F5GQ>].

41. See, e.g., Amanda Burdon, *Speaking Up*, *AUSTR. GEOGRAPHIC* (APR. 26, 2016), <https://www.australiangeographic.com.au/topics/history-culture/2016/04/speaking-up-australian-aboriginal-languages> [<https://perma.cc/KK2W-SC2A>]; Deborah Kikkawa, *Turning Back the Tide Of Indigenous Language Loss: Children to the Rescue?*, *AUSTL. DEP'T OF SOC. SERVS.*, [https://www.dss.gov.au/sites/default/files/documents/02\\_2015/indigenous\\_language\\_loss.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2015/indigenous_language_loss.pdf) [<https://perma.cc/S57S-TPBM>].

42. Frances Jenner, *South America's Indigenous Languages: Where Are They Now?* *LATIN AMERICA REPORTS* (Apr. 18, 2019), <https://latinamericareports.com/status-update-south-america-indigenous-languages/1759> [<https://perma.cc/4VFT-PTVE>] (“According to The World Bank’s 2015 study “Indigenous Latin America in the 21st century,” the number of languages spoken in the region is 560, although some studies estimate that before Spanish colonization the continent was home to over 2,000.”). These numbers depend on what is meant by a language, versus language dialect or language family—topics that are beyond the scope of this Article. For an older work, see *THE INDIGENOUS LANGUAGES OF SOUTH AMERICA IX* (Campbell & Grondona eds., 2012) (describing South America’s “53 language families and 55 isolates, that is, 108 known families and isolates together, including assessment of proposals of more distant relationships and listing of named but mostly unknown other ‘languages.’”).

43. See Hubert Devonish, *Protecting, Propagating, and Revising Caribbean Indigenous Languages*, *UNESCO* (Jan. 31, 2004), <https://www.mona.uwi.edu/dlp/jlu/ciel/pages/protecting.htm> [<https://perma.cc/WNU3-HE47>].

44. James Crawford, *Endangered Native American Languages: What Is to be Done, and Why?*, 19 *BILINGUAL RES. J.* 17, 22 (1995).

45. *Id.*

from decades or centuries of oppression.<sup>46</sup> The continuity of language transmission from generation to generation has been lost in many communities, and the psychological harm and collective trauma of past discrimination and violence makes some people reluctant or unable to try to learn, speak, or teach indigenous languages.<sup>47</sup> In a 2016 statement to the United Nations Permanent Forum on Indigenous Issues, a representative of the Indigenous Language Caucus stated that approximately 500 languages were projected to be lost by 2030.<sup>48</sup>

One problem, in our view, is that states either fail to recognize language rights as human rights or subordinate these rights to others. There are several iterations of these dynamics. Indigenous language rights are notoriously difficult to assert in states that have adopted policies of monolingualism as an aspect of national unity and governing power.<sup>49</sup> One writer recalls that after the Arabic became the official language of Libya in 1969, “Qaddafi’s Revolutionary Council could officially approve other languages but even singing in the traditional Amazigh language of Tamazight was punishable by death.”<sup>50</sup> These measures ended with Qaddafi’s removal, but Libya still has not recognized the (indigenous) Tamazight language as an official language. To this day, postcommunist states in Eastern Europe seek to build a single and indivisible national identity.<sup>51</sup> To achieve these goals, some states

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46. See generally Kellie Rolstad, *Language Death in Central Mexico: The Decline of Nahuatl and the New Bilingual Maintenance Programs*, Bilingual Rev. (2001), <http://terpconnect.umd.edu/~rolstad/pdf%20of%20Language%20Death.pdf> [<https://perma.cc/2UYB-93M2>] (evaluating historical and contemporary aspects of Nahua language in Mexico).

47. See, e.g., Maureen Smith, *Forever Changed: Boarding School Narratives of American Indian Identity in the U.S. and Canada*, 2 INDIGENOUS NATIONS STUD. J. 57, 61–70 (2001) (examining personal narrative to examine indigenous students’ experiences with boarding schools in the United States, including punishment for speaking indigenous languages). The historic suppression of indigenous languages in the United States and contemporary ramifications of these policies are discussed in detail in Subpart II.A.

48. Indigenous Language Caucus, 2016 Statement to the U.N. Permanent Forum on Indigenous Issues, <http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH01e2/7188dd89.dir/PF16Indigenous-Language-Caucus208.pdf> [<https://perma.cc/4HWM-M5XU>].

49. See Alan & Kymlicka, *supra* note 21, at 3 (noting that countries that formally accorded recognition to a range of minority languages during Communist regimes, such as countries of the former Soviet Union and Yugoslavia, shifted to an official policy of monolingualism when they became independent).

50. Ernesto Alvarado et al., *Regions*, 20(1) HUM. RTS. BRIEF 36, 45 (2012).

51. See COUNCIL OF EUROPE, COMMENTS OF THE GOVERNMENT OF THE RUSSIAN FEDERATION ON THE FOURTH OPINION OF THE ADVISORY COMMITTEE ON THE IMPLEMENTATION OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES BY THE RUSSIAN FEDERATION (2018), <https://rm.coe.int/government-comments-on-the-4th-acfc-opinion-on-switzerlandenglish-lang/1680908a1b> [<https://perma.cc/5A9A-ENPA>].

introduce voluntary assimilation discourse, emphasizing the right of minorities to access services in national languages. In this paradigm, some states argue that preventing indigenous peoples from learning their indigenous languages advances equal access to education for persons.<sup>52</sup> Under the umbrella of monolingualism, whether de jure or de facto, indigenous peoples may find themselves in unable to control educational systems, language policies, or writing systems.

Elsewhere, states exercise hegemony around what they perceive to be national cultural resources. Even if indigenous culture is recognized, language rights may be neglected in favor of other national efforts around cultural heritage, which may in turn obscure indigenous peoples' political and other rights. In such a paradigm, indigenous peoples may have only secondary role, which does not include active and decisive positions, and indeed conflicts with the global norm of "self-determination" in indigenous peoples' relationships with states. A new law in Japan, for example, has yielded a mixed reception for its simultaneous recognition of the Ainu as indigenous peoples and promotion of Ainu cultural tourism, but failure to address rights to Ainu language, land, or artifacts.<sup>53</sup>

Even in those states that recognize and promote interests in language diversity it remains difficult for indigenous peoples to assert language rights. Tolerance for language pluralism may merely accommodate multiple dominant languages without benefit to indigenous languages.<sup>54</sup> This type of multilingualism fails to acknowledge the particular historical experiences and current aspirations of indigenous peoples. From 1876 to 1996, the now infamous "residential school"

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52. COUNCIL OF EUROPE, REPORT OF THE RUSSIAN FEDERATION ON IMPLEMENTATION OF THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES UNDER THE THIRD MONITORING CYCLE 101–102 (2010), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168008b7c3> [<https://perma.cc/X3LD-XEVM>].

54. See Fernand de Varennes & Elżbieta Kuzborska, *Language, Rights and Opportunities: The Role of Language in the Inclusion and Exclusion of Indigenous Peoples*, 23 INT'L J. ON MINORITY & GROUP RTS. 281, 296 (2016) ("Even in jurisdictions where indigenous peoples are a majority, such as in the territory of Nunavut in Canada, fluency in an official indigenous language is generally still not a requirement for government employment, and otherwise generous legislation still does not create a right to use a language such as Inuktitut, despite consideration of how to make this language a working language in government departments during a few years in 2000–2001. Indeed, while there is a right for members of the public to communicate with government offices in French and English, no such right exists for official indigenous languages (Chipewyan, Cree, Dogrib, Gwich'in, Inuktitut and Slavey) unless there is a significant demand for communications with and services from a specific government office or service, or 'due to the nature of the office, it is reasonable that communications with and services from that office be available in such language.'").

program in Canada was created to assimilate indigenous children by removing them from their families, forcing them to speak English and French, and punishing them for using indigenous languages.<sup>55</sup> Even as policies have now changed, the physical coercion and psychological trauma of those earlier efforts casts an intergenerational shadow over contemporary language use by indigenous peoples and is not ameliorated by contemporary Canadian policies that accommodate both English and French, no matter how laudable they are.<sup>56</sup>

In some countries, the issue of indigenous language use is largely or mostly absent from the public sphere. Government policy may be formally supportive or neutral but fail to provide any sufficient support for language rights, which are treated as aspects of cultural heritage, family traditions, or ethnic rituals. In many countries, this means that nonprofit heritage organizations, centers for cultural memory, or language development institutes undertake the work of indigenous peoples' language documentation, education, and publication.<sup>57</sup> While these organizations may have more autonomy and primacy to the community

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55. See Carole Blackburn, *Culture Loss and Crumbling Skulls, The Problematic of Injury in Residential School Litigation*, 35 *PoLAR: POL. & LEGAL ANTHROPOLOGY REV.* 289, 289, 294–97, 300 (2012); Pamela O'Connor, *Squaring the Circle: How Canada is Dealing with the Legacy of Its Indian Residential Schools Experiment*, 6(1) *AUST L.J. HUM. RTS.* 188, 191 n.17 (“The most frequent cause of punishments for children in residential schools was speaking their native languages.”); *Reports*, NAT’L CTR. FOR TRUTH & RECONCILIATION, <http://nctr.ca/reports.php> [<https://perma.cc/6G26-G67F>] (last visited Jan. 23, 2020).

56. See Varennes & Kuzborska, *supra* note 54, at 297.

57. These dynamics are varied and complicated. See ADMINISTRATION FOR NATIVE AMERICANS, NATIVE LANGUAGES ARCHIVES REPOSITORY PROJECT 9–10, <http://www.aihec.org/our-stories/docs/NativeLanguagePreservationReferenceGuide.pdf> [<https://perma.cc/Q5J7-WRJT>] (“It is difficult to tally how many community language programs exist throughout the country. They are, for the most part, unheralded and ignored, struggling to survive against a mosaic of obstacles. It is clear, though, what does bode well for fledgling tribal language programs. The apparent ideal, based on established programs with any history of survival, is a private, community-based, small-scale program, unattached from any of the institutions of the day on the reservation or in the community. Those fledgling programs utilizing separate private, state or tribal charters, tax exempt status and staff appear to garner more community support in the long run. The success they muster as private entities is offset by the lack of financial support enjoyed by public programming. They are at the mercy of sporadic foundation and private source funding, as well as long ingrained attitudes against teaching a Native language in a school environment.”); Brittney Melloy, *From Threatened to Thriving: Using Technology to Preserve Arctic Indigenous Languages*, *ARCTIC TODAY* (Dec. 14, 2018), <https://www.arctictoday.com/threatened-thriving-using-technology-preserve-arctic-indigenous-languages> [<https://perma.cc/2ND3-E7W4>] (describing indigenous language platform in need of private or public donor); Emily Dreyfuss, *Brazil’s Museum Fire Proves Cultural Memory Needs a Digital Backup*, *WIRED* (Sept. 7, 2018), <https://www.wired.com/story/brazil-museum-fire-digital-archives> [<https://perma.cc/3VUD-3P3F>] (describing destruction of digitization project for indigenous languages caused by fire, albeit at a nationally funded museum).



than public projects, they may also lack sufficient resources or status to fulfill the human rights obligations that international law imposes on states.

## B. The Human Rights Framework

These varying national approaches occur against a backdrop of international law on language rights. Article 2 of The International Covenant on Civil and Political Rights (ICCPR), provides against language discrimination: “Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>58</sup> Additionally, Article 14 provides for language rights in criminal trials, stating that any person “[i]n the determination of any criminal charge against him . . . shall be entitled to the following minimum guarantees, in full equality . . . (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him . . . [and] (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.” Article 24 extends the right of nondiscrimination based on language to children.<sup>59</sup>

While the ICCPR applies generally to all human beings, Article 27 speaks specifically to the rights of “minorities,” which have been interpreted to include indigenous peoples.<sup>60</sup> Article 27 provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”<sup>61</sup> The Human Rights Committee has noted that the positive

58. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, art. 2 (Dec. 16, 1966) [hereinafter ICCPR].

59. *Id.* arts. 14, 24.

60. Rep. of the Human Rights Committee, Communication No. 167/1984, *Ominayak v. Canada*, ¶ 32.2, U.N. Doc. A/45/40 (1990) (“Although initially couched in terms of alleged breaches of the provisions of article 1 of the Covenant, there is no doubt that many of the claims presented raise issues under Article 27. The Committee recognises that the rights protected by Article 27, include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong.”).

61. ICCPR, *supra* note 58, art. 27. Article 27 can be further understood by reference to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992. The Declaration was by its own terms “inspired by the provisions of article 27 of the International Covenant on Civil and Political Rights,” described above. G.A. Res. 47/135, Declaration on the Rights of Persons Belonging to National or

duties of states include measures to support the revival of cultures and languages of indigenous peoples.<sup>62</sup>

In the International Covenant on Economic, Social and Cultural Rights, state parties recognizes the right of everyone to take part in cultural life.<sup>63</sup> The Committee on Economic, Social and Cultural Rights has consistently called upon state parties to protect and promote indigenous peoples' rights to their cultures and languages, under Article 15 of the Covenant.<sup>64</sup>

The Convention on the Elimination of Racial Discrimination notes in its preamble that "all Member States have pledged themselves . . . to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion."<sup>65</sup> In the indigenous peoples context, the Committee on the Elimination of Racial Discrimination has said that states must "recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation" and to "ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practice their languages."<sup>66</sup>

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Ethnic, Religious and Linguistic Minorities, para. 4 (Dec. 18, 1992). With respect to language rights, this Declaration observes that "the promotion and protection of the rights of persons belonging to national or ethnic, religious and linguistic minorities contribute to the political and social stability of States in which they live." *Id.* para. 5. Its operative articles provide that linguistic minorities shall have the right to use their languages in public and private; maintain contacts with others sharing linguistic ties; be free to express themselves and develop their languages; and be free from discrimination on this basis. *Id.* arts. 1–4. Additionally, states shall protect the existence of linguistic minorities and adopt legislation to achieve those ends; and, where possible, should also take appropriate measures for minorities to learn their "mother tongue" and through education to encourage knowledge of minority languages existing within their territories. *Id.* art. 4. While this Declaration is a helpful building block in understanding the evolution of a human rights approach to languages, it is also important to note that indigenous peoples also have a right to "self-determination" that impacts their language rights.

62. Human Rights Committee, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, ¶ 18, U.N. Doc. CCPR/C/SLV/CO/6 (Nov. 18, 2010).

63. G.A. Res. 2200 (XXI), International Covenant on Economic, Social and Cultural Rights, art. 15 ¶ 1 (Dec. 16, 1966).

64. See Comm. on Economic, Social and Cultural Rights (CESCR), General Comment No. 21, Right of Everyone to Take Part in Cultural Life (art. 15, para. 1(a) of the International Covenant on Economic, Social and Cultural Rights), ¶¶ 3, 36–37, 49–50, 53, 55, 73, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009).

65. International Convention on the Elimination of All Forms of Racial Discrimination, Preamble, Dec. 21, 1965, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969).

66. Rep. of the Comm. on the Elimination of Racial Discrimination, General Recommendation on the Rights of Indigenous Peoples, U.N. Doc. A/52/18, annex V, at 122 (1997).

The International Labor Organization (ILO) Convention 169 on Indigenous and Tribal Peoples provides the following recognition of language rights, stating in Article 28:<sup>67</sup>

1. Children belonging to the peoples concerned shall, wherever practicable, be taught to read and write in their own indigenous language or in the language most commonly used by the group to which they belong. When this is not practicable, the competent authorities shall undertake consultations with these peoples with a view to the adoption of measures to achieve this objective.
2. Adequate measures shall be taken to ensure that these peoples have the opportunity to attain fluency in the national language or in one of the official languages of the country.
3. Measures shall be taken to preserve and promote the development and practice of the indigenous languages of the peoples concerned.

In this regard, ILO Convention 169 makes clear that opportunities to learn the national language must not come at the expense of the right to learn one's indigenous language, and that states have an obligation to support indigenous language development and practice. In Article 30, ILO Convention 169 sets forth:

1. Governments shall adopt measures appropriate to the traditions and cultures of the peoples concerned, to make known to them their rights and duties, especially in regard to labour, economic opportunities, education and health matters, social welfare and their rights deriving from this Convention.
2. If necessary, this shall be done by means of written translations and through the use of mass communications in the languages of these peoples.

The second point is quite powerful because it underscores state obligations to ensure human rights by providing translation and communication in indigenous languages, where necessary, and not merely by forcing or inducing indigenous peoples to learn the majority language.

The Convention on the Rights of the Child states that indigenous children shall not be denied the right to enjoy their culture, nor to profess and practice their own religion or to use their language.<sup>68</sup> In its General Comment No. 11 on indigenous children, the Committee on the Rights of the Child recognizes that special measures may be needed to

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67. See International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, art. 28, Jun. 27, 1989, 1650 U.N.T.S. (entered into force, Sept. 5, 1991).

68. Convention on the Rights of the Child, art. 30, Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990). See *id.* arts. 2, 29.

enable indigenous children to enjoy their cultural rights, including positive action on the part of the State.<sup>69</sup>

Cultures and languages are an integral part of the mandate of UNESCO, as evidenced by its leadership in IYIL2019. UNESCO has a number of instruments especially relevant to cultures and languages, as well as a broader policy of encouraging indigenous peoples' self-determined cultural development and work in relation to endangered languages. The 2001 UNESCO Universal Declaration on Cultural Diversity provides:

All persons have therefore the right to express themselves and to create and disseminate their work in the language of their choice, and particularly in their mother tongue; all persons are entitled to quality education and training that fully respect their cultural identity; and all persons have the right to participate in the cultural life of their choice and conduct their own cultural practices, subject to respect for human rights and fundamental freedoms.<sup>70</sup>

The UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003) recognizes that "communities, in particular indigenous communities, groups and, in some cases, individuals, play an important role in the production, safeguarding, maintenance and recreation of intangible cultural heritage."<sup>71</sup> The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005) encourages groups to "create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging to minorities and indigenous peoples."<sup>72</sup>

An additional instrument of importance is the European Charter for Regional or Minority Languages of 1992.<sup>73</sup> Declaring that regional or minority languages are part of Europe's heritage, this Charter specifies legal obligations for the languages under its purview. The Charter

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69. Comm. on the Rights of the Child (CRC), General Comment No. 11 (2009): Indigenous Children and Their Rights Under the Convention, ¶ 13, U.N. Doc. CRC/C/GC/11 (Feb. 12, 2009).

70. Records of the General Conference, *UNESCO Universal Declaration on Cultural Diversity*, art. 5, UNESCO Doc. 31C/Res. 25 (Nov. 2, 2001).

71. UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, Preamble, Oct. 17, 2003, 2368 U.N.T.S. 3 (entered into force Apr. 20, 2006).

72. UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO Doc. CLT.2005/CONVENTION DIVERSITE-CULT REV.2, art. 7 ¶ 1 (Oct. 20, 2005).

73. COUNCIL OF EUROPE, EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES (Nov. 5, 1992), <https://rm.coe.int/168007bf4b> [<https://perma.cc/JC6M-NPFT>] [hereinafter ECRML].

creates a right for individuals not to be subjected to discrimination and introduces a system of positive protection measures for minority languages and the communities using them.<sup>74</sup> However, states parties can flexibly determine “the nature and scope of the measures to be taken to give effect to this Charter . . . bearing in mind the needs and wishes and respecting the traditions and characteristics of the groups which use the languages concerned.”<sup>75</sup>

As we mentioned above, the most recent international instrument to emerge with respect to indigenous peoples' rights is the United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly in 2007.<sup>76</sup> The Declaration is a resolution of the General Assembly and as such, is not signed or ratified by states, nor enforceable in international tribunals. Some states are now in the process of developing implementation plans, whether in specific subject matters<sup>77</sup> or more generally.<sup>78</sup> Moreover, the Declaration is significant for the fact that indigenous peoples were deeply involved in its drafting and 144 states (with support later articulated by another 4) voted in favor of its adoption.<sup>79</sup> The Declaration sets forth a global consensus regarding indigenous peoples' rights and states' obligations to ensure those rights,<sup>80</sup> and can be used alone or as a vehicle for interpreting other instruments in the context of indigenous peoples.<sup>81</sup>

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74. COUNCIL OF EUROPE, EXPLANATORY REPORT TO THE EUROPEAN CHARTER FOR REGIONAL OR MINORITY LANGUAGES (Nov. 5, 1992), <https://rm.coe.int/16800cb5e5> [<https://perma.cc/F8S8-AKYV>].

75. ECRML, *supra* note 73, part II art. 7 ¶ 5.

76. G.A. Res. 61/295 (Sept. 13, 2007).

77. In the United States, for example, the Advisory Council on Historic Preservation, an independent federal agency, has a plan for compliance with the Declaration with respect to the administration of lands sacred to American Indians, pursuant to the National Historic Preservation Act. *United Nations Declaration on the Rights of Indigenous Peoples*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/indian-tribes-and-native-hawaiians/united-nations-declaration-rights-indigenous-peoples> [<https://perma.cc/T8AW-TLGY>] (last visited Jan. 23, 2020).

78. In Canada, for example, there is legislation currently pending “to ensure that the laws of Canada are in harmony with the United Nations Declaration on the Rights of Indigenous Peoples.” *United Nations Declaration on the Rights of Indigenous People Act*, OPENPARLIAMENT, <https://openparliament.ca/bills/42-1/C-262> [<https://perma.cc/78EW-EH-QA>] (last visited Jan. 23, 2020).

79. See Carpenter & Riley, *supra* note 28, at 176.

80. See S. James Anaya, *The Human Rights of Indigenous Peoples: United Nations Developments*, 35 U. HAW. L. REV. 983, 993 (2013).

81. See Conference Report, *Implementing the United Nations Declaration on the Rights of Indigenous Peoples in the United States*, U. COLO. L. REV. (forthcoming 2020) (summarizing arguments of James Anaya regarding the use of the Declaration as an interpretive device).

Article 13 of the Declaration is worth quoting in full, as it is the foundational language rights provision:

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.<sup>82</sup>

Thus, the Declaration's approach, building on ILO Convention 169, is to provide affirmative commitments to indigenous languages. Human rights cannot be effectuated merely by providing indigenous peoples access to majority languages, but rather states must make sure indigenous peoples can retain and communicate in their own languages.

The Declaration further provides, in Articles 14 and 15, for the right of indigenous peoples to "control their [own] education systems and institutions providing education in their own languages" and, in Article 31, "maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions."<sup>83</sup> In addition, indigenous peoples have the right to determine their own identity and membership and to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, juridical systems or customs, all of which may implicate language use, as further described in our case studies.<sup>84</sup> Indeed, under the ICCPR and other instruments, cultural and language rights are indivisible and central to all the other rights.<sup>85</sup>

Of additional importance, especially with respect to the Declaration, is its recognition of indigenous peoples' right to self-determination, which includes indigenous peoples' rights to freely determine their cultural development, to autonomy, and to participate fully, if they so choose, in the political, economic, social and cultural life of the State (arts. 3, 4 and 5).<sup>86</sup> Language rights may be necessary to ensure that indigenous peoples are able to participate politically, i.e., to vote, as

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82. G.A. Res. 61/295, *supra* note 76, art. 13.

83. *Id.* arts. 14, 15, 31.

84. *Id.* art. 34.

85. See, e.g., The Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent: A Human Rights-Based Approach, U.N. Doc. A/HRC/39/62, ¶¶ 7, 22 (2018).

86. G.A. Res. 61/295, *supra* note 76, arts. 3–5.

well as to provide free, prior, and informed consent to legislation and other matters affecting them.<sup>87</sup>

While indigenous peoples have the right to participate in all stages of language rights work, it is also true that a human rights approach to indigenous languages places the obligation for these measures on states.<sup>88</sup> Moreover these obligations contain both remedial and ongoing components, so states must acknowledge and correct past harms to indigenous peoples. This includes restitution for spiritual and other forms of property taken without indigenous peoples' consent, and nonrecurrence of past violations. Among human rights experts and advocates

87. See S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 97–184 (2D ED. 2004) (elaborating on the norm of self-determination in international law as it pertains to indigenous peoples).

88. International law, and international human rights law, are traditionally based on the notion of states as the exclusive holders of rights and responsibilities. See, e.g., LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 341 (1905) (“Since the Law of Nations is a law between States only and exclusively, States only and exclusively are subjects of the Law of Nations.”). For a practically-oriented, contemporary view, see *International Human Rights Law*, OFFICE OF THE HIGH COMM’R, <https://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> [https://perma.cc/6ZPW-MSRE] (last visited Jan. 23, 2020) (“International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of basic human rights.”). The view of international law view as exclusive to states has softened somewhat, to allow for the recognition of the roles of nonstate actors, such as corporations. See, e.g., Harold Hongju Koh, *Remarks: Twenty-First-Century International Lawmaking*, 101 GEO. L.J. 725, 743 (2013) (“Finally, the new twenty-first-century international lawyering process recognizes that states are not the only actors. Of course, neither international law nor foreign policy have ever been completely restricted to states, but the proliferation and influence of nonstate actors has gone viral in recent years. And so it is inevitable that the United States government now finds itself developing relationships not just with states, but with civil-society and industry groups too, among others.”) (internal citations omitted); Philip Alston, *The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 3–5 (Philip Alston ed., 2005). Yet, state liability remains particularly salient in the realm of indigenous peoples’ rights, where states have historical and current responsibilities based on their roles in the conquest and colonization of indigenous peoples. See, e.g., *Cherokee Nation v. State of Georgia*, 30 U.S. 1, 17 (1831) (stating the relationship between Indian Nations and United States “resembles that of a ward to his guardian”); *United States v. Kagama*, 118 U.S. 375, 383–84 (1886) (These Indian tribes *are* the wards of the nation . . . . From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them, and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.”); *Seminole Nation v. United States*, 316 U.S. 286, 296–97 (1942) (To the extent that the United States “has charged itself with moral obligations of the highest responsibility and trust” towards the Indians, it maintains fiduciary obligations to them).

alike, there is an emerging sentiment that states who previously spent public resources to destroy indigenous languages have an obligation to devote at least equivalent resources to restoring them today.<sup>89</sup>

## II. LANGUAGE RIGHTS IN PRACTICE: CASE STUDIES

In this Part, we consider the gap between aspiration and realization, also known as the challenge of implementation, with respect to the survival and revitalization of indigenous rights to languages.

The United Nations Expert Mechanism on the Rights of Indigenous Peoples has stated that IYIL2019 is an opportunity for states and indigenous peoples to undertake unprecedented and urgent preservation and revitalization measures, “which earlier have seemed impossible or untimely,”<sup>90</sup> in order to save the languages from extinctions.

In many states, there are laws to guide indigenous language rights in domestic contexts, including the expectations for language rights as well as means for education, translation, and other services, as in Australia and Peru.<sup>91</sup> As we mentioned above, state laws range in terms of the nature and scope of protection for indigenous languages and their speakers.

An example of affirmative legal support is arguably found in Section 17, subsection 3 of the Finnish Constitution, which stipulates “the Sámi, as an indigenous people, as well as the Roma and other

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89. See Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 13, ¶ 17 (“There is a need for the recognition of the continuing value to communities and society of indigenous peoples’ traditional knowledge, including spiritual, cultural and linguistic knowledge. This will require long-term financial investments in measures for the reclaiming and relearning and sharing of this knowledge. The resources spent on this should be, at a minimum, commensurate with the monies and efforts previously spent to destroy such knowledge.”); United Nations International Year of Indigenous Languages Conference, *Focusing On The Work Of Tribal Nations In Oklahoma To Preserve, Protect And Revitalize Their Languages*, 3 (Nov. 16, 2019), [https://perma.cc/G2MY-XVRL] (“We . . . [e]ncourage governments to provide funding for Indigenous-led restorative language programs on an equal basis to what they spent to destroy Indigenous language fluency. For example, in the case of the United States that would include the 2.8 Billion dollars, that the US government spent on the Boarding school programs adjusted for inflation, as well as an unspecified additional amount for other governmental assimilation and child removal programs and policies.”).

90. Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 27.

91. Bridget Brennan, *NSW Introduces Nation’s First Laws to Recognise and Revive Indigenous Languages*, AUSTL. BROADCASTING CORP. (OCT. 11, 2017, 3:11 AM), <https://www.abc.net.au/news/2017-10-11/nsw-passes-unprecedented-laws-to-revive-indigenous-languages/9039746> [https://perma.cc/UDE6-4SPV]; Peru Officially Recognizes Indigenous Languages, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/news/peru-officially-recognizes-indigenous-languages> [https://perma.cc/8267-WT]; Rosaleen Luis Howard et al., *Translating Rights: the Peruvian Indigenous Languages Act in Quechua and Aymara*, 40 AMERINDIA 219 (2018) (PERU).



groups, have the right to maintain and develop their own language and culture.” National legislation, particularly the Sami Parliament Act<sup>92</sup>—which regulates status and operations of the Sami representative and self-governance body—recognizes rights of indigenous negotiation in the development of the teaching of the Sámi language in schools, as well as the social and health services or any other matters affecting the Sámi language and culture or the status of the Sámi as an indigenous people.

Yet even this official recognition of language rights does not ensure sufficient realization. The Sámi complain that Finland refuses to provide sufficient financial support for ensuring the use of language in public services, which results in the absence of medical services and education in Sámi language. There is also insufficient funding to translate among Sámi languages, which is necessary for effective use of the languages in the Sámi Parliament itself.<sup>93</sup>

In the remainder of this Part, we engage in detailed study of the recognition and realization of indigenous language rights in two countries, namely the United States and Russia as a means of illuminating challenges and best practices on domestic contexts. Our primary goal is to suggest specific and thematic areas for domestic legal reform in order to recognize language rights as human rights and realize the aims of the IYIL2019. Secondarily, we offer some reflections on best practices in the implementation of indigenous peoples’ rights more broadly.

#### A. United States

At the time of European contact, there were approximately 300–350 indigenous languages spoken throughout what is now the United States and Canada. Subsequent developments, including a long policy history of federal suppression of Indian languages in both countries,

92. While subject to Finnish laws, the Sami Parliament is selected by the Sami and has an important role implementing constitutional provisions and represents the Sami in necessary consultations on all issues related to the indigenous people. Operations of another important institution for the Sami language in Finland, the Center for Language Ecology, Sámi Giellagáldu, were almost suspended in 2018, as the government threatened to cut off the funding significantly and suggested other Nordic countries to share the responsibility to uphold this center. See Civil Code, Act on the Sami Parliament, (974/1995; amendments up to 1026/2003 included, laki saamelaiskäräjistä), <https://www.finlex.fi/fi/laki/kaannokset/1995/en19950974.pdf> [<https://perma.cc/DLV9-3CYL>].

93. In 2019, Norway reported at the United Nations that it supports the idea of establishing Sámi Giellagáldu as a crossborder effort. Anne Karin Olli, State Secretary, Address at UN Permanent Forum on Indigenous Issues, Item 5 Discussion on the 2019 International Year of Indigenous Languages at 2 (Apr. 22, 2019), <http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH3011/ee3d651c/075f43b2.dir/PF19OLLI050422.pdf> [<https://perma.cc/VF54-W4W2>].

account at least in significant part for the very low numbers of native speakers (described in census data below). In this Subpart, we describe the legal history and current situation of indigenous languages in the United States and recommend better practices and policies in the spirit of a human rights approach for national policy in IYIL2019 and beyond.

## 1. Legal History and Current Situation

### *a. Federal Indian Policy and the Suppression of American Indian Languages 1800s–1960s*

When Europeans arrived in what is now North America, there were hundreds of indigenous languages spoken in the region. European monarchs, settlers, traders, and religious officials initially pursued several periods of diplomacy, war, treaty negotiation, and missionary policies toward the indigenous peoples of North America.<sup>94</sup> With the adoption of the U.S. Constitution, the United States continued treaty-making, but ultimately this gave way to federal Indian removal in the 1820–1860s and then a policy of “assimilation” after the Civil War.<sup>95</sup> With respect to assimilation, federal policymakers attributed American Indians’ continued adherence to their distinctive ways of life to various socioeconomic and cultural factors. The government then tried various programs, including the allotment of tribal lands to individual Indians and the prohibition of tribal languages, with the goal of destroying the tribes and assimilating their members into mainstream U.S. society.

Prominent among these assimilation efforts was the creation of federally funded boarding schools that would teach Indian children the lessons of Christianity and “civilization” in order to “Kill the Indian in him and save the man.”<sup>96</sup> The model for accomplishing these goals was to assimilate Indians into the general population by taking them away from their parents and placing them in boarding schools where they would learn English.<sup>97</sup> As the Peace Commissioners explained, “In the difference of language to-day lies two-thirds of our trouble . . . . Schools should be established, which children should be required to attend; their barbarous dialect should be blotted out and

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94. GETCHES, WILKINSON ET AL., *FEDERAL INDIAN LAW* 47–287 (2017) (describing the periods of European and US policy toward American Indians).

95. *Id.* at 167–215 (ON THE PERIODS “ASSIMILATION AND ALLOTMENT”).

96. DAVID WALLACE ADAMS, *EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928* 52 (1995).

97. See, e.g., LORIE M. GRAHAM, “*The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*,” 23 AM. INDIAN L. REV. 1, 10–18 (1998) (describing the US federal government’s and missionaries’ attempts to Christianize Indian children by removing them from their homes and installing them in federal boarding schools where they had religious and other instruction).

the English language substituted.<sup>98</sup> The accepted idea that “by educating the children of these tribes in the English language[,] these differences would have disappeared, and civilization would have followed at once.”<sup>99</sup>

The Indian Bureau issued regulations in 1880 that “all instruction must be in English” in both mission and government schools under threat of loss of government funding.<sup>100</sup> The Commissioner of Indian Affairs during this time opined that students’ native language was a “barbarous dialect.”<sup>101</sup> Equating indigenous languages with barbarism was consonant with the ethic of the time in which American Indians were often seen as savage and backward. Their languages, religions, subsistence practices, and family relationships, and even in some cases their emotions and internal thought processes, were all thought of by non-indigenous society as non-civilized.<sup>102</sup> Moreover in an early policy formulation against multilingual education, the Commissioner opined that “to teach Indian school children their native tongue is practically to exclude English, and to prevent them from acquiring it.”<sup>103</sup>

As a result, indigenous children in boarding schools were deprived of food, had their mouths washed out with soap, or whipped for speaking their languages. One individual recounted that his father “was punished for speaking his tribal language by having sewing needles pushed through his tongue, ‘a routine punishment for language offenders.’”<sup>104</sup> Beyond the physical injuries and psychological trauma, children became unable to communicate with their parents in their

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98. Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 26–27 (1868–69).

99. *Id.*

100. AMERICANIZING THE AMERICAN INDIANS 199 (Francis Paul Prucha, ed., 1973).

101. Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior, 504 (1887).

102. For more information on notions of Indian inferiority and languages, see Charla Bear, *American Indian Boarding Schools Haunt Many*, NAT’L PUB. RADIO (May 12, 2008), <https://www.npr.org/templates/story/story.php?storyId=16516865> [https://perma.cc/9AZ8-EBSR]. For an analysis of historical notions of Indian barbarism and savagery as they affect contemporary Indian rights, see generally ROBERT A. WILLIAMS JR., *LIKE A LOADED WEAPON: THE REHNQUIST COURT, INDIAN RIGHTS, AND THE LEGAL HISTORY OF RACISM IN AMERICA* (2005).

103. UNITED STATES CONGRESS, ABRIDGMENT . . . CONTAINING THE ANNUAL MESSAGE OF THE PRESIDENT OF THE UNITED STATES TO THE TWO HOUSES OF CONGRESS . . . WITH REPORTS OF DEPARTMENTS AND SELECTIONS FROM ACCOMPANYING PAPERS, VOLUME 1 679 (2015). See, e.g., J.D.C. ATKINS, *THE ENGLISH LANGUAGE IN INDIAN SCHOOLS*, in AMERICANIZING THE AMERICAN INDIANS: WRITINGS BY THE “FRIENDS OF THE INDIAN,” 1880–1900, 199 (Francis Paul Prucha, ed., 1973).

104. See Smith, *supra* note 47, at 61–62 (quoting CELIA HAIG-BROWN, *RESISTANCE AND RENEWAL* 11 (1988)).

native tongue, pray in a traditional manner, or participate in subsistence activities that required verbal communication.<sup>105</sup> Those who had their language beaten out of them suffered individual shame and loss of identity, and as adults they were unlikely or unable to transmit the language to the next generation.<sup>106</sup>

*b. Self-Determination in Federal Indian Language Policy*

Finally, in the 1960s, American Indian activism around the Red Power and Civil Rights movement coalesced into the tribal self-determination movement. An American Indian political platform advocated for indigenous rights in the realms of education, economic development, health care, government, culture, and language. In 1990, Congress passed the Native American Languages Act (NALA), acknowledging that “the traditional languages of Native Americans are an integral part of their cultures and identities and form the basic medium for the transmission, and thus survival, of Native American cultures, literatures, histories, religions, political institutions, and values” and that the “United States has the responsibility to act together with Native Americans to ensure the survival of these unique cultures and languages.” The Act stopped short of apologizing for the government’s past suppression of indigenous languages but did recognize, that “acts of suppression and extermination directed against Native American languages and cultures are in conflict with the United States policy of self-determination for Native Americans.”

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105. See Bear, *supra* note 102 (offering narratives from boarding school survivors that illustrate these points). For other sources, see also Eric Hemenway, *Indian Children Forced to Assimilate at White Boarding Schools*, NAT’L PARK SERV., <https://www.nps.gov/articles/boarding-schools.htm> [<https://perma.cc/U6AZ-PNL6>] (last visited Feb. 17, 2020) (“Anishnaabamowin was spoken by the vast majority of Odawa at Little Traverse. All of these characteristics changed rapidly after the War of 1812. One mechanism that greatly accelerated these changes was boarding schools.”); Bear, *supra* note 102 (“In 1945, Bill Wright, a Pattwin Indian, was sent to the Stewart Indian School in Nevada. He was just 6 years old. Wright remembers matrons bathing him in kerosene and shaving his head. Students at federal boarding schools were forbidden to express their culture—everything from wearing long hair to speaking even a single Indian word. Wright said he lost not only his language, but also his American Indian name.”).

106. For example, Tracy Hebert of First Peoples Cultural Council in British Columbia, has said that “intergenerational trauma” caused by Canadian residential schools is a major factor in the decline of indigenous languages. See Terri Coles, *Indigenous Languages are in Danger of Becoming Extinct: Here’s How You Can Help Save Them*, HUFFINGTON POST (June 21, 2018), [https://www.huffingtonpost.ca/entry/indigenous-languages\\_ca\\_5cd556cde4b07bc7297724ce](https://www.huffingtonpost.ca/entry/indigenous-languages_ca_5cd556cde4b07bc7297724ce) [<https://perma.cc/Z2WT-SH7X>] (“Young Indigenous children were punished, often severely, for using their mother tongues, and that led to a loss of the languages—and the culture and nationhood integral to them—for the next generations, she said. ‘They protected their children by not sharing the language for fear that they would have a similar experience.’”).

NALA declared it the policy of the United States to “preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages,”<sup>107</sup> with specific reference to the use of indigenous languages in federal, state, and tribal education systems, tribal government, and public expression.<sup>108</sup> As amended in 1992, NALA had funding provisions, making one to three year grants available to tribal governments and organizations for “the survival and continuing vitality of Native American languages” and enumerated the types of programs that were eligible, including teacher training, intergenerational knowledge transmission, the dissemination of documents and so on.<sup>109</sup> Still, NALA’s funding was criticized as both inadequate and unreliable.<sup>110</sup>

NALA’s substantive provisions were interpreted narrowly in the case of *Office of Hawaiian Affairs v. Department of Education*, in which a federal district court held that NALA provided no basis for Native Hawaiians to claim a right to language immersion in education, a right that the plaintiffs had asserted through the section of NALA prohibiting restrictions on the right of Native Americans “to express themselves through the use of Native American languages . . . in any public proceeding, including publicly supported education programs.”<sup>111</sup> Among other things, this case highlighted the disparity between the law on the books and the language revitalization in the community. Hawaiian was already recognized as an official state language and successful language nest programs were thriving pedagogically. However, the court stopped short of finding a statutory right to the kind of education—immersion—that actually worked in teaching language fluency.

In 2006, Congress passed the third iteration of indigenous language rights legislation in the form of the Esther Martinez Language Preservation Act.<sup>112</sup> As Allison Dussias has carefully recounted,<sup>113</sup> witnesses testified to Congress about the links between language, individual wellbeing, tribal survival and human rights.<sup>114</sup> They also

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107. *Id.*

108. *Id.*

109. *Id.*

110. Allison M. Dussias, *Indigenous Languages Under Siege: The Native American Experience*, 3 INTERCULTURAL HUM. RTS. L. REV. 5, 24 (2008).

111. *Office of Hawaiian Affairs v. Dep’t of Educ.*, 951 F. Supp. 1484 (D. Haw. 1996).

112. Esther Martinez Native American Languages Preservation Act of 2006, 42 U.S.C. § 2991 (2018).

113. See Dussias, *supra* note 110, at 27–51. For an international law perspective on minority language rights, see generally Julie Chi-hye Suk, *Economic Opportunities and the Protection of Minority Languages*, 1 L. & ETHICS OF HUMAN RTS. 1 (2007).

114. See Dussias, *supra* note 110, at 32. (Representative Heather Wilson of New

explained best practices in tribal language revitalization methodologies, including immersion opportunities, teacher training, relevant materials, and whole family involvement.<sup>115</sup> Their comments referenced not only interests in preserving, but also keeping cultures alive. The resulting Act expanded the types of eligible Native American language programs to language nests, survival schools, and restoration programs, aimed to stop further loss of indigenous languages and to improve Indian children's educational performance overall.

The Esther Martinez Act expired in 2012, but the program continues to be funded through annual appropriations. In 2019, Congress passed the "Esther Martinez Native American Languages Programs Reauthorization Act," funding the program nationally at \$13 million dollars annually from 2020 to 2024, for education, training employment, and social services.<sup>116</sup> In Canada, the government of British Columbia recently invested \$50 million in indigenous language revitalization for one province alone.<sup>117</sup> Going forward, it would be helpful to have broad-based economic analysis of the costs and benefits of a national plan for indigenous language revitalization to meet policy objectives set in consultation with tribal governments.<sup>118</sup> For example, in Hawaii, revitalizing the native language has both raised graduation rates and lowered suicide rates.<sup>119</sup> Such research could be a component of a national activity plan during what we hope will be a forthcoming decade on indigenous languages.

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Mexico "situated the struggle for native language protection and support within the broader national and international struggle for human rights: 'The United States of America and other countries around the world are supporting human rights, including the rights of indigenous minorities . . . . The time has come now for equal recognition of the basic human rights of America's native peoples and the control of our education . . . '").

115. *Id.* at 43.

116. Esther Martinez American Languages Program Reauthorization Act (2019), Pub. L. No. 116-101, 133 Stat. 3261 ("To amend the Native American Programs Act of 1974 to provide flexibility and reauthorization to ensure the survival and continuing vitality of Native American languages.").

117. *British Columbia Invests \$50 Million in Indigenous Languages*, LANGUAGE MAG. (Mar. 16, 2018), <https://www.languagemagazine.com/2018/03/16/british-columbia-invests-50-million-for-indigenous-languages> [<https://perma.cc/3CS4-EEGF>].

118. One possible approach would be to study the resources required for language revitalization in Hawaii over the last 20–30 years and adjust for experiences and circumstances of other indigenous communities in the U.S. Frances Kai-Hwa Wang, *Hawaiian Language Revival Used as Model for Other Indigenous Languages*, NBC (Mar. 17, 2017, 9:56 PM), <https://www.nbcnews.com/news/asian-america/hawaiian-language-revival-used-model-other-indigenous-languages-n734891> [<https://perma.cc/G7LG-EU6P>].

119. Keala Carter, *What I've Learned from Hawaii's Language Revitalization Movement*, INTERCONTINENTAL CRY (Feb. 14, 2018), <https://intercontinentalcry.org/ive-learned-hawaiis-language-revitalization-movement> [<https://perma.cc/RZP4-J6E9>].

National education and voting laws also impact language rights and practices. Following the earlier No Child Left Behind Act, Congress passed the Every Student Succeeds Act in 2015.<sup>120</sup> This Act established a grant program supporting Native American language immersion programs and schools whose primary language of instruction is a Native American language.

Additionally, the Voting Rights Act, as amended in 1975, requires state elections departments to provide language assistance to groups whose language is Spanish, Native American, Alaska Native, or one of the Asian languages if more than five percent of the voting age population speaks limited English.<sup>121</sup> In Alaska, there were years of litigation by Alaska Natives showing that Department of Elections activities were “not designed to transmit substantially equivalent information in the applicable minority . . . languages.”<sup>122</sup> A 2016 settlement order contains extensive provisions for meeting the requirements of the Voting Rights Act by making voting information and processes truly available to Alaska Natives.<sup>123</sup>

Two states, namely Hawaii and South Dakota, recognize indigenous languages as official state languages.<sup>124</sup> But, as described below,

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120. See Every Student Succeeds Act, Pub. L. No. 114-95, § 1111(c)(2)–(c)(3), 129 Stat. 1802, 1825–35 (2015); Every Student Succeeds Act § 1111(h)(1)(C)(i)(I).

121. See Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (codified as amended in 42 U.S.C. §§ 1973–1973bb-1).

122. See James T. Tucker et al., “*Why Should I Go Vote Without Understanding What I Am Going to Vote For?*” *The Impact of First Generation Voting Barriers on Alaska Natives*, 22 MICH. J. RACE & L. 327, 372 (2017) (discussing *Nick v. Bethel* and *Toyukak v. Treadwell*).

123. *Id.* at 377–78 (“Pre-election dissemination of information in the Official Election Pamphlet to Alaska Native voters in their language and dialect; Translation of election information into Gwich’in and several Yup’ik dialects in addition to the translations already made in the Central Yup’ik dialect; Increased collaboration with tribal councils to meet the needs of Alaska Native voters who need to receive election information in their native languages and dialects; A full-time employee responsible for administrating and coordinating all of the Division’s language assistance activities; Providing sample ballots in Gwich’in and Yup’ik that voters can bring into the voting booth with them; Making Gwich’in and Yup’ik dialects available on touch-screen voting machines when it is technologically feasible; Increased pre-election outreach by bilingual election workers; Preparation of glossaries of election terms and phrases in Gwich’in and several Yup’ik dialects to guide bilingual poll workers providing language assistance; Mandatory bilingual poll worker training on how to provide language assistance to voters; Providing Gwich’in and Yup’ik-speaking voters with a toll-free number through which they can make inquiries in their native languages and dialects; Relying on Yup’ik and Gwich’in language experts to translate election materials, including information on ballot measures, candidates, absentee and special-needs voting and voter registration; Pre-election publicity in Gwich’in and Yup’ik through radio ads, public service announcements and announcements over VHF ra F radios in villages that do not receive local radio stations.”).

124. S.D. Codified Laws § 1-27-20 (2019).

some states have also passed laws purporting to restrict indigenous language use.

Recently and for the first time, the US Census assessed indigenous language use, including how many speakers of North American Native languages reside in the United States, where they live across the country, and what languages they speak.<sup>125</sup> Results of the study appear in a report entitled “Native North American Languages Spoken at Home in the United States and Puerto Rico: 2006 to 2010.” The mere fact of collecting this data is a helpful step toward identifying and addressing indigenous languages issues in the United States.

The Census Bureau counted about 372,000 people who speak Native North American languages at home.<sup>126</sup> The most common of these languages is Navajo, or Diné, with nearly 170,000 speakers, followed by Yupik and Dakota, each with about 19,000 speakers. After that were Apache, Keres, Cherokee, Choctaw, Zuni, Ojibwe, Pima, Inupik, Hopi, Tewa, Muscogee, Crow, Shoshoni, Eskimo, Tiwa, and additional North American indigenous languages not specified.<sup>127</sup>

Most Native North American language speakers are concentrated in Alaska, Arizona, and New Mexico, with just nine counties from these three states containing half of the nation’s speakers.<sup>128</sup> Apache County in Arizona has the most concentrated population of speakers with 37,000, while McKinley County in New Mexico has 33,000. Other states with significant numbers include South Dakota, California, Oklahoma, and Washington. The report does not include information on Native Hawaiians.

The Census Bureau looked for disparities among Native North Americans who reside in American Indian or Alaska Native Areas (AIANAs) and those who do not.<sup>129</sup> The majority of Native North American language speakers live in AIANAs (237,000 of the 372,000 counted as speakers). Out of Navajo speakers, 112,000 resided in AIANAs. As for Yupik and Dakota speakers, 84.5 percent and 51.5 percent lived in AIANAs, respectively. Nonetheless, the vast majority

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125. See *Census Shows Native Languages Count*, LANGUAGE MAG., <https://www.languagemagazine.com/census-shows-native-languages-count> [https://perma.cc/EF2A-M9M5] (last visited Jan. 28, 2019).

126. U.S. DEP’T OF COMMERCE, U.S. CENSUS BUREAU, NATIVE NORTH AMERICAN LANGUAGES SPOKEN AT HOME IN THE UNITED STATES AND PUERTO RICO: 2006–2010 at 2 (2011), <https://www2.census.gov/library/publications/2011/acs/acsbr10-10.pdf> [https://perma.cc/RC4K-7ENW].

127. *Id.*

128. *Id.* at 5.

129. *Id.*



of AIANAs residents do not speak a Native North American language at home (only 5.4 percent do). Five percent of AIANAs residents speak Spanish, making it the most common non-Native North American language spoken at home—apart from English—and rivaling the number of residents who do speak an indigenous language at home.

A dispiriting trend identified by the Census was an overall decrease in indigenous language use. Among those who identified themselves as American Indian or Alaska Native, one in five people aged 65 and over spoke a Native North American language in their home compared with only one in ten of people aged between 5 and 17. The numbers suggest that younger generations are not learning indigenous languages, which may lead to the extinction of some languages. Of the 169 indigenous languages coded by the survey, less than 20 have over 2000 speakers using the language at home.

While federal law, especially the Esther Martinez Native American Languages Preservation Act, now seeks to protect instead of eradicate language rights, American Indians still face political and legal challenges to their efforts to secure language rights.<sup>130</sup> Some of the political opposition seems to emerge from debates on language rights in the immigration context. Not too long ago, for example, the Oklahoma Legislature convened to discuss an “English Only” measure motivated by a desire to assimilate immigrants into mainstream society.<sup>131</sup> When principal chiefs of several Indian nations appeared to testify against the bill, they were denied the opportunity to address the legislature—even in English. The bill passed the state house, though eventually died in the state senate.<sup>132</sup> Clearly, legal advocacy and social conditions alike must ameliorate in order to ensure indigenous peoples’ language rights in the United States.

## 2. The Right to Revitalize, Use, Develop and Transmit

Following the passage of NALA and the Esther Martinez Act, the most innovative efforts continue to emerge from American Indian tribes and organizations, using their often scarce resources to create

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130. See generally Allison M. Dussias, *Waging War With Words: Native Americans Continuing Struggle Against the Suppression of Their Languages*, 60 OHIO ST. L.J. 901 (1999); Dussias, *supra* note 110. For an international perspective, see generally Suk, *supra* note 113.

131. *Official English Legislation Passes House Committee Following Tense Hearing*, ASSOCIATED PRESS (Apr. 2, 2008), <https://oklahoman.com/article/3224542/official-english-legislation-passes-house-committee-following-tense-hearing> [https://perma.cc/V3DG-R2ZP].

132. *Id.*

language immersion programs, train fluent speakers as instructors, and publish teaching materials.<sup>133</sup> Many promising initiatives are occurring in Indian Country, led and funded either by tribal government or private organizations. As we observed above, it is national governments—not indigenous peoples—that hold human rights obligations. Yet it is also true that in many instances, indigenous peoples cannot wait for national governments to act, especially when there are pressing problems in communities. As a practical matter in the United States, tribal governments work in partnership with the federal government.

In this Part, we discuss several examples, from the Navajo, Cherokee, Yuchi, and Wampanoag peoples, each illustrating certain methodologies and objectives around language revitalization. These examples should not be read as representative of the situation of indigenous languages in the United States., which differ greatly across regions, smaller tribes, urban populations, and so on. Other sources provide very helpful information on language revitalization in Alaska, Hawaii, and throughout the Lower-48 states of the United States.<sup>134</sup> Nevertheless, we wish to give a relatively detailed snapshot of several tribes to contextualize some of the international and national law points more specifically through these examples.

The Navajo Nation is located in the Four Corners Region of the United States on a reservation of approximately 17,544,500 acres. Its population consists of around 350,000 people, residing both on the reservation and in other locations throughout the United States. Use of the Navajo language defies the stereotype of indigenous languages as cultural relics. During World War II, the Navajo language was used as an unbreakable code for US forces.<sup>135</sup> Today, the Navajo language continues to be used for communication at home and in religious

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133. See, e.g., Janine Jano's Bowen, *The Ojibwe Language Program: Teaching Mille Lacs Band Youth the Ojibwe Language to Foster a Stronger Sense of Cultural Identity and Sovereignty*, HARV. PROJECT AM. INDIAN ECON. DEV. 1 (Dec. 2004), [https://hpaied.org/sites/default/files/publications/Ojibwe\\_Language\\_Program\\_Web\\_Version.pdf](https://hpaied.org/sites/default/files/publications/Ojibwe_Language_Program_Web_Version.pdf) [<https://perma.cc/JMD2-EDK6>].

134. See, e.g., BARBARA A. MEEK, *WE ARE OUR LANGUAGE: AN ETHNOGRAPHY OF LANGUAGE REVITALIZATION, IN A NORTHERN ATHABASKAN COMMUNITY* (2011) (extended study of language renewal efforts by the Kaska community); HINTON, *supra* note 23 (edited collection of essays on indigenous language revitalization examples among the Miami, Wampanoag, Karuk, Yuchi, Mohawk, Hawaiian, Anishinabe, and Kawaiisu people of the United States, with comparative examples from Maori and others around the world).

135. *Navajo Code Talkers and the Unbreakable Code*, CENT. INTELLIGENCE AGENCY, (Nov. 6, 2008), <https://www.cia.gov/news-information/featured-story-archive/2008-featured-story-archive/navajo-code-talkers> [<https://perma.cc/K98H-CYLF>].

ceremonies,<sup>136</sup> is taught in tribal and public schools,<sup>137</sup> and is used in tribal courts and legal processes.<sup>138</sup> Yet law and society, coupled with history and current events, present significant challenges to keeping the language vital.

Historically, the Navajo people suffered from the federal government's policies of removal and imprisonment in the 1860s. The Treaty of 1868 allowed them to return to the Navajo homeland, albeit on a smaller land base, and also provided for an "English education."<sup>139</sup> In this regard, assimilation fallowed very quickly on the heels of military conquest. As Professor Sarah Krakoff has explained,<sup>140</sup> "when the Navajo returned from Bosque Redondo, the US military built the first schools, and troops were then sent out to round up Navajo children, often forcibly separating them from their families."<sup>141</sup> The federal government, in implementing the treaty, imposed an "English education" meaning "not only that children would learn the English language, but that they would not be able to wear their hair long, speak their language, or learn about their traditions and cultures."<sup>142</sup> As in other boarding schools, the teachers punished students for speaking Navajo and gave them English names, to further the effort.

Krakoff writes that "[i]n 1930, seventy-one percent of Navajos spoke no English, as compared to seventeen percent of the rest of the Indian population. Since that time, the number of Navajo-only speakers has dropped while the number of English-only speakers has risen."<sup>143</sup> In two rural areas more than 95 percent of students entering schools spoke Navajo whereas by 1995, it was only 50 percent.<sup>144</sup> A 2018 study shows that Navajo students face a myriad of pressures—from poverty

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136. See, e.g., Felicia Fonseca, *Navajos Top List of Native Language Speakers in U.S.*, BOSTON.COM (Dec. 14, 2011), [http://archive.boston.com/news/nation/articles/2011/12/14/navajos\\_top\\_list\\_of\\_native\\_language\\_speakers\\_in\\_us](http://archive.boston.com/news/nation/articles/2011/12/14/navajos_top_list_of_native_language_speakers_in_us) [<https://perma.cc/4GSQ-TU9K>].

137. *Learning Navajo Language Helps Students Connect to Their Culture*, ARIZONA STATE UNIVERSITY (Apr. 17, 2014), <https://asunow.asu.edu/content/learning-navajo-language-helps-students-connect-their-culture> [<https://perma.cc/X4XU-ZDEF>].

138. Noel L. Smith, *Program Enhances Navajo Language in Tribal Courts*, ALBUQUERQUE J. (Nov. 23, 2017), <https://www.abqjournal.com/1096795/program-enhances-navajo-language-in-tribal-courts.html> [<https://perma.cc/WX3S-VBK9>].

139. Treaty with the Navajo, U.S.–Navajo, art. 6, June 1, 1868, 15 Stat. 667.

140. Sarah Krakoff, *A Narrative of Sovereignty: Illuminating the Paradox of the Domestic Dependent Nation*, 83 OR. L. REV. 1109 (2004).

141. *Id.* at 1142.

142. *Id.*

143. *Id.* at 1143.

144. *Id.*

to peer pressure—that impact how and whether they speak Navajo in school and at home.<sup>145</sup>

Today, the Navajo Nation “faces a significant challenge to turn education from a threatening, negative influence into one that can provide positive opportunities.”<sup>146</sup> While the Navajo Nation has used the power of tribal law and governance to meet this challenge, it has also faced the pressure of “English only” policies in local governance,<sup>147</sup> employment,<sup>148</sup> and education.<sup>149</sup> In 1984, for example, the Navajo Tribal Council passed a law requiring all schools on the Navajo Reservation to teach Navajo language and culture in all grades.<sup>150</sup> In practice, schools on the Navajo reservation took various approaches to language education ranging from schools that had minimalist inclusion of Navajo language, if at all, to those that use Navajo as the medium of instruction.<sup>151</sup> In between are those schools that use Navajo only as a means to teach English and those that approach Navajo as a supplemental “foreign” language.<sup>152</sup>

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145. Tiffany S. Lee, “If They Want Navajo to Be Learned, Then They Should Require It in All Schools”: Navajo Teenagers’ Experiences, Choices, and Demands Regarding Navajo Language, WICAZO SA REV. 22 (Spring 2007), <https://nau.edu/wp-content/uploads/sites/49/2018/04/Lee-If-They-Want-Navajo-to-be-Learned-then-they-should-require-it-in-all-schools.pdf> [<https://perma.cc/X2V9-WD57>] (an empirical study of predictors for Navajo language fluency, and finding use in the home, use at school, and traditional religious practices to be positively correlated with language acquisition, and peer pressure to be negatively correlated.) (“[T]he students reported in the interviews having strongly negative recollections of being teased when trying to speak Navajo. The most elaborate stories shared in the interviews came from these types of experiences . . . . In addition, students’ peers within the school affect their language choices. Students conform to one another in the English-speaking school environment.”). *Id.*

146. Krakoff, *supra* note 140, at 1142.

147. Don Terry, *Arizona Court Strikes Down Law Requiring English Use*, N.Y. TIMES (Apr. 29, 1998), <https://www.nytimes.com/1998/04/29/us/arizona-court-strikes-down-law-requiring-english-use.html> [<https://perma.cc/4PJV-2XU8>] (noting that twenty-three states passed laws in the 1980s and ‘90s making English the official language, and that in Arizona the statute—eventually struck down by the Arizona Supreme Court—prohibited government officials from conducting state business in any language but English).

148. Michael Janofsky, *Ban on Speaking Navajo Leads Cafe Staff to Sue*, N.Y. TIMES (Dec. 20, 2002), <https://www.nytimes.com/2002/12/20/us/ban-on-speaking-navajo-leads-cafe-staff-to-sue.html> [<https://perma.cc/9JQ2-ACF5>] (employees of a burger drive-in restaurant were required by company policy to speak only in English—even with other employees—unless a customer could not understand English).

149. Marley Shebala, *Council Slams Door on “English Only”*, NAVAJO TIMES (Jul. 22, 1999), [CChttp://www.languagepolicy.net/archives/NT1.htm](http://www.languagepolicy.net/archives/NT1.htm) [<https://perma.cc/52TR-9F75>].

150. *Id.* (citing Nation Code tit. 10, § 111 (Equity 1984) (requiring instruction in Navajo language); *id.* § 112 (requiring instruction in Navajo culture)).

151. Lee, *supra* note 145, at 13.

152. *Id.*

In several instances, the Arizona legislature has imposed language policy that would limit the use of languages other than English by government officials or in public places.<sup>153</sup> While these measures may have been intended to impact Spanish-speaking immigrants, they pose challenges for Navajo speakers as well.<sup>154</sup>

In 1987, proponents pushed through a ballot initiative to amend the state constitution. The resulting Article XXVIII, declared English as the official language of the state of Arizona, and that the state and its political subdivisions—including all government officials and employees performing government business—must “act” only in English. Violating the state constitution is punishable through employment sanctions.

The measure was challenged by Spanish and Navajo speaking state government employees, on grounds of free speech and due process, arguing that prohibiting that it violated the 1st and 14th Amendments of the Constitution, as well as federal civil rights laws.<sup>155</sup> The Ninth Circuit, noting that “the protection of the Constitution extends to all, to those who speak other languages as well as those born with English on the tongue” held that Article XXVIII constituted “a prohibited means of promoting the English language and affirm[ed] the district court’s ruling that it violates the First Amendment.”<sup>156</sup>

While the Ninth Circuit opinion was ultimately vacated by the US Supreme Court for mootness and nonjusticiability, it contained important reasoning about the role of indigenous languages in expression, and relatedly in political representation and participation. Considering the case of a legislator elected in part for his ability to speak to a constituency in Spanish or Navajo, the court stated:

No one could order such an official to speak Spanish or Navajo. Neither, however, can the state preclude him or his staff from transmitting information regarding official state business to persons resident in his

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153. See, e.g., *Yniguez v. Arizonans for Official English*, 69 F.3d 920, 923 (9th Cir. 1995) (en banc), *vacated sub nom. by Arizonans for Official English v. Arizona*, 520 U.S. 43, 48–49 (1997).

154. Mary Carol Combs & Sheilah E. Nicholas, *The Effect of Arizona Language Policies on Arizona Indigenous Students*, SPRINGER SCI. & BUS. MEDIA 101, 102 (Feb. 1, 2012), [https://www.coe.arizona.edu/sites/default/files/combs-nicholas-published\\_article.pdf](https://www.coe.arizona.edu/sites/default/files/combs-nicholas-published_article.pdf) [<https://perma.cc/DC8A-6R5J>] (“Arizona’s coercive—and byzantine—language and education policies for English language learners provide an instructive example of the phenomenon of unintended consequences. Although these policies were overtly designed to restrict the access of Spanish-speaking students to bilingual education programs, their reach has extended to Native American children in Arizona’s rural and urban public schools.”).

155. *Yniguez*, 69 F.3d at 920.

156. *Id.* at 923–24.

district in whatever language he deems to be in the best interest of those he was elected to serve.<sup>157</sup>

Turning to education, in 2000, Arizona approved legislation imposing “structured English immersion” education programs with impacts on indigenous students as well.<sup>158</sup> The legislation’s approach to English acquisition—a certain number of hours of English-only instruction—was criticized by both education and language experts. It also threatened to interfere with tribal education policy and pedagogy regarding Navajo instruction, including bilingual and bicultural programs that showed high achievement in English and Mathematics.<sup>159</sup> Eventually the Attorney General opined that NALA denied the state authority to prohibit teaching of Native American languages whether the public schools were on or off the reservation.<sup>160</sup>

Despite all of these challenges, the Navajo Nation’s own initiatives have been remarkable. As Krakoff has written, “without tribal initiatives to preserve language and culture, there would be virtually no chance that language and culture could survive and adapt in the unique Navajo way.”<sup>161</sup>

In our own research at the intersection of indigenous rights and language, we have found one use of the Navajo language in contemporary society particularly remarkable, and that is its role in the tribal legal process.<sup>162</sup> Navajo courts have a preference for Navajo customary law,

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157. *Id.* at 937. See also *id.* at 941 (“The practical effects of Article XXVIII’s *de facto* bar on communications by or with government employees are numerous and varied . . . [A]s we suggested earlier, the restrictions that Article XXVIII imposes severely limit the ability of state legislators to communicate with their constituents concerning official matters. For example, the provision would preclude a legislative committee from convening on a reservation and questioning a tribal leader in his native language concerning the problems of his community. A state senator of Navajo extraction would be precluded from inquiring directly of his Navajo-speaking constituents regarding problems they sought to bring to his attention. So would his staff. The legislative fact-finding function would, in short, be directly affected.”).

158. Joseph Flaherty, *Legislation Seeks to Relax Arizona’s Restrictive English-Only Teaching Mandate*, PHOENIX NEW TIMES (Jan. 16, 2019), <https://www.phoenixnewtimes.com/news/lawmakers-arizona-immersion-ell-english-language-learners-11111977> [<https://perma.cc/KNX7-8MBE>].

159. *Combs & Nicholas, supra note 154*, at 107. (“In the decade and a half leading up to passage of Proposition 203, achievement data from Navajo bilingual-bicultural and immersion programs were encouraging. Students in bilingual-bicultural programs at Rock Point and Rough Rock consistently outperformed their peers in mainstream English programs at these schools, acquiring literacy in both English and Navajo. They also came to appreciate and value their Navajo identities.”) (internal citation omitted).

160. Application of Proposition 203 to Schools Serving the Navajo Nation, 101–006 (R00–062) Op. Ariz. Att’y Gen. 4–6 (2001).

161. Krakoff, *supra note 140*, at 1144.

162. See Kristen A. Carpenter, *Interpretive Sovereignty: A Research Agenda*, 33 AM.

which often relies on concepts—for example the trust that the people have a for a leader or the role of in-laws in the community—expressed most accurately in the tribal language<sup>163</sup> Navajo Supreme Court Justice Ray Austin has written that this process “involves retrieving ancient tribal values, customs, and norms and using them to solve contemporary legal issues and tribal problems.”<sup>164</sup>

Yet, in law and governance, promoting Navajo language use can be contested even internally. In one recent case, an otherwise popular candidate for the Navajo Nation presidency was disqualified from election on grounds that he could not show fluency in the language.<sup>165</sup> This example illuminates the difficulties of overcoming the intergenerational legacies of federal policies designed to suppress languages in the past. Despite such challenges of language use and revitalization, tribal judges, leaders and community members are committed to practices of “traditional jurisprudence” that “incorporate[es] [tribal] beliefs into our tribal institutions.”<sup>166</sup>

Similarly, there are internal tensions over the use of language in Navajo schools. As Professor Tiffany Lee has written, in Navajo culture traditionally, education may have been about preparation for life in a holistic sense, a life in which speaking Navajo was an inherent attribute. Conversely, education today is formal and may be viewed by some Navajos as an opportunity to master bodies of knowledge that will enable one to participate in the wage-earning economy in which English may be more useful than Navajo.<sup>167</sup> In more traditional families, students continue to use Navajo at home, and also in the religious and ceremonial contexts in which Navajo language is inherently consistent with the worldview and activities. Yet some teenage tribal members report social stigma and embarrassment when they try to speak Navajo,

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INDIAN L. REV. 111, 131–38 (2008).

163. *See id.*

164. RAYMOND D. AUSTIN, *NAVAJO COURTS AND NAVAJO COMMON LAW: A TRADITION OF TRIBAL SELF-GOVERNANCE*, xvii (2009).

165. Tristan Ahtone, *Navajo Nation Changes Language Law*, NAT'L PUB. RADIO (Oct. 27, 2014), <https://www.npr.org/sections/codeswitch/2014/10/27/358586876/navajo-nation-changes-language-law> [<https://perma.cc/TUY9-MWC7>] (reporting on the divisive situation of a Navajo Nation citizen who was disqualified from tribal elected office because he lacked fluency in Navajo).

166. *See* Gregory H. Bigler, *Traditional Justice and Protection of Our Society: A Juris-generative Tail*, 43 AM. INDIAN L. REV. 1, 2 (2018) (alteration to original) (A recent article describing the role of traditional norms and values, as well as international human rights law, in the contemporary institutions of the Muscogee (Creek) Nation and Euchee tribes. Throughout this Article, Judge Bigler describes aspects of the relationship between indigenous languages and the survival of tribal law, society, and culture today.).

167. *Lee, supra note 145*, at 12–13.

in the form of teasing by peers for trying to speak an old-fashioned language and by elders for their lack of fluency.<sup>168</sup> Others suggest that Navajo has low social status compared to English, especially at school, and that they must seek out “secret, safe places” to speak Navajo.<sup>169</sup> This may include sports practices with likeminded kids or Navajo language class.<sup>170</sup>

Recent efforts undertaken by Diné College to produce educational materials in Navajo and prioritize Diné studies may help not only to provide material for use in education but also increase feelings of pride associated with the language.<sup>171</sup> We also see tremendous progress in the work of the Navajo Supreme Court and the Navajo Nation Human Rights Commission, both of which use the language intensively in its own right and as a source of information on Navajo law.<sup>172</sup> These developments show that the Navajo language is meaningful in contemporary society and institutions. Perhaps they will come to help to underscore the importance of indigenous languages, as against the many impediments.<sup>173</sup>

To turn to another example, we consider the Cherokee people, including the three federally recognized Cherokee tribes (the Eastern Band of Cherokees, Cherokee Nation of Oklahoma, and United Keetoowah Band). The Eastern Band of Cherokee Indians, located in North Carolina, has approximately 14,000 citizens residing on what remains of the Cherokees’ traditional southeastern homeland.<sup>174</sup> The descendants of Cherokees relocated on the Trail of Tears in the 1830’s reside in Oklahoma where the Cherokee Nation has approximately 370,000 enrolled tribal citizens and the United Keetowah Band has approximately 14,000 citizens.<sup>175</sup>

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168. *Id.* at 20–21.

169. *Id.* at 24.

170. *Id.*

171. *Navajo Children’s Multimedia Literature Books*, CTR. FOR DINE TEACHER EDUC., <http://hooghan.dinecollege.edu/cdte/mmbooks/tsf/multimediasbooks.htm> [https://perma.cc/399V-RFD3] (last visited Jan. 20, 2020) (providing publicly-accessible stories in Dine at a wide variety of proficiency levels).

172. See Carpenter & Riley, *supra* note 28, at 222 (on interpretive work of the NNHRC).

173. See Laura Gomez, *Bill To Repeal Arizona’s English-Only Law Moves Forward*, ARIZ. MIRROR (Mar. 13, 2019), <https://www.azmirror.com/2019/03/13/bill-to-repeal-arizonas-english-only-law-moves-forward> [https://perma.cc/7WPJ-2HSQ] (noting efforts associated with H.Res. 2026, a bill to repeal Structured English Immersion).

174. *Eastern Band of Cherokee Indians in North Carolina*, NCAI, <http://www.ncai.org/tribal-wawa/sdvcej-today/eastern-band-of-chokeee-indians-in-north-carolina> [https://perma.cc/AY2M-R7HU] (last visited Mar. 3, 2020).

175. *Frequently Asked Questions*, CHEROKEE NATION, <https://www.cherokee.org/>



In the Eastern Band of Cherokees, the Cherokee language is also extremely endangered.<sup>176</sup> For children, the Kituwah immersion school is deeply committed to keeping the language alive.<sup>177</sup> The immersion program has two components: an early childhood education beginning with newborns to five-year-olds and an elementary education, with teaching positions modeled after Cherokee Central Schools and a curriculum that meets the North Carolina Standard Course of Study.<sup>178</sup> The students, teachers, and parents involved in Kituwah Academy take an approach to education in which the school is a home and its members are a family.

With respect to adult education, some Eastern Cherokees have taken a different pedagogical approach. Adults who do not grow up speaking Cherokee are learning Cherokee as a second language and their sense of shame around Indian identity and language issues may surface more readily than for children. Eastern Band tribal member John Standingdeer, along with folklorist Barbara Duncan, came to understand that second language learners may need special techniques for learning a language that was originally transmitted orally from generation to generation.<sup>179</sup> Standingdeer explained how alienation from the language as a young person distanced him from his identity—even

about-the-nation/frequently-asked-questions/common-questions/?page=2&pageSize=7 [https://perma.cc/9GDL-BJWY] (last visited Mar. 3, 2020); *About Us*, UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA, <https://www.ukb-nsn.gov/about-us> (last visited Mar. 3, 2020).

176. Dale Neal, *Why I am Learning Cherokee, the First Language of Our Landscape*, CITIZEN TIMES (Aug. 1, 2016), <https://www.citizen-times.com/story/life/2016/08/01/why-m-learning-choerokee-first-language-our-landscape/87885016> [https://perma.cc/BRD8-424Y] (reporting that “there are only about 100 to 200 fluent speakers among the tribe’s 15,000 members, mostly elderly . . . and about only of about 50 youngsters who are serious about learning the language.”).

177. *New Cherokee School Opens*, CULTURAL SURVIVAL, <https://www.culturalsurvival.org/news/new-choerokee-school-opens> [https://perma.cc/L8ZN-NCAT] (last visited Jan. 20, 2019) (“With only 420 fluent elderly speakers remaining among the Eastern Band communities in North Carolina, tribal officials and language advocates in 2004 opened a pre-school immersion program for six babies. Those children now form the kindergarten class at Kituwah Academy, and will remain full-time students at the immersion school through their fifth-grade year, by which time their second-language Cherokee speaking and writing skills will be firmly internalized. The community estimates that by 2011 as few as 200 fluent speakers will still be living among elder generations, so the training of 32 language-fluent children comes at a critical time in their struggle to save the language.”).

178. *Id.*

179. Marti Maguire, *John Standingdeer’s Goal is Saving the Cherokee Language*, CHARLOTTE OBSERVER (Nov. 30, 2015), <https://www.charlotteobserver.com/news/local/article47153445.html> [https://perma.cc/LQQ4-PUSX] (“The tribe’s “speakers” were skeptical of the new system, and many still are. But Standingdeer insists his method is particularly useful for people who are learning the language later in life—and is not meant to replace the oral language, from which it differs in some ways.”).

his name—as a Cherokee, leading to years of frustrating attempts to learn the language.

Standingdeer and Duncan describe the importance of discovering the “inherent indigenous patterns of the language,” which may differ from other linguistics, grammar, and other methodologies for language preservation, recording and teaching.<sup>180</sup> Locating these patterns has, from a practical perspective, made it possible to program conjugation on a computer, to become fluent without memorizing each long polysynthetic word, and to transcend a Eurocentric, colonized approach to the language.<sup>181</sup> Standingdeer and Duncan developed a new methodology and technology and received a U.S. Patent for their invention in 2015.<sup>182</sup>

The Cherokee Nation of Oklahoma runs a language program consisting of an Office of Translation, Community Language, and Language Technology.<sup>183</sup> Its mission is “the perpetuation of our language in all walks of life ranging from day to day conversation, ceremonially, as well as in online arenas such as social media.”<sup>184</sup> The Cherokee language is taught in public and tribal schools (both immersion and otherwise), offered to government employees, and through community classes, both local and online. The language is still heard regularly at ceremonial stomp dances and at academic conferences in the community. The tribe continues to print the newspaper, *CHEROKEE PHOENIX*, partly in Cherokee syllabary, and also hosts a weekly radio show, “Cherokee Voices”, almost entirely in the Cherokee language.<sup>185</sup>

Despite all of these signs of vitality, Cherokee is an endangered language, used by only 10,000 people in daily life. To address this serious situation, in 2019, the Cherokee Nation announced a new Cherokee Language Advisory Board to unite the vision and efforts represented in the Cherokee Translation Department, Cherokee Language Master Apprentice Program, Cherokee Language Technology Program, and the Cherokee Immersion School.<sup>186</sup> Later that year, the newly elected

180. *Id.*

181. *Id.*

182. *John Standingdeer Receives Patent, YOUR GRANDMOTHER’S CHEROKEE* (Nov. 23, 2015), <https://www.yourgrandmotherscherokee.com/blog/john-standingdeer-receives-patent> [<https://perma.cc/4D8Y-R5WC>].

183. *See* CHEROKEE NATION, *Language*, <https://language.cherokee.org> [<https://perma.cc/PJ5U-TQZC>] (last visited Feb. 19, 2020).

184. *Id.*

185. *Radio Show Archives*, CHEROKEE NATION, <https://www.cherokee.org/radio-show-archives> (last visited Mar. 3, 2020).

186. *See* Bill John Baker, *Cherokee Nation Keeps Language Alive for Future Generations*, INDIANZ (Feb. 4, 2019), <https://www.indianz.com/News/2019/02/04/bill-john-baker-cherokee-nation-keeps-la.asp> [<https://perma.cc/38DC-27B3>].

Principal Chief Chuck Hoskin, Jr., announced a \$16 million investment by the tribe to create a new tribal language center and programming.<sup>187</sup>

Through these several methodologies—involving children, adults, and elders—learning the language enables Cherokees to participate more fully in their culture, to see the landscape in the way that their ancestors did long ago, and even to begin to understand the relationship between humans and language differently.<sup>188</sup> Beginning with the election of Wilma Mankiller as Principal Chief in 1987, Cherokee culture and language have played a more prominent role in contemporary politics.<sup>189</sup> Cherokee language appears both symbolically and informationally on place names, street signs, and at the Cherokee museums and cultural centers. Both tribes have funded Cherokee language education, ranging from elementary immersion to high school instruction, local community and employee instruction to online, at-large, and even publicly available lessons. Subsequent chiefs of the Cherokee Nation and Eastern Band have prioritized language in their election and governing platforms.<sup>190</sup>

Successful students of these programs have gone on to use the language in scholarly and community work, including a publication of the Cherokee National Resources Department on traditional plant knowledge.<sup>191</sup> Cherokee scholars and elders are also using the language to revitalize indigenous ethnobotany in the Cherokee Nation.<sup>192</sup> Such work is an example of the relationship between language preservation and use, as well as land management and biodiversity, in the contemporary United States. These efforts also beneficially disrupt<sup>193</sup>

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187. *Chief Hoskin Announces \$16M Cherokee Language Initiative*, CHEROKEE PHOENIX (Oct. 1, 2019), <https://www.cherokeephoenix.org/Article/index/103591> [https://perma.cc/5MXV-9339].

188. See John Standingdeer, *Remarks at the Session on the International Year of Indigenous Languages, Conference on Implementing the Declaration on the Rights of Indigenous Peoples*, YOUTUBE (Mar. 16, 2019), <https://www.youtube.com/watch?v=evlMOfcghuU>.

189. See DURBIN FEELING ET AL., CHEROKEE NARRATIVES: A LINGUISTIC STUDY 5 (2018).

190. See, e.g., CHAD “CORNTASSEL” SMITH, LEADERSHIP LESSONS FROM THE CHEROKEE NATION: LEARN FROM ALL I OBSERVE 6, 25, 83 (2013).

191. See generally CHEROKEE NATION NATURAL RESOURCES DEPARTMENT, WILD PLANTS OF THE CHEROKEE NATION (2009).

192. See generally CLINT CARROLL, ROOTS OF OUR RENEWAL: ETHNOBOTANY AND CHEROKEE ENVIRONMENTAL GOVERNANCE (2015). Cherokee citizen Clint Carroll worked with a group of Cherokee medicine keepers and students to promote traditional knowledge and land conservation and won funding from the National Science Foundation. Courtney Packard, *Prof Preserves Native Traditions with Help of the National Science Foundation*, COLO. ARTS AND SCI. MAG. (Feb. 27, 2017), <https://www.colorado.edu/asmagazine/2017/02/27/prof-preserves-native-traditions-help-national-science-foundation> [https://perma.cc/899E-L3M6].

193. For an example of a good collaborative effort between a linguist (Dr. Andrew

the more conventional narrative in which a nonindigenous linguist studies an indigenous language for his own purposes, without necessarily benefiting the community.<sup>194</sup> By contrast, in this case, a Cherokee citizen holds the patent for the language methodology, which has in turn educated Cherokee scholars to use the language for the benefit of the community and with the promise of benefiting other indigenous communities as well.<sup>195</sup>

Lessons from the Cherokee experience show that the people are still recovering, politically, culturally, and linguistically, from the federal government's actions in the 1830s to relocate them from their homeland and remove them to Indian Territory, present day Oklahoma.<sup>196</sup> Before this so-called "Removal" policy, everyone spoke Cherokee; now, this is no longer the case. Yet one of the Nation's points of pride is the fact that Sequoyah invented the Cherokee syllabary in the 1820's and the language has been printed for many years. Now it is available for electronic communication. As a result of negotiations between the tribal leadership and technology companies in the early 2000s,<sup>197</sup> Cherokee can be used on various mobile devices, operating systems, and applications.<sup>198</sup> Contemporary projects, especially in the realm of technology,

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Cowell at the University of Colorado) and indigenous community (the Northern Arapaho), see *The Arapaho Language Project*, UNIV. COLO. BOULDER, <https://www.colorado.edu/p13d6ec61edd> [<https://perma.cc/QZ2K-NHFR>] (last visited Jan. 31, 2020) ("This website was created to support the revitalization of the Arapaho language and be a helpful resource for Arapaho language learners. In addition to the *Arapaho Lessons* and *Dictionary*, this website also features a *Pronunciation Guide*, examples of the *language being used for everyday life*, scanned *bilingual curriculum materials* and other *resources helpful in learning this language*.").

194. See, e.g., Taté Walker, *Three Questions to Ask Yourself Before Learning an Indigenous Language as a Non-Native*, EVERYDAYFEMINISM (July 30, 2016), <https://everydayfeminism.com/2016/07/learn-indigenous-language> [<https://perma.cc/H4UG-YKQE>] (describing that while indigenous people learn their languages "for cultural survival," others may have mixed motives including enhancing personal profit or specious identity claims, which may risk cultural appropriation).

195. See Barbara Duncan, *Remarks at the Session on the International Year of Indigenous Languages as read by Clint Carroll, Conference on Implementing the Declaration on the Rights of Indigenous Peoples*, YOUTUBE (Mar. 16, 2019), <https://www.youtube.com/watch?v=evlMOfcghuU> (noting that a focus on the inherent patterns of the Cherokee language may be helpful to studying other indigenous languages as well).

196. See Kristen A. Carpenter, *supra* note 162, at 117–18.

197. See Eugene Huo, *Cherokee Nation Convinces Apple to Add Language Support to iPhone, iPad*, MACGASM (Dec. 24, 2010), <https://www.macgasm.net/2010/12/24/cherokee-nation-convinces-apple-add-language-support-iphone-ipad> [<https://perma.cc/H4VP-CFPZ>].

198. Slash Lane, *Apple Partners with Cherokee Tribe to put Language on iPhones*, APPLEINSIDER (Dec. 23, 2010, 12:00 PM), [https://appleinsider.com/articles/10/12/23/apple\\_partners\\_with\\_cherokee\\_tribe\\_to\\_put\\_language\\_on\\_iphones](https://appleinsider.com/articles/10/12/23/apple_partners_with_cherokee_tribe_to_put_language_on_iphones) [<https://perma.cc/D95P-JDYH>].

plant knowledge, and journalism, make the relevance and the potential of the language apparent. At the same time, Cherokees often hear and use the languages in cultural settings ranging from school to the stomp grounds and Cherokee Heritage Center.

Video testimony explains powerfully how some concepts and experiences like rightful living or explaining one's home really do not translate from Cherokee to English.<sup>199</sup> Some families have been able to place their children in tribal immersion schools, which have been successful if challenging in both North Carolina and Oklahoma. Several publishers seek to make not only elementary education but also literary, historical, and legal materials available in Cherokee. Yet contemporary realities of poverty, education, employment, and otherwise may make it very difficult for the majority of tribal citizens to access these programs or prioritize language in their lives. Unlike for some Navajo speakers, the challenge for many Cherokees is revitalization versus maintenance of language skills, because a Cherokee family may not have spoken Cherokee for a generation or two. As Cherokee language speakers have rightfully said, recovering and using the language is critical to being Cherokee.<sup>200</sup>

Navajo and Cherokee are two of the largest tribes in the United States. But it also bears noting that smaller tribes are doing very significant work on language revitalization. For example, the Yuchi or Euchee people comprise approximately 2000 people, many of whom are recognized as citizens of the Muscogee (Creek Nation) in Oklahoma. For the Yuchi or Euchee, elders such as Josephine Wildcat Bigler have been instrumental in keeping the language alive over recent generations, even as numbers of speakers diminished.<sup>201</sup> The Yuchi Language Project in Sapulpa, Oklahoma, directed by Richard Grounds, teaches children from the time of their birth and is producing fluent speakers in the youth generation, with young people learning not only from elders, but also teaching each other.<sup>202</sup> An initiative called the Euchee

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199. For a powerful video account of the struggle to save Cherokee, see *FIRST LANGUAGE: THE RACE TO SAVE CHEROKEE* (The North Carolina Language and Life Project 2014).

200. See generally *id.*

201. *One of the Last Remaining Native Yuchi Speakers Passes*, CULTURAL SURVIVAL (JUNE 13, 2016), <https://www.culturalsurvival.org/news/one-last-remaining-native-yuchi-speakers-passes> [<https://perma.cc/2AJ4-DRPZ>] (documenting her efforts to preserve the Yuchi language by creating youth programs, translating hymns, recording folk tales, history, recipes, and traditional practices for the next generation, and working at a language nonprofit where she contributed her deep knowledge of the Yuchi language, culture, and history).

202. John Michael Baglione, *Preserving a Culture, One Speaker at a Time*, HARV. GAZETTE (Nov. 21, 2017), <https://news.harvard.edu/gazette/story/2017/11/yuchi-language-project-seeks-to-revitalize-indigenous-identity-through-common-tongue> [<https://perma.cc/>

Language Program led by Cultural Leader Yoney Spencer connects the language to the ceremonial stomp grounds, and use of the language in traditional Euchee law and traditions.<sup>203</sup>

Across the country in Gay Head, Massachusetts, the Wôpanâak language had been dormant since the 1850's. In 1993, Jessie Little Doe Baird started the Wôpanâak Language Reclamation Project.<sup>204</sup> She has used historic bibles translated into Wôpanâak, as well as a variety of course styles, to bring fluency back to the people.<sup>205</sup> The Miami language has also reawakened from dormancy, supported by a growing relationship of healing between the Miami Tribe and Miami University of Ohio.<sup>206</sup> Each of these stories is important in its own right and also as a demonstration of the diversity of circumstances among American Indian tribes and their languages. Indeed, each of the 573 federally recognized tribes could write its own story about its language history, challenges, and vision.

### 3. Implementing Human Rights

First and foremost, we must note that the United States did not announce a national plan for the International Year, nor did it have a national organizing committee. The United Nations General Assembly stated in its resolution on the International Decade that it:

*Invites Member States to consider establishing national mechanisms with adequate funding for the successful implementation of the International Decade of Indigenous Languages in partnership with indigenous peoples, and invites indigenous peoples, as custodians of*

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WT9J-6MCR].

203. Yoney Spencer, *Remarks at Muscogee (Creek) Nation District Court CLE 2019: Traditional Law and Courts*, YouTube (June 18, 2019), [https://www.youtube.com/watch?v=H14\\_gXAP0SE](https://www.youtube.com/watch?v=H14_gXAP0SE) (discussing Euchee law).

204. Ellen L. Lutz, *A Language Out of Time*, CULTURAL SURVIVAL Q. MAG. (June 2007), <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/language-out-time> [https://perma.cc/6CR5-5VUN].

205. Jessica Little Doe Baird, MACARTHUR FOUND. (SEPT. 28, 2010), <https://www.mac-found.org/fellows/24> [https://perma.cc/RE3K-PE2K] (noting her work to revitalize the Wôpanâak language, including producing a 10,000-word Wôpanâak-English dictionary, instructional materials for the study of the language, afterschool language classes, and an immersion summer camp).

206. Mary Annette Pember, *How a University and a Tribe are Teaming up to Revive a Lost Language*, YES MAG. (MAY 9, 2018), <https://www.yesmagazine.org/peace-justice/how-a-university-and-a-tribe-began-mending-ties-and-revived-a-lost-language-20180509> [https://perma.cc/3XEQ-49LJ] (detailing the work of the Myaamia Center, a joint project of the Miami University and the Miami tribe of Oklahoma, to facilitate instruction in Myaamia language and culture).

their own languages, to initiate and develop appropriate measures for the implementation of the International Decade . . . .<sup>207</sup>

Therefore, the very first suggestion we would make is for the United States to take seriously the opportunity to join the world community in implementing indigenous peoples' language rights. A national organizing committee—comprised of indigenous and state leaders and supported by partners from academia, the media, entertainment, and other realms—should develop a mechanism or plan for the Decade.

Taking the opportunity to engage in the human rights community as inspiration for domestic legal reform is particularly important given that, as Scholar James Fife has said, “The US scheme for indigenous language protection . . . must change if the indigenous languages in this country are to survive.”<sup>208</sup> The United States is well-situated to reform domestic policy, in particular the Esther Martinez Acts, in ways that would more closely meet the aims of the Declaration.

As the United States reflects on its language policy, we note that there are some things that U.S. policy currently excels at—namely recognizing, at least formally, the self-determination of tribal governments in forming language policy and allowing for approaches that suit the tribes' differing language needs. NALA and the Esther Martinez Act have recognized “the status of the cultures and languages of Native Americans is unique and the United States has the responsibility to act together with Native Americans to ensure [their] survival.” This legislation helpfully recognizes the obligation of the government to indigenous peoples to ensure their language rights. These grant programs authorized by these statutes were recently highlighted by the representative for the United States at the Global Launch of IYIL2019 at the United Nations General Assembly.

From a human rights perspective, however, the United States should more fully acknowledge the impacts of the government's role in suppressing indigenous languages from both a financial and moral perspective.<sup>209</sup> Government relocation of Indians, including the Navajo Long Walk and the Cherokee Trail of Tears, was devastating to their survival with ramifications for all aspects of life. The federal Indian boarding school program subsequently specifically targeted languages

207. G.A. Res. A/74/396, ¶ 25 (Dec. 2, 2019).

208. See James Fife, *The Legal Framework for Indigenous Language Rights in the United States*, 41 WILLAMETTE L. REV. 325, 368 (2005).

209. Cf. Task Force on Aboriginal Languages and Cultures, *Towards a New Beginning: A Foundational Report for a Strategy to Revitalize New Nation, Inuit, and Métis Languages and Cultures*, DEP'T CAN. HERITAGE 89 (June 28, 2005) (considering these issues) <http://www.afn.ca/uploads/files/education2/towardanewbeginning.pdf> [<https://perma.cc/2RHS-NT26>].

to destroy Indian culture. The federal U.S. government issued an “apology” statement to Native Americans in 2010, but unlike the Canadian Truth & Reconciliation Commission, this apology did not come about through a broad-based process, nor provide any remedial calls for action. The US apology failed to acknowledge the role of the federal government in attempting to destroy indigenous culture and language.<sup>210</sup> The intergenerational impacts of these policies are well-known to indigenous peoples and they should inform national policy.

At a minimum, the United States must recognize and apologize for its destruction of indigenous languages and, as a measure of reconciliation, work to meet indigenous peoples’ aspirations with respect to language use, revitalization and transmission. In Canada, national chief Perry Bellegard recently gave a speech articulating a vision of fluency for indigenous communities in Canada.<sup>211</sup> This would be our personal recommendation as well, and we believe that as a matter of human rights, all indigenous peoples in the United States should have at least the opportunity for fluency in their languages. But different tribal governments may have differing priorities and federal programming should allow for that, with perhaps a baseline set of services, plus opt-in programs. These measures would have to be taken in consultation and with the free, prior, and informed consent of indigenous peoples. A model, though one with insufficient funding, is the Native American Graves Protection and Repatriation Act which sets out substantive standards and allows tribes to pursue repatriation as their priorities and values allow. The next iteration of a federal native languages act could consider amendments accordingly.

Beyond legislative efforts, the federal executive branch, through relevant departments (such as Interior, Education, State, Homeland Security, Immigration and Customs Enforcement, Health and Human

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210. See Ann Piccard, *Death by Boarding School: “The Last Acceptable Racism” and the United States’ Genocide of Native Americans*, 49 GONZ. L. REV. 137, 165 (2013–2014). A bill introduced by Senator Brownback would acknowledge the role of federal boarding schools in eradicating language and culture. S.J. Res. 14, 111th Cong. (1st Sess. 2009) (“Whereas the Federal Government condemned the traditions, beliefs, and customs of Native Peoples and endeavored to assimilate them by such policies as the redistribution of land under the Act of February 8, 1887 (25 U.S.C. 331; 24 Stat. 388, chapter 119) (commonly known as the “General Allotment Act”), and the forcible removal of Native children from their families to faraway boarding schools where their Native practices and languages were degraded and forbidden.”).

211. For publicity associated with this event, see *Indigenous Languages Celebrated at Conference June 24–26 in Victoria, B.C.*, NATION TALK (June 24, 2019), <http://nationtalk.ca/story/indigenous-languages-celebrated-at-conference-june-24-26-in-victoria-b-c> [<https://perma.cc/7NFT-UF6L>].



Services, and others) should work with tribal governments and language organizations to develop a comprehensive approach to meeting the aims of the Declaration and other human rights instruments with respect to language use. There are several models for such cooperative approaches to American Indian issues, such as the White House Tribal Nations Conference,<sup>212</sup> the White House Initiative on American Indian and Alaska Native Education,<sup>213</sup> as well as the Working Group on Violence Against Women.<sup>214</sup>

With respect to legislation and regulation in the area of languages, some of the issues to consider are as follows:

Acknowledging the government's role in suppressing indigenous language could play a role in diffusing the shame associated with language use and loss alike. The federal government could then work with tribal governments and others to form a plan of reconciliation that would facilitate healing and recovery in this realm. A critical part of this plan would be to recognize that indigenous languages are key not only to remembering a cultural past, but moreover, architecting a multifaceted future, including everything from indigenous science to literature, government to economic development, as in the examples from the Cherokee Nation, Navajo Nation, and others.

Policymakers must become alert to the way that language rights are linked to other rights, with attention paid to specific contexts. Some indigenous persons cannot enjoy the right to vote or receive due process

212. See generally EXEC. OFFICE OF THE PRESIDENT, 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS (JAN. 2017), [https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa\\_report.pdf](https://obamawhitehouse.archives.gov/sites/default/files/docs/whncaa_report.pdf) [https://perma.cc/5FPN-PERS].

213. See *White House Initiative on American Indian and Alaska Native Education*, U.S. DEP'T OF EDUC., <https://sites.ed.gov/whiaiane/advisory-council-agencies/agencies> [https://perma.cc/7PJU-5GYX] ("There is established the Interagency Working Group (IWG) on AI/AN education and TCUs. The IWG shall consist of senior officials from the Department of Education and the Department of the Interior and officials from the Departments of Justice, Agriculture, Labor, Health and Human Services, and Energy, the Environmental Protection Agency, and the White House Domestic Policy Council, as well as such additional agencies and offices as the Secretaries of Education and the Interior may designate. Each agency designated by the co-chairs as a member of the Interagency Working Group shall develop and implement a two part, 4 year plan of the agency's efforts to fulfill the purposes of this order, with part one of the plan focusing on all AI/AN students except for those attending TCUs, and part two focusing on AI/AN students attending TCUs.").

214. See 2016 WHITE HOUSE TRIBAL NATIONS CONFERENCE PROGRESS REPORT: A RENEWED ERA OF FEDERAL-TRIBAL RELATIONS, *supra* note 212, at 4, 26 (announcing President Obama signed Executive Order 13647 on June 26, 2013, establishing the White House Council on Native American Affairs (WHCNA) as . . . "a path to a more effective federal government for Indian Country, bringing together federal Departments and Agencies from across the Executive Branch to "break down siloes" and coordinate for more effective programs").

without translation services. In other communities, it may be rights to religious or cultural freedoms, treaty rights or child welfare that necessitate the restoration of language rights.

Some U.S. states continue to fail to appreciate the right of indigenous peoples to express themselves in public in their languages. This issue has been acute in litigation over religious freedoms and sacred sites in Hawaii, where some practitioners speak to the court and tribunals in Hawaiian—even if they understand some English—insisting that they have a right to do so and that some concepts of spiritual significance must be expressed in Hawaiian.<sup>215</sup> The state initially refused to provide translation, despite the fact that Hawaiian is an official language of the state, and only recently changing the policy.<sup>216</sup> From a human rights perspective, this issue goes both to the right to understand legal proceedings and to identity, which, in Hawaii, is linked to place and ancestral relationships.<sup>217</sup>

Lack of funding is also a problem in access to health care, voting, employment, and other fundamental needs. At the federal level, the United States should be encouraged to commit to today's language programs at least the sums spent to eradicate indigenous languages in the 1800's and 1900's.<sup>218</sup>

In the language context, journalist and Cherokee Nation citizen Rebecca Nagle has reported that “[b]etween 1877 and 1918, the

215. Ray Downs, *Hawaii Judge Orders Arrest of Man Who Spoke Hawaiian Language in Court*, UNITED PRESS INT'L (Jan. 25, 2018), <https://www.upi.com/Hawaii-judge-orders-arrest-of-man-who-spoke-Hawaiian-language-in-court/8471516857580> [https://perma.cc/5FCH-5ADJ] (reporting on the arrest of Professor Kaleikoa Ka'eo for failure to appear after he was present in court to answer three misdemeanor charges related to his protest of construction in Haleakalā National Park, but answered the judge in Hawaiian “to defend our right as a people to speak our language in our own homeland,” and because “there are things you can say in Hawaiian that you know really express through our cultural view of why it's important for us to defend our sacred sites”).

216. Frances Kai-Hwa Wang, *Hawaiian Language Finds New Prominence in Hawaii's Courts Decades After Near Disappearance*, NBC NEWS (Feb. 28, 2018), <https://www.nbc-news.com/news/asian-america/hawaiian-language-finds-new-prominence-hawaii-s-courts-decades-after-n851536> [https://perma.cc/AE79-8JGV].

217. See generally Shawn Malia Kana'iaupuni & Nolan Malone, *This Land is my Land: The Role of Place in Native Hawaiian Identity*, in 3 HÜLLI: MULTIDISCIPLINARY RES. ON HAWAIIAN WELL-BEING 281 (2006) (on the significance of Hawaiian place names to identity); Edward Haleaoha Ayau, *Rooted in Native Soil*, 7 COMMON GROUND (1995), [https://home.nps.gov/Archeology///Cg/fd\\_fa\\_win\\_1995/soil.htm](https://home.nps.gov/Archeology///Cg/fd_fa_win_1995/soil.htm) [https://perma.cc/W3FD-ATRF] (on the relationship of identity to ancestors whose names and relationships are expressed in Hawaiian).

218. For an example, albeit in a different posture than language policy, of federal litigation and settlement for an accounting of federal mismanagement of tribal resources, see, e.g., *Consultations on Cobell Trust Land Consolidation*, U.S. DEP'T OF THE INTERIOR, <https://www.doi.gov/cobell> [https://perma.cc/7F5Y-A7SC].

United States allocated \$2.81 billion (adjusted for inflation) to support the nation's boarding school infrastructure—an educational system designed to assimilate Indigenous people into white culture and destroy Native languages.”<sup>219</sup> Nagle compares this to her assessment that “[s]ince 2005, however, the federal government has only appropriated approximately \$180 million for Indigenous language revitalization. In other words, for every dollar the U.S. government spent on eradicating Native languages in previous centuries, it spent less than 7 cents on revitalizing them in this one.”<sup>220</sup>

These figures and additional accounting to elucidate the public funds previously spent to eradicate American Indian languages could help provide a moral and ethical benchmark to assess the adequacy of public funding under the Esther Martinez Act—currently proposed at \$13 million annually. From a practical perspective, these funds appear inadequate considering that “[i]n 2018, only 47 language projects received funding—just 29% of all requests, leaving more than two-thirds of applicants without funding, according to ANA.”<sup>221</sup> Even if we add other sources of federal funding which would raise the 2019 figure to approximately \$17 million, Nagle believes that “[c]ompared to how much the United States spent on exterminating Native languages, that sum is a pittance.”<sup>222</sup>

Beyond funding, issues in the education realm are the following: the certification process for teachers, requirements of mandatory testing in public schools, and the overall achievement gap between American Indian and non-Indian children. National requirements for certification and testing were quite stringent under the No Child Left Behind Act, replaced now by the Every Child Succeeds Act, which provides more state autonomy. The administration of this Act is an opportunity for states and tribal governments to implement indigenous children's language and education rights, perhaps by following the model of the Navajo Nation's education department in partnering with tribal and public schools—and repealing English-only measures.

With respect to retention and achievement, American Indian students are dropping out of school at a rate roughly twice the national average, a statistic that may correlate with indigenous language

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219. Rebecca Nagle, *The U.S. has Spent More Money Erasing Native Languages than Saving Them*, HIGH COUNTRY NEWS (DEC. 9, 2019), <https://www.hcn.org/articles/indigenous-affairs-the-u-s-has-spent-more-money-erasing-native-languages-than-saving-them> [<https://perma.cc/K9WK-HUT4>].

220. *Id.*

221. *Id.*

222. *Id.*

instruction. A national study reported that in 2009, barely a quarter of Bureau of Indian Education students reported speaking to each other in Native American languages every day, and the numbers for public school students are negligible.<sup>223</sup> By contrast, the opposite appears to be true in immersion schools. Indigenous students are thriving in these settings, showing higher test scores and graduation rates, as well as stronger connections to their culture.<sup>224</sup>

Some of the reform in the language rights space should of course occur in partnership with universities, industry, museums, and archives. The federal government could support such initiatives and partnerships through programs that emphasize innovative research and development.<sup>225</sup> Tribal colleges, given their unique position in Indian Country, should be prioritized.<sup>226</sup>

From American Indian language experiences, we must come to appreciate the diversity of tribal histories, resources, and aspirations. Accordingly, federal law in the United States should be encouraged to set baselines complying with the Declaration, for example through amendments to the Esther Martinez Act providing more funding, but also allow flexibility such that each tribal nation can help to determine precisely what kind of assistance it needs in light of past history and current aspirations. Tribes in the United States are quite familiar with negotiating their needs through consultation and agreements with the federal government,<sup>227</sup> although this process can always be improved

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223. Kelsey Klug, *Native American Languages Act: Twenty Years Later, Has It Made a Difference?*, CULTURAL SURVIVAL (Jul. 18, 2012), <https://www.culturalsurvival.org/news/native-american-languages-act-twenty-years-later-has-it-made-difference> [https://perma.cc/3LVN-3SY2].

224. *Id.* (“Virtually all students in Native Hawaiian schools now graduate from high school, and their language programs have expanded so much that students can go through university completely in Native Hawaiian. Diné (Navajo) immersion students are scoring with or above their non-immersion peers on standardized tests, even in English. At Waa-dookodaading, an Ojibwe language school in Wisconsin, one hour of English instruction per day is enough for students to reach ‘proficient and above proficiency’ performance levels on NCLB assessments. The school says it ‘turned [the] model on its head’ to successfully teach English as its students’ foreign language. Since these programs incorporate Native culture, they also help students to become more proud of their traditional culture.”).

225. Several tribes have their own protocols for free, prior, and informed consent in projects with researchers. *See, e.g.*, RII Native Peoples Technical Assistance Office, *Tribal Community and Research Protocols*, UNIV. ARIZONA, <http://nptao.arizona.edu/tribal-community-and-research-protocols> [https://perma.cc/4YRK-RM9Y].

226. *See Language Revitalization*, 24 TRIBAL C. J. OF AM. INDIAN HIGHER EDUC. 1, 5 (2013) (“From the Arctic Circle to the Great Plains, tribal colleges and universities are launching a vast array of new programs to revitalize and preserve Native languages.”).

227. *See generally* Robert J. Miller, *Consultation or Consent: The United States Duty to Confer with American Indian Governments*, 91 N.D. L. REV. 37 (2015) (considering standards of consultation).

and should be improved consistent with the Declaration's provisions on free, prior, and informed consent.<sup>228</sup>

Some language revitalization measures should involve not only tribal and federal governments, but also private industries and social institutions. This would help individual indigenous children and families, as well as tribal communities, neighbors, and American society at large to become aware of and support indigenous languages. As awareness grows through education, media, entertainment and so on, pride and motivation to study languages is also likely to increase. In one interesting example, the Disney Corporation recently signed a contract with Sámi people of the Nordic countries to produce *Frozen 2*, featuring a Sámi language and storyline.<sup>229</sup> The Cherokee Nation has partnered with technology companies to enable texting and the use of various apps in the Cherokee syllabary.<sup>230</sup> In some places, the federal government and tribes have cooperated on bilingual highway signs<sup>231</sup> and visionaries are imagining public transportation in indigenous languages.<sup>232</sup> Scientists are testing the relationship among indigenous language use and cultural participation<sup>233</sup> and good health.<sup>234</sup> The possibilities are endless for enriching activities using and promoting indigenous languages in the United States.

Jacob Manatowa-Bailey, director of the Sac and Fox Nation of Oklahoma's Sauk Language Department, explained that "[w]hen tribal children are given the opportunity to learn their language, they are happier, healthier human beings. It doesn't mean their lives are easier. It does mean that their identities are stronger and that they are better prepared to face the challenges of being an Indigenous person in the modern world."<sup>235</sup>

Manatowa-Bailey captures the essence of a human rights approach to indigenous languages. It is this sentiment and vision that the United States should strive to achieve in partnership with indigenous peoples.

Finally, we recommend the United States address the situation of indigenous migrants, who are currently without translation services when they cross the US border. In US deportation hearings, aliens' due process rights include a right to government provided interpreters or language services.<sup>236</sup> Yet lesser standards apply in detention. Homeland

228. G.A. Res. 61/295, U.N. Declaration on the Rights of Indigenous People (Sept. 13, 2007), arts. 10, 11, 19, 28, 29, 32.

235. See Klug, *supra* note 223.

236. *Nazarova v. I.N.S.*, 171 F.3d 478, 484 (7th Cir. 1999) ("A non-English-speaking alien has a due process right to an interpreter at her deportation hearing because, absent an interpreter, a non-English speaker's ability to participate in the hearing and her due process right to a meaningful opportunity to be heard are essentially meaningless."); see Tal Kopan,

Security insists that if Customs & Border Protection agents “ever have a language or communication issue, they are required to find another Agent who speaks the language or to utilize contract interpreters.”<sup>237</sup> Yet in many instances, indigenous peoples do not receive translation services. Noting shortfalls in government offered language assistance, a 2000 Executive Order directed each federal agency to “examine the services it provides and develop and implement a system by which [limited English proficient] individuals can meaningfully access those services consistent with, and without unduly burdening the fundamental mission of the Agency.”<sup>238</sup> This resulted in the creation of U.S. Department of Homeland Security’s Language Access Plan,<sup>239</sup> including the U.S. Immigration and Custom Enforcement’s Handbook.<sup>240</sup> The Handbook states that in detention centers, “[o]ral interpretation or assistance shall be provided to any detainee who speaks another language in which written material has not been translated or who is illiterate,” at least regarding initial orientation.<sup>241</sup> Recently, the Department of Justice has been criticized for terminating the provision of interpreters at immigration hearings, replacing them with mass videos in which individuals may not have any chance to understand the legal process they face.<sup>242</sup>

The international human rights standards discussed in this Article arguably imposes greater obligations to provide translation or otherwise make sure indigenous peoples can understand legal proceedings surrounding the criminalization of unauthorized entry (even understanding

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*Trump Administration Ending In-person Interpreters at Immigrants’ First Hearings*, S.F. CHRON., July 3, 2019, <https://www.sfchronicle.com/politics/article/Trump-administration-ending-in-person-14070403.php> [<https://perma.cc/JLH8-8BSG>] (discussing the potential due process implications of a 2019 Trump Administration policy that is replacing in-person interpreters with pre-recorded videos during initial immigration court hearings).

237. *Id.*

238. Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (Aug 16, 2000).

239. See generally U.S. DEP’T OF HOMELAND SEC., LANGUAGE ACCESS PLAN (Feb. 28, 2012), <https://www.dhs.gov/sites/default/files/publications/crcl-dhs-language-access-plan.pdf> [<https://perma.cc/5ETH-984K>].

240. See generally U.S. IMMIGRATION & CUSTOMS ENF’T, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS, DETAINEE HANDBOOK (2016), <https://www.ice.gov/detention-standards/2011>.

241. *Id.* at 410.

242. U.S. COMM’N ON CIVIL RIGHTS, THE U.S. COMMISSION ON CIVIL RIGHTS DENOUNCES REPLACEMENT OF INTERPRETERS WITH A VIDEO AT IMMIGRANTS’ FIRST IMMIGRATION HEARING 1 (July 19, 2019), <https://www.usccr.gov/press/2019/Immigration-Interpreter-Statement.pdf> [<https://perma.cc/GU63-LQCZ>]. See International Covenant on Civil and Political Rights, G.A. Res. 2200, 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316 (1967) (“Each State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

that immigration courts are civil courts). The Covenant on Civil and Political Rights provides that individuals have a right to understand legal proceedings in criminal matters and prohibits discrimination against minorities on the basis of language.<sup>243</sup> The Declaration recognizes that indigenous peoples have the right to use, revitalize, and transmit their languages.<sup>244</sup> It further provides that “[s]tates shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”<sup>245</sup>

To ensure basic human rights to life, due process, family, privacy, and health—and also to avoid mistakes and disasters like denying available medical care to indigenous children or accidentally separating them from parents—we recommend that the United States meets international standards on language rights and strives to ensure that indigenous migrants have translation services as all stages of interactions with US officials in immigration, customs, and enforcement matters. Live interpreters are preferable to videos and if the United States starts to gain information and track data about indigenous migrants, it will be better equipped to provide translation in the necessary languages. Additionally, there are programs, including a tool used by Department of Homeland Security—the “I Speak” documents—that can help to identify language at least for literate individuals.<sup>246</sup> Technology may be able to provide both prerecorded information and real time translation of use to migrants. All of these measures can help to address the “translation crisis” at the US border with Mexico, especially as it impacts indigenous peoples.<sup>247</sup>

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243. Additionally, Article 14 provides for language rights in criminal trials, stating that any person, “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . (c) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him and (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.” Article 24 extends the right of non-discrimination based on language to children. Article 27 provides: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”)

244. Declaration on the Rights of Indigenous Peoples, *supra* note 228, art. 13.

245. G.A. Res. 61/295, ¶ 12, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).

246. See generally U.S. DEP’T OF HOMELAND SEC., “I SPEAK” BOOKLETS AND POSTERS FOR DHS RECIPIENTS (May 10, 2019), <https://www.dhs.gov/sites/default/files/publications/Overview%20of%20I%20Speak%20Resources%20for%20Recipients.pdf> [<https://perma.cc/JJ4U-EYTW>].

247. Nolan, *supra* note 39.

## B. Russia

In Russia today, there are approximately one hundred indigenous groups, including the Selkup and Shor of Siberia, Udege and Uylta of the Far East, Nenets and Chukchi of the Arctic, Udmurt and Mari in Europe, and Avar and Lezgin in the Caucasus. Like their counterparts around the world, Russian indigenous peoples have struggled to retain their languages during periods of national assimilation. Yet specific to Russia, Russian indigenous peoples have been impacted by particular aspects of Russian language policies, which must inform measures to support the recovery of indigenous languages today. Russian legislation distinguishes 47 indigenous groups who do not exceed 50,000 in population and therefore require measures for special protection. Both small and ‘bigger’ groups comply with internationally recognized criterion of self-identification, relations to historical lands, traditional occupations and distinct language and culture. This Article therefore takes an inclusive approach and considers language policies as they relate to all indigenous peoples in the country.

### 1. Legal History and Current Situation

#### *a. Language Policy in Tsarist Russia and the Soviet Union: Russification and Other Concerns*

In different historical periods, Russia has taken different approaches to indigenous languages.<sup>248</sup> In the sixteenth century, the Tsar authorized Russian traders and military troops to expand his influence by entering the territories of indigenous peoples in Siberia and the Far East. While pursuing a regime of conquest, the Tsar also ordered that “native peoples should be treated respectfully and accommodatingly, while military actions should only be applied against armed revolts.”<sup>249</sup> Native peoples were forced to pay a tax, primarily in furs (yasak), in exchange for the promise of protection by the Tsarist Empire. In areas of massive Russian settlement, the indigenous population was subject to “Russification”—meaning pressure to adopt the Russian language, economic activities, and social organization.<sup>250</sup> However, in 1822, the

248. A note on sources in this Subpart: many legal sources are available only in the Russian language. Coauthor Alexey Tsykarev, who is a native Russian speaker, fluent in English and trained as a translator, has provided English language translations where no other was available. We also provide citations to the original sources for readers who wish to review them in Russian.

249. Winfried K. Dallmann, *Indigenous Peoples of the Russian North*, NORWEGIAN POLAR INST., [https://ansipra.npolar.no/english/items/Russ\\_north.html](https://ansipra.npolar.no/english/items/Russ_north.html) [<https://perma.cc/3DJJ-9FE5>] (last visited Jan. 31, 2020).

250. *Id.* (citing “the Statute ‘On the Governing of Outlanders’” (“inorodsy”—outlanders,



first Russian legal act to define the status of indigenous peoples recognized that they had both the freedom of religion and the right to use and learn native languages.<sup>251</sup> This law, known as the “Statute on the Governing of Outsiders,” provided for the establishment of special schools where indigenous languages served as the languages of instruction. Additionally, indigenous populations were never forced to change their traditional lifestyle, move to other territories, or learn Russian.<sup>252</sup> In this manner, the Russian Empire strove to ally itself with indigenous peoples, rather than eradicate its indigenous populations.<sup>253</sup>

At the early stages of the Soviet era, in the 1920s and 1930s, the concept that all peoples are equal and have the right to self-determination was supported in politics according to ethnic lines. Ethnic republics and autonomous districts (‘okrug’) had been established and named after so called ‘titular peoples.’<sup>254</sup> This method of administrative division introduced by Lenin’s government was subsequently inherited by modern Russia. Presently, both ethnic republics and autonomous districts reflect the idea of national<sup>255</sup> self-determination of peoples and self-governance of peoples within the Russian Federation. In this structure, republics introduce a concept of statehood for non-Russian peoples, while autonomous districts represent a form of self-governance of indigenous peoples within larger administrative units.<sup>256</sup> There is also an autonomous Jewish oblast (‘region’) and three federal cities. All other types of regions—‘krai’ (‘territory’) and ‘oblast’—are legally

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literally “people of another origin” of 1822)).

251. Cf. Galina Diatchkova, *Indigenous Peoples of Russia and Political History*, 21 CAN. J. NATIVE STUD. 217, 219 (2001).

252. Anna Varfolomeeva, *Evolution of the Concept “Indigenous People” in the Soviet Union and the Russian Federation: The Case Study of Vepses*, CENT. EUR. UNIV., 25 (2012).

253. Ruslan Garipov, *Pravo na ispol'zovanie i okhranu rodnogo iazyka u korennykh malochislennykh narodov Rossii* [The Right to Use and to Protect Mother-Tongue Among Indigenous Small-Numbered Peoples of Russia], 4 Rossiiskii iuridicheskii zhurnal [RUSS. JURIDICAL J.] 157 (2012).

254. Jeremy Smith, *Was There a Soviet Nationality Policy?*, 71 EUROPE-ASIA STUD. 972 (2019).

255. In the Russian context, national republic or national district is a more commonly used term as in the Russian ethnology ‘nation’ and ‘ethnos’ are equal, while nation is also used to refer the entire population of the country—political nation.

256. Chukotka autonomous district does not belong to any other larger territory and therefore constitutes an exception. For sources on Chukotka’s status and history as it relates to indigenous peoples, see, e.g., Igor Krupnik & Mikhail Chlenov, “The end of “Eskimo Land”: Yupik Relocation in Chukotka, 1958–1959 31 Études/Inuit/Studies, 59, 59–81 (2007) (history of Inuit in Chukotka autonomous district); Jennifer Kingsley, *A Fading Culture Adapts to the Changing Times in this Arctic Town*, NAT’L GEOGRAPHIC (Jan. 25, 2019), <https://www.nationalgeographic.com/culture/2019/01/women-of-chukotka-arctic-russian-culture> (current situation of indigenous women in Chukotka autonomous district).

identical and mostly populated by Russians with no or little indigenous representation.<sup>257</sup> In some regions with minor indigenous populations, ethnic districts were established and ethnic schools were opened.

Both ethnic districts and republics of the Soviet-era were meant to recognize the right of peoples to self-governance through direct participation in decisionmaking, quotas for representation in power, and enforcement of indigenous languages use.<sup>258</sup> This included freedom to use indigenous languages in administration and public affairs and to make them visible in cities and villages. During this period, many indigenous languages, which had previously existed only in oral traditions, acquired written script.<sup>259</sup> Additionally, new vocabulary enabled the languages to serve new roles in media, administration and education. For example, in the Republic of Karelia, named after the Karelian people, a university was established, and newspapers and textbooks were published in Karelian.<sup>260</sup> Similarly, in Tverskaya oblast—a mostly Russian region near Moscow with a significant Karelian population—a Karelian ethnic district was established for a short period of time, which allowed for running schools in the Karelian language.<sup>261</sup> In these respects, early Soviet-era policies and practices allowed indigenous languages to survive and even flourish.

After World War II, changes to the political landscape in Russia had deleterious impacts on indigenous languages. To recover from the war and confront threats of separatist sentiment, leaders promoted “unification” in both culture and industry. This meant a prevailing state-building role for the majority “Russian” ethnicity at the expense of other ethnic, minority, or indigenous traditions. As a

257. Marina Obrazkova, *How Russia's Administrative System Works*, RUSS. BEYOND (JAN. 12, 2014), [https://www.rbth.com/politics/2014/01/12/how\\_russias\\_administrative\\_system\\_works\\_32209](https://www.rbth.com/politics/2014/01/12/how_russias_administrative_system_works_32209) [https://perma.cc/4ENH-2P69].

258. Compare ALEXEI G. ARBATOV ET AL., *MANAGING CONFLICT IN THE FORMER SOVIET UNION: RUSSIAN AND AMERICAN PERSPECTIVES* 90 (ALEXEI ARBATOV ET AL. EDS., 1997) (on governance in Soviet Union) with *ETHNIC AND RELIGIOUS MINORITIES IN STALIN'S SOVIET UNION: NEW DIMENSIONS OF RESEARCH* (Andrej Kotljarchuk & Olle Sundström eds., 2017).

259. JULIE TETEL ANDRESEN & PHILLIP M. CARTER, *LANGUAGES IN THE WORLD: HOW HISTORY, CULTURE, AND POLITICS SHAPE LANGUAGE* 108–10 (2016).

260. Compare Paul M. Austin, *Soviet Karelian: The Language that Failed*, 51 *SLAVIC REV.* 16 (1992) (DESCRIBING POLITICAL CHALLENGES TO THE SURVIVAL OF KARELIAN LANGUAGE) with Richard Lloyd Christophe Morin, *Livvi Karelian at Petrozavodsk State University An Ethnography of Language Attitudes*, UNIV. E. FIN. 1, 1–3 (2017), [https://publications.uef.fi/pub/urn\\_nbn\\_fi\\_uef-20171148/urn\\_nbn\\_fi\\_uef-20171148.pdf](https://publications.uef.fi/pub/urn_nbn_fi_uef-20171148/urn_nbn_fi_uef-20171148.pdf) [https://perma.cc/7W-MY-7Q9G] (describing Karelian language studies at Petrozavodsk State University).

261. For information generally on Karelians in Tverskaya see, e.g., Ott Kurs, *Indigenous Finnic Population of NW Russia*, 34 *GEOJOURNAL*, 447, 447–56 (1994); SEPPÖ LALLUKKA, *The Breakdown of Tver' Karelian Demographic Continuity*, 19 *ETHNIC AND RACIAL STUD.* 316 (1996).

direct consequence, the Russian language was promoted among Soviet citizens as a language of highly developed culture of world class. It therefore offered more opportunities to their speakers, while languages of other ethnic groups seemed out of date and nonfunctional in the context of major spheres of public life. The concept of bilingual education did not yet exist, nor was it contemplated by the Russian government as a viable approach to language policy.

As Ruslan Garipov has explained, the Soviet Union after WWII adopted a highly paternalistic and purposeful assimilation policy toward all non-Russian populations.<sup>262</sup> Self-determined administrative entities lost their ethnic independence or were destroyed altogether. Indigenous cultures were perceived as a burden to the efficiency of expanding industrialization and exploitation of natural resources, as well as the shared sense of a Russian identity that would support these activities during the Cold War. The country strove to rebuild its destroyed economy and win its strategic competition with the West. This required societal transformations, large movements of the workforce across the country, the unification of villages, and the closure of economically unsustainable villages—all of which had a significant impact on the ability to use and transmit languages in Russia. In addition, children were told not to speak their native languages in schools and other public places, and parents were discouraged from speaking indigenous languages at home. To further eradicate indigenous culture and language, the government encouraged settlers to move into indigenous villages, thereby disrupting their languages and ways of life even more broadly.

After the collapse of the Soviet Union in 1991, the Russian Federation encountered an economic crisis that threatened to further disrupt and disintegrate the country. This new period in Russian history, however, brought with it freedoms and liberties, where ethnic movements gained renewed strength and indigenous peoples experienced a so-called ‘ethnic renaissance,’ featuring an activation of national self-identification and pride, and growth of political support for indigenous peoples and their languages.<sup>263</sup> In many republics, languages of titular peoples were declared state languages, and additional laws and policies were put in place in support of indigenous populations. However, after a so called ‘parade of sovereignties’, when regions acquired as much authority as the weak central government allowed for in the

262. Garipov, *supra* note 253, at 4.

263. Alxey Konuykhov, *Natsional'naiā identichnost' finno-ugorskikh narodov* [*National Identity of Finno-Ugric Peoples*], FINNO-UGORSKII MIR [FINNO-UGRIC WORLD] 79 (2008).

1990s, the economic and political growth in the 2000s led to a resurgence of anti-indigenous sentiment reminiscent of similar policies from late in the Soviet era. Ethnic and linguistic policies have since been constrained, leading to a reduction in the right to develop and encourage use of indigenous languages.

*b. Controversies of Linguistic Policy in the Post-Soviet Era*

This complex background stands in stark contrast to the current narrative, advanced by the Russian government, that there was no colonization in Russia,<sup>264</sup> that indigenous peoples voluntarily joined the Russian state, and that Russia's indigenous languages have been carefully preserved.<sup>265</sup> According to some Russian policy makers, the endangered state of some indigenous languages stems from globalization and urbanization,<sup>266</sup> rather than historical injustices or contemporary policies of states. To be sure, some UNESCO officials support the theory of the danger of minority language extinction in Russia caused by globalization. According to Victor Montiloff, "this danger is growing exponentially with the introduction of new technologies," which widens "the economic gap between those who have access to information in their own language and those who don't."<sup>267</sup>

Allying themselves with this assertion, individual government-backed experts report that only one indigenous language has ever died in Russia,<sup>268</sup> despite the fact that data provided by researchers from

264. Welcoming Address by the Head of the Delegation of the Russian Federation A.D. Viktorov at the Opening Ceremony of the 14th Session of the UN Permanent Forum on Indigenous Issues (Apr. 20, 2015), [http://russiaun.ru/ru/news/un\\_pfis](http://russiaun.ru/ru/news/un_pfis) [https://perma.cc/URS3-ABP5].

265. *Statement by the Head of the Russian Delegation Igor Barinov as Part of the Consideration by the Committee on the Elimination of Racial Discrimination of the Combined 23rd and 24th Periodic Reports of the Russian Federation on the Implementation of the International Convention on the Elimination of All Forms of Racial Discrimination*, MINISTRY FOREIGN AFF. RUSS. FED'N. (Aug. 4, 2017), [http://www.mid.ru/foreign\\_policy/news/-/asset\\_publisher/cKNonkJE02Bw/content/id/2832374](http://www.mid.ru/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2832374) [https://perma.cc/8H9S-M269].

266. Aleksei Shipilov rasskazal, kak proidet forum iazykov korennykh narodov v Iugre [Alexey Shipilov Spoke at the Conference on Indigenous Languages in Ugra], UGRA NEWS (Feb. 6, 2019), [https://ugra-news.ru/article/aleksey\\_shipilov\\_rasskazal\\_kak\\_proydet\\_forum\\_yazykov\\_korennykh\\_narodov\\_v\\_yugre](https://ugra-news.ru/article/aleksey_shipilov_rasskazal_kak_proydet_forum_yazykov_korennykh_narodov_v_yugre) [https://perma.cc/84VR-YQNG].

267. Viktor Montiloff, *Internet and Language Diversity: Is It Possible?*, in LINGUISTIC AND CULTURAL DIVERSITY IN CYBERSPACE 60, 68 (Evgeny Kuzmin et al. eds., 2008).

268. Senior Researcher and Chief Scientist of the Institute of Ethnology and Anthropology of the Russian Academy of Sciences Vladimir Zorin and Valery Tishkov (both former federal Ministers for Ethnic Politics) have stated in interviews that "no people has disappeared, no language has died over 1150 years of co-existence of more than 190 peoples in Russia." See Interview, Professor Vladimir Zorin: *Luchshe desiāt' let peregovorov, chem odin den' voïny*, [Better ten Years of Negotiations than one day of war], INSTITUT ÉTNOLOGII I ANTROPOLOGII RAN [INST. ETHNOLOGY AND ANTHROPOLOGY] (May 22, 2014), <http://iea-ras.ru/index.php?go=News&in=view&id=243> [https://perma.cc/R7AC-DPCD]. See also

the Russian Academy of Sciences for official use by policymakers and government officials suggests that fourteen languages disappeared in Russia over the last 150 years.<sup>269</sup> Linguist Olga Kazakevich provides specific examples: the Chuvan and Omok languages died during Tsarist Russia, Yug and Kamasin were lost in 1970s, and most recently in 2003—the Babin Sami language lost its last remaining speaker.<sup>270</sup> According to the opening address at the 2019 International Year of Indigenous Languages in Russia, 18 indigenous languages are on the verge of extinction.<sup>271</sup> Indeed, the UNESCO Atlas of Endangered Languages considers *all* Russian indigenous languages endangered to a certain degree.<sup>272</sup> In between the censuses of 2002 and 2010, almost all indigenous peoples in Russia showed demographic decline and critical loss of language speakers.<sup>273</sup> In total, the number of indigenous language speakers decreased by 15–16 percent over the eight year period.<sup>274</sup> Researchers anticipate that the next census in 2020 will show an even more acute negative shift.<sup>275</sup>

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Natalya Rybakova, «*Identichnost' cheloveka toporom narubit' na kusochki neprosto*»: Valerii Tishkov o rossiianakh kak edinom narode i o tom, kak zapishut tatar v perepisi-2020 [“It’s not Easy to Chop a Person’s Identity with an ax”: Valery Tishkov About Russians as a Single People and how the Tatars will be Recorded in the 2020 Census], SOBYTIIÂ [EVENTS] (Feb. 12, 2019), <https://sntat.ru/obshchestvo/identichnost-cheloveka-toporom-narubit-nakusochki-neprosto-valeriy-ti> [<https://perma.cc/ND3G-XGXX>].

269. V FADN Rossii rasskazali, chto v Rossii za poslednie 150 let ischezli 14 redkikh iazykov [The Federal Agency for Ethnic Affairs of Russia Said that 14 Rare Languages Have Disappeared in Russia Over the Past 150 years], FED. AGENCY FOR ETHNIC AFF. (Feb. 5, 2019), <http://fadn.gov.ru/special/news/2019/02/05/3725-v-fadn-rossii-rasskazali-chto-v-rossii-za-poslednie-150-let-ischezli-14-redkih-yazykov> [<https://perma.cc/TF67-Z94X>].

270. Alisa Veselkova, *Smert' i vozrozhdenie iazykov. Skol'ko iazykov my poteriâli i poteriâem v blizhaishem budushchem, a kakie smogli vozrodit'sia* [The Death and Rebirth of Languages. How Many Languages Have We Lost and Will Lose in the Near Future, and Which Ones Could Be Reborn], RUSS. AGENCY (Dec. 14, 2018), [https://chrdk.ru/other/smert\\_i\\_vozrozhdenie\\_yazykov](https://chrdk.ru/other/smert_i_vozrozhdenie_yazykov) [<https://perma.cc/2GPW-V46N>].

271. 18 iazykov korennykh narodov strany nakhodiâsiâ pod ugrozoî ischeznoveniâ [Indigenous Languages Endangered], PROUFU (Mar. 26, 2019), [https://proufu.ru/news/society/78194-18\\_yazykov\\_korennykh\\_narodov\\_strany\\_nakhodyatsya\\_pod\\_ugrozoy\\_ischeznoveniia](https://proufu.ru/news/society/78194-18_yazykov_korennykh_narodov_strany_nakhodyatsya_pod_ugrozoy_ischeznoveniia) [<https://perma.cc/38GK-WNY3>].

272. *Atlas of Endangered Languages*, UNESCO, <http://www.unesco.org/languages-atlas/index.php?hl=en&page=atlasmap> [<https://perma.cc/Z5KC-9NMT>] (last visited Jan. 31, 2020).

273. RUSSIAN FED’N, ALL-RUSSIAN CENSUS 2010 (2010), [https://www.gks.ru/free\\_doc/new\\_site/perepis2010/croc/perepis\\_itogi1612.htm](https://www.gks.ru/free_doc/new_site/perepis2010/croc/perepis_itogi1612.htm) [<https://perma.cc/8U2F-DRGZ>].

274. Nail Gylman, *How Many Indigenous Peoples in Russia, How Many Languages Do They Have and How to Preserve Them?* HORIZONTAL RUSSIA 7x7 (JULY 13, 2018 1:11 AM), <https://7x7-journal.ru/post/109272> [<https://perma.cc/3Y6W-RASW>].

275. See generally VALERY TISHKOV, *ËTNICHESKOE I RELIGIOZNOE MNOGOOBRAZIE ROSSII* [ETHNIC AND RELIGIOUS DIVERSITY IN RUSSIA] (2018).

Today's Russian Federation is a plurinational state where 151 languages (around 270 with dialects) are spoken, according to official data provided by the Institute of Linguistics of the Russian Academy of Sciences. Of these, 25 languages are used in the education system as a language of instruction, 81 languages are taught in schools as part of curriculum, and 9 more languages are taught on an optional basis as an extracurricular activity.<sup>276</sup> The United Nations Special Rapporteur on the Rights of Indigenous Peoples, James S. Anaya, explained in his country report on Russia that in many indigenous communities only 15–20 percent of members of a given community study native languages.<sup>277</sup> Linguistic diversity in the country and the internal and external sensitivity associated with this issue compels the federal government to portray the country as responsible when it comes to language rights. Therefore, Russia was among the first of United Nations member states to establish a national organizing committee for the IYIL2019, and it subsequently adopted a national Action Plan of major events and efforts to uplift the level of support for indigenous languages. Russia has also supported the proposals for an International Decade of Indigenous Languages, and the opportunity to promote the country's experience. On one hand, Russia's involvement signals a commitment to indigenous languages, but on the other, it is not entirely clear that Russia is actually committed to fully embracing indigenous peoples' own aspirations in formulating its language policies.<sup>278</sup>

As a formal matter, Russian law contains a number of important provisions on language rights. Article 26(2) Constitution of the Russian Federation stipulates that everyone shall have the right to use his or her native language, and to freely choose a language of communication, specifically for the purposes of raising children, education and

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276. Statement by the Head of the Federal Agency of Ethnic Affairs of the Russian Federation Igor Barinov at the 18th Session of the UN Permanent Forum on Indigenous Issues (2019), <http://cendoc.docip.org/collect/cendocdo/index/assoc/HASH3444/85da7ac9.dir/PF19BARINOVA050422.pdf> [<https://perma.cc/V6X9-HXDJ>].

277. James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, U.N. Doc. A/HRC/15/37 (July 19, 2010).

278. One of the examples of such practices are so called immersion groups in kindergartens, where Russian is the language of instruction and teachers only use some words and sentences in indigenous languages. Therefore, this methodology does not produce language speakers unlike "language nests," but just introduces the languages to children before attending school. While this information comes from author Alexey Tsykarev's personal experience, additional information on indigenous languages in Russian schools can be found at Marina Starodubtceva, *Indigenous Education Systems of Canada and the Russian Federation: Comparative Analysis*, 15 GLOBAL J. HUMAN-SOC. SCI.: G LINGUSTICS & EDUC. 1, 12–13 (2015) (discussing strengths and weaknesses of indigenous language education in Russia as compared with aboriginal language education in Canada).

creative work. Article 68(3) provides that the Russian Federation shall guarantee to all of its peoples the right to preserve their native language and to create opportunities for its study and development. Article 69 of the Constitution specifically guarantees the rights of indigenous peoples according to the universally recognized principles and norms of international law, international treaties, and agreements of the Russian Federation.

Two federal laws, entitled the ‘Languages of the Peoples of the Russian Federation’ and ‘Education in the Russian Federation’ ensure the linguistic rights of citizens. In addition, there are several policy documents, such as the State Ethnic Policy Strategy until 2025 issued in 2012 and amended in 2018, which prioritize the preservation of the ethnocultural and linguistic diversity of the country, albeit while still underlining the statebuilding and interethnic communication role of the Russian language.<sup>279</sup> Another policy document, the Concept of the State Educational Policy of 2006, recognizes the need for the reconciliation of the state’s interest in providing access to quality educational and cultural services and the interests of Russia’s populace to have educational opportunities in native languages and broadly speaking, preserve their languages and cultures.<sup>280</sup> The legislation is therefore adequately developed and linguistic rights are elaborated on in great detail. Here, we address why accessing these rights in practice is challenging due to revisions, amendments, inefficient implementation and the lack of funding.

Professor Vladimir Kryazhkov summarizes indigenous peoples’ collective and individual linguistic rights in Russia vis a vis the existing legislation: (1) the right to preserve, use and revitalize languages free from administrative restrictions; (2) the right to create scripts; (3) the right to learn native languages, establish their own educational systems and obtain state support for teaching and research; and (4) the right to develop the languages, for example, by providing financial support and stimulating community-based activities such as publishing literature and media. Kryazhkov emphasizes that the language rights of indigenous peoples are the shared responsibility of indigenous peoples and the state. He clarifies that the legislation considers indigenous languages as secondary, having communicative and integrative value only within

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279. *Strategiya Gosudarstvennoy Natsionalnoy Politiki Rossiyskoy Federatsii Na Period Do 2025 Goda* [State Ethnic Policy Strategy of the Russian Federation Until 2025] 2012, <http://pravo.gov.ru/proxy/ips/?docbody=&nd=102161949> [<https://perma.cc/FV6L-R69B>].

280. RUSSIAN FED’N, *KONTSEPTSIYA RAZVITIYA OBRAZOVANIYA RF DO 2020 G* [THE CONCEPT OF DEVELOPMENT OF EDUCATION OF THE RUSSIAN FEDERATION UNTIL 2020], (2014) AT NO. 2765-R.

a limited territory and inside a certain community, therefore implying that is not obligatory in public spheres for exercising political and civil rights. By contrast, Russian language is a precondition for Russian citizenship and is required to access the benefits and social services conferred by citizenship.<sup>281</sup>

Each of Russia's 22 republics\* may designate a second state language in addition to Russian. The vitality of indigenous languages in Russia varies depending on levels of support available in each republic.<sup>282</sup> The Republic of Sakha (also known as Yakutia), located in Far Eastern Siberia, recognizes both Russian and Sakha as state languages. In addition, Sakha recognises five official indigenous languages—Dolgan, Yukagir, Evenk, Even and Chukchi—that can be used public life, including government and media. Thus, in Sakha, there is a relatively strong level of support for multiple indigenous languages.

By contrast, the Republic of Karelia, located in Western Russia along the Finnish border, recognizes Russian as the sole state language. Ironically, perhaps, Karelia fails to recognize even the Karelian language as a state language. In 2004, the republic's legislators introduced the law «On State Support of the Karelian, Vepsian and Finnish Languages in the Republic of Karelia». This law provides full legal protection to the language communities of indigenous peoples, including the possibility for language use in governance, education, public life and the media, but stops short of state language status.

Recently, however, the autonomy of republics regarding language policy has been undermined and subordinated by 2017 amendments to the federal law on education. Previously, in republics where an indigenous language was recognized alongside Russian as a state language, all children would learn both Russian and the indigenous language in school. But now, the Republic cannot make native language instruction mandatory, even with state languages of the Republic. Children in all Russian republics are instructed only in Russian, unless parents elect for extra instruction in a “native” or “ethnic language.”<sup>283</sup>

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281. Vladimir Kryazhkov, *Native Language Right [By the Example of Small-Numbered Peoples of the North]*, 11 ST. AND L. 32 (2016). Republic of Crimea is de-facto one of the 22 republics within the Russian Federation, but according to the Resolution of the UN General Assembly 68/262 Autonomous Republic of Crimea are an integral part of Ukraine. See G.A. Res. 68/262 (Mar. 27, 2014).

282. See generally VALERY TISHKOV, *ROSSIISKAIĀ ARKTIKA: KORENNYE NARODY I PROMYSHLENNOE RAZVITIE* [THE RUSSIAN ARCTIC: INDIGENOUS PEOPLES AND INDUSTRIAL DEVELOPMENT] (2016) (discussing regional differences).

283. See Konstantin Zamyatin, *Finno-Ugric Languages in Russian Education: The Changing Legal-Institutional Framework and Falling Access to Native Language Learning*, 44 ÉTUDES FINNO-UGRIENNES ¶¶ 44–46 (2012). Understanding the law may require



What do the new amendments mean in practice? Under the old policy, for example, children who were ethnically Russian in the Republic of Komi studied Komi as a state language, while indigenous children attended Komi-as-native classes. Today, there is no more mandatory study of Komi for any student, and only ethnic Komis are likely to elect it for their children. The amendments thus diminish bilingualism and crosscultural exchange, as well as the status, visibility, and utility of indigenous languages.

Some more specific policy documents, concepts and strategies have been adopted in numerous regions. Examples of such concepts and strategies include the Concept of the Development of Ethnocultural Education in the Republic of Komi and the Strategy for the Development of the Karelian Language until 2020 in the Republic of Karelia. Whereas the former describes efforts at digitalization and modernization of indigenous languages and providing educational services in those languages, the latter looks at the language ecology and modernization and then suggests the creation of a unified Karelian language out of the three major dialects. As part of these policies or laws, executive authorities may adopt state target programs that identify both the specific government actors in charge of different elements of state language policies and the amounts of subsidies to which each actor is entitled.

Internationally, Russia is very active in the realm of linguistic diversity, going so far as to promote its own best practices of language preservation. As one of eight founding members of the Arctic Council Cooperation, Russia has proposed a project called Children of the Arctic, which endeavors to disseminate many of the best practices that have been successfully deployed in the Russian High North. One such practice is that of nomadic schools, where specially trained teachers are placed with reindeer herder families in the tundra and they provide

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additional context. The term “native language” (“родной язык”) in Russian means an individual’s first learned language. The Indigenous peoples’ movement in Russia also uses this term to identify the language associated with a person’s ethnicity, even if in fact the first language he or she learned was Russian or another language. Previously many ethnic republics required students to learn the language of the republic, which was often an indigenous language. However, 2017 amendments to national law make these languages optional and limit classes to two hours a week. Commentators have said “[t]hese measures will only hasten the demise of these languages—and will ensure that the Russian language remains preeminent across the country.” See Guzel Yusapova, *Russia is Cracking Down on Minority Languages but a Resistance Movement is Growing*, THE CONVERSATION (Sept. 11, 2018, 8:47 AM), <http://theconversation.com/russia-is-cracking-down-on-minority-languages-but-a-resistance-movement-is-growing-101493> [https://perma.cc/DS5P-2NHW]; see also Neil Hauer, *Putin’s Plan to Russify the Caucasus: How Russia’s New Language Law Could Backfire*, FOREIGN AFFAIRS, Aug 1, 2018, <https://www.foreignaffairs.com/articles/russia-fsu/2018-08-01/putins-plan-russify-caucasus> [https://perma.cc/TT5J-9NJC].

educational services to the children in close proximity to their families, thereby preventing them from having to attend residential schools. This educational model allows children to stay with their parents, learn and speak their native language, and perform their traditional vocations. As one such illustration, during the 2016/17 academic year, in the territory of the Yamal-Nenets Autonomous District, educational services were provided in Nents nomadic encampments by nine kindergartens, one nursery school and three primary schools. Teaching was administered by 24 “nomadic” teachers. In all, 106 children received preschool education and 77 were enrolled in general primary classes.<sup>284</sup>

With respect to international legal norms, Russia has not expedited its incorporation of international standards and treaties into its domestic normative framework. As one of 47 Member-States of the Council of Europe, an international organization established in 1949 to promote harmony, cooperation, good governance, human rights, democracy and the rule of law on the European continent, Russia is party to 60 conventions. One of them is the Framework Convention for the Protection of National Minorities, a comprehensive treaty which commits states to “promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their religion, language, traditions and cultural heritage.”<sup>285</sup> Russia initially signed but refused to ratify the European Charter of Regional or Minority Languages, a treaty that introduces specific protective measures for nondominant languages, including indigenous languages. This treaty introduces a comprehensive list of measures to protect languages, and state parties can choose and implement only those which reflect regional specificities and most adequately would support particular languages. An explanation for Russia’s unwillingness to ratify this charter can be found in a study titled, “European Language Charter and Russia, Applied and Urgent Anthropology.”<sup>286</sup> The authors refer first and foremost to the unprecedented scale of linguistic diversity in Russia, along with the vast territories of the country, which make it difficult to collect data and monitor sociolinguistic situation. The financial resources

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284. Human Rights Council Res. 16/21, U.N. Doc. A/HRC/WG.6/30/RUS/1 (May 7–18, 2018).

285. COUNCIL OF EUROPE, FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES AND EXPLANATORY REPORT (Feb. 1, 1995), <https://rm.coe.int/16800cb5eb> [<https://perma.cc/X3H8-EJWK>].

286. S.V. Sokolovsky & V.A. Tishkov, *Evropeiskaia Iazykovaia Xartiia I Rossiia* [*European Language Charter and Russia*], 218 STUD. IN APPLIED AND EMERGENCY ETHNOLOGY (2010).

required to implement the Charter is also a clear cause for concern. In addition, there are concerns that implementation of this Charter can destroy fragile peace and revive old or cause new interethnic conflicts in linguistically diverse regions with some history of tensions between different ethnic groups, for example the Republic of Dagestan. Finally, the study emphasizes that many existing federal and regional legislation and support measures already satisfy most of the obligations the Charter imposes on state parties.

Despite the abundance of legal frameworks and prominent governmental support for linguistic diversity, however, the implementation of sustainable practices that secure language rights remains incomplete. In particular, five notable components of federal and regional language policies demonstrate how much work still must be done in order to meet the aims of the Declaration and the aspirations of indigenous peoples with respect to language rights.

First of all, and again in contrast with the work of the Canadian Truth and Reconciliation Commission, which led to the historic acknowledgement of linguistic oppression and a formal apology from the Canadian government, Russia has failed to acknowledge the damage caused by government policies to indigenous languages. The official position that Russia has saved languages spoken even by the smallest communities, such as the Votians (68 language speakers) and the Izhorians (123 language speakers), is called into question by the minute size of each language community itself. The absence of substantial speakers in each community demonstrates Russia's inability to promote, grow, and safeguard indigenous languages.

Second, decisionmakers lack a deeply informed sense of how international and constitutional obligations to support languages should be administered as a practical matter. One illustration comes from the Ministry of Education's recent statement on the "Concept of Teaching Indigenous Languages." The need for such a statement was unclear given that, according to Russia's report under the Framework Convention for the Protection of National Minorities, the regulations necessary to provide quality language education are already in place.<sup>287</sup> Moreover, the statement failed to address the main impediment to effective teaching identified by educators themselves, namely that state assessment of educational materials is prohibitively time-consuming and expensive. Framed as a "deliverable" for IYIL2019, this statement wasted resources by repeating aspects of national policy that already comply

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287. COUNCIL OF EUROPE, *supra* note 52.

with international standards, while missing an opportunity to address bureaucratic impediments to improved language instruction.

Third, the legislative framework does not guarantee the right to learn native languages, nor does it allow students to elect native languages as their primary language of instruction, except in certain exceptional cases. The federal education law provides that “citizens have the right to receive preschool, primary, basic, and general basic education in their mother tongue from among the languages of Russia’s peoples and to learn such language if the education system can provide this opportunity.” Yet schools have the right to refuse to provide education in a given language if there is an absence of any of the following conditions: availability of textbooks in that language, methodological material in the language, qualified teachers, and many others. In addition, in some regions, such as the Republic of Karelia, the Central Election Commission refuses to print out ballots and other election-related material in indigenous languages, on the grounds that the specific territories in which indigenous peoples reside are not legally defined, and that indigenous peoples can speak Russian.<sup>288</sup> This directly contrasts with federal legislation, however, which states that indigenous peoples are granted the opportunity to exercise their electoral rights in their native languages.

Beyond these longstanding problems, experienced observers have noted recent signs of regression in language policy. Indeed, recent amendments to federal education laws have eroded the entire system of obligatory instruction in non-Russian state languages in the republics. Protests by ethnic elites,<sup>289</sup> meaning the intellectual and civil leadership of indigenous peoples, ultimately produced a compromise: state languages and other languages must be taught if (1) children or their parents ask for instruction, and (2) if the particular educational institution has the capacity to render educational services in the language.<sup>290</sup> While the President has announced new funding for language

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288. *Karel'skie aktivisty osporili otkaz TSIK pechatat' izbiratel'nye biulleteni na karel'skom i vepsskom iazykakh* [Karelian Activists Challenged CEC Refusal to Print Ballots in Karelian and Veps Languages], LEV GUMILEV CENTRE (Feb. 13, 2018), <https://www.gumilev-center.ru/karelskie-aktivisty-osporili-otkaz-cik-pechatat-izbiratelnye-byulleteni-na-karelskom-i-vepsskom-azykakh> [https://perma.cc/GJY9-XRDF].

289. Dmitry Lyubimov et. al, *A Common Language: Russia's 'Ethnic' Republics See Language Bill As Existential Threat*, RADIO FREE EUR./RADIO LIBERTY (June 20, 2018, 3:54 PM), <https://www.rferl.org/a/russia-language-bill-ethnic-republics-existential-threat/29306974.html> [https://perma.cc/58Z2-P2TK].

290. Konstantin Zamyatin, *Minority Language Education in Russia: Enforcing the Voluntary Teaching of Non-Russian Languages*, INT'L CENTRE FOR ETHNIC AND LINGUISTIC DIVERSITY STUD. (July 3, 2018), <http://www.icelds.org/2018/07/03/>

education, a fundamental problem remains: the new legislative regime weakens previous requirements for instruction in languages other than Russian, specifically indigenous languages like Komi, Mari, Udmurt, Sakha, Moksha and others.

Fourth, the central role of schools as the traditional keeper of social and cultural life in rural settlements has diminished. Small rural schools have been closed and pupils are either offered enrollment at boarding schools or daily transportation via substandard roads to schools in bigger settlements far from their homes. These developments are reminiscent of a 1950s-era policy that eliminated so-called “unpromising” villages, displacing thousands of indigenous peoples from their homes and disrupting intergenerational transmission of indigenous languages.<sup>291</sup> The apparent revival of this practice exacerbates migration of indigenous people to cities and increases the number of intermarriages, factors which may again facilitate the disappearance of indigenous languages.

Fifth, central authorities tend to consider languages from the perspective of national security, in which linguistic diversity appears incongruous with national unity and nationbuilding projects. The widely advanced concept of the so-called “Russian world” highlights the Russian language as critical to the unity of all peoples of the Russian Federation. In furtherance of this policy, the State Duma passed legislation in 2002 requiring that all state languages in the Russian Federation be based on Cyrillic script, with limited exceptions.<sup>292</sup> The law was aimed at preventing centrifugal tendencies in Tatarstan, one of the most independent Central-Russian republics, which possesses both a strong ethnic elite and a cultural affiliation with the transnational Turcic people’s movement. In the early 2000s, Tatar elites proposed that the official script of the Tatar language be changed from Cyrillic to Latin, in line with current practice in other Turcic countries. Such a move by a republic, especially one with a preferential tax regime granted by the federal government, was viewed as crossing a red line in the eyes of decisionmakers in Moscow. The central government responded by making it clear that it retains control over scripts used by indigenous

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minority-language-education-in-russia-enforcing-the-voluntary-teaching-of-non-russian-languages [https://perma.cc/AN82-JT4D].

291. Alexandra Tomaselli and Anna Koch, *Implementation of Indigenous Rights in Russia: Shortcomings and Recent Developments*, 5 INT’L INDIGENOUS POL’Y J. 9 (2014).

292. See BRIAN P. BENNET, RELIGION AND LANGUAGE IN POST-SOVIET RUSSIA 34 (2011). SEE ALSO *O Gusudartvennom Iazyke Rossiiskoi Federatsii* [About the State Language of the Russian Federation], ROSSIYSKAYA GAZETA [ROS. GAZ.] (JUNE 7, 2005).

populations, and it resisted this attempt to change the status quo.<sup>293</sup> The Constitutional Court later affirmed the position of the central government, and Tatarstan was not permitted to switch the Tatar language's alphabet from Cyrillic to Latin.<sup>294</sup> This incident demonstrates the Russian government's intolerance of language rights when such rights conflict with national security concerns.

The outcome of this incident also became an obstacle for the continued usage of the Latin-based Karelian language as a state language in the Republic of Karelia, despite the fact that Karelian had been utilized as a state language since 1989. From that year, all efforts to develop modern language in Karelia have been based on the Latin script: dictionaries, textbooks, media publications, road signs, and more. Karelian civil society devoted substantial resources to literacy enhancing projects in villages in order to teach the Latin script to older generations so that they would be able to read books and newspapers in the Karelian language. While lawyers are confident that the federal law is discriminatory to Karelians,<sup>295</sup> and that indigenous peoples should have the right to control their scripts,<sup>296</sup> the Russian government insists that script has nothing to do with language phonetics or the cultural context, and that this anti-Latin policy can therefore be imposed as a political decision.<sup>297</sup> The Constitutional Court supported this position when it decided that the legislation ensures "the state unity, harmonization and balanced functioning of the common federal language and republican state languages, providing for their optimal interaction within the common languages space."<sup>298</sup> Yet linguists argue that the choice of a script by a language community is a byproduct of the historical, cultural, and linguistic contexts.<sup>299</sup> States should therefore not impose their own regulations and

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293. *Putin Makes Cyrillic Official Alphabet*, MIDLAND DAILY NEWS (Dec. 11, 2002, 8:00 PM), <https://www.ourmidland.com/news/article/Putin-Makes-Cyrillic-Official-Alphabet-7152929.php> [<https://perma.cc/3EHY-QCNE>] (reporting on a new Russian law requiring the use of the Cyrillic alphabet for official languages.).

294. Zamyatin, *supra* note 283.

295. EUR. COUNSULT. ASS., *Comments of the Government of the Russian Federation on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the Russian Federation*, GVT/COM/INF/OP/I(2003)005 (Feb. 21, 2003).

296. G.A. RES. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

297. COUNCIL OF EUROPE, *supra* note 51.

298. Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 16 noiābria 2004 g. № 16-p [Resolution of the Constitutional Court of the Russian Federation of November 16, 2004 No. 16-P], Meeting of the Legislation of the Russian Federation, at 47 (2004).

299. See Peter Unseth, *The Sociolinguistics of Script Choice*, 192 INT'L J. SOC. LANGUAGE 1, 1–4 (2008); Opinion of the Institute of Linguistics of the Russian Academy of

restrictions, especially if those regulations and restrictions are guided by fear, incomplete analysis and misunderstanding. In the case of the Karelian language, the principal sources for the development of new vocabulary are the Finnish, Estonian, and Sami languages, which are all based on the Latin script. Abandonment of the right of indigenous peoples to control their scripts contributes to the violation of their right to self-determination and identity, and prevents them from developing their language in a historically and culturally appropriate way.

## 2. The Right to Revitalize, Use, Develop and Transmit

Leading Russian researchers believe that the educational system plays a leading role in language preservation and revitalization. Vep-sian scholar Zinaida Strogaltshikova<sup>300</sup> has written that “education is the primary guarantor of preservation of indigenous languages:”

It is education that forms and raises both humans and civilians. There is therefore a vital need for a special program or sub-program that is aimed at the preservation of languages spoken by minorities with small populations. I must underline that, for many children, their native language is no longer native, and we must therefore adjust our approach to teaching these languages as if they are foreign languages.<sup>301</sup>

Linguist Olga Kazakevich agrees that school can be a significant factor in the destiny of languages. While it is common practice in Russian schools to teach indigenous languages once a week in the first four grades, scholars believe that deploying a full-fledged language program starting with three lessons per week would have positive results.<sup>302</sup>

Ruslan Garipov goes even further by suggesting a change to the purpose of education—shifting the focus away from the integration of indigenous populations into mainstream society and toward the preservation and promotion of cultural diversity. For this shift to happen, he proposes including cultural and linguistic diversity concepts into course

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Sciences Regarding Use of Cyrillic or Latin Script, No. 14405-01-218 (Sept. 26, 2017) (on file with the authors). The choice of script could also be seen as constituting a medium of expression pursuant to the “freedom of expression” contained in various human rights instruments. *See, e.g.*, G.A. Res. 217 (III) A, Universal Declaration of Human Rights at art. 19 (Dec. 10, 1948).

300. Zinaida Strogaltshikova is a Senior Researcher of the Institute of Language, Literature and History of the Karelian Research Center of the Russian Academy of Sciences and Chair of the Association of the Teachers of Native Languages and Literatures of Indigenous Small-Numbered Peoples of the North, Siberia and the Far East.

301. Irina Akhmedova, Zinaida Strogaltshikova, “The Main Guarantor of the Preservation of the Languages of Small Peoples is the Field of Education,” UGRA-NEWS (MAR. 21, 2019), [https://ugra-news.ru/article/zinaida\\_strogaltshikova\\_glavnym\\_garantom\\_sokhraneniya\\_yazykov\\_malochislennykh\\_narodov\\_yavlyaetsya\\_s](https://ugra-news.ru/article/zinaida_strogaltshikova_glavnym_garantom_sokhraneniya_yazykov_malochislennykh_narodov_yavlyaetsya_s) [<https://perma.cc/49G8-TF59>].

302. Gylman, *supra* note 274.

curricula, and even encourages the adoption of some of Tsarist Russia's educational concepts with respect to indigenous peoples.<sup>303</sup>

Indigenous peoples' own views on the role of education is very similar. For example, the Congress of the Karelian people and Congresses of Finno-Ugric Peoples of Russia have repeatedly asked for the establishment of an ethnic school department within the federal and subnational ministries of education.<sup>304</sup> Indigenous peoples believe that this institutional improvement would help build the formal educational infrastructure required to maintain the uninterrupted teaching of indigenous languages in kindergartens, schools and universities. This model would also allow for the departure from teaching indigenous languages as just a subject, toward the establishment of real ethnic schools with indigenous languages as the languages of instruction. Such an aspirational model can be found in New Zealand,<sup>305</sup> where Maori is a language of instruction in kindergartens, schools and universities, showing that an educational system can function to support revitalization and further maintenance of indigenous languages. As Annika Pasanen has explained:

A language nest is a day-care facility for pre-school age children in an area where a certain minority language is spoken. The idea behind the language nest is the same as in early, complete language immersion: the children who come into the language nest are mostly speakers of the majority language, and from their first minutes in the language nest, the carers will only speak the minority language to them.<sup>306</sup>

The 'Kohanga Reo' Language nest was established in early 1980's in New Zealand as Maori early childhood immersion and culturally supportive sites in order to teach 'Te Reo' the Maori language and peoples' customs. This methodology later expanded to other indigenous territories. In the 1980's, language nests were launched in Hawaii under the name 'Aha Punana Leo,' and in the 1990's, language nests appeared in Finland to revitalize Inari Sami language. The first indigenous language nest in Canadian British Columbia was started in 1987, and then

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303. Garipov, *supra* note 253, at 4.

304. REZOLIŬTŠIĀ VI s"ezda Obshcherossiiskogo obshchestvennogo dvizheniĀ AssotsiatšiiĀ finno-ugorskikh narodov Rossiiskoi Federatsii [Resolution VI Congress of the All-Russian Social Movement "Association of Finno-Ugric Peoples of the Russian Federation"], (Sept. 27–29, 2017).

305. *New Zealand the Educational System—Overview* (2019), STATEUNIVERSITY EDUC. ENCYCLOPEDIA, <https://education.stateuniversity.com/pages/1080/New-Zealand-EDUCATIONAL-SYSTEM-OVERVIEW.html> [<https://perma.cc/XE8R-8UPC>] (last visited Jan. 31, 2020).

306. Annika Pasanen, *The Language Nest*, VISAT (APR. 21–23, 2015), <http://www.visat.cat/articles/eng/116/the-language-nest.html> [<https://perma.cc/UMU8-5UKJ>].



expanded throughout Canada,<sup>307</sup> Australia, United States and other countries. The method has shown proved results in relatively quick increase in language speakers in communities where language natural acquisition in families from generation to another has interrupted. For example, in New Zealand, the number of speakers has increased up to a few percentage points since 1982.<sup>308</sup> As the author Ulla Aikio-Puoskari has written, “The start of the Inari Sámi–medium education in 2000 can be considered one of the most remarkable outcomes of language nest activities”.<sup>309</sup> Success of the immersion program has also changed the attitude of parents who initially believed that fluency in the native language provided for both increased career opportunities and enabling them ‘to learn the traditional cultures, values, beliefs and way of thinking’.<sup>310</sup>

Nevertheless, while linguists believe in the power of education, such linguists remain skeptical of the longterm viability of critically endangered languages with only tens or hundreds of speakers. They believe that languages spoken by so few people cannot be rescued even with strong support programs and significant financial support.

A different approach is perhaps best articulated by Andrey Kibrik, the Director of the Institute of Linguistics of the Russian Academy of Sciences. Kibrik states that, because language is a living thing, it is impossible to transmit in the formal setting of the classroom. For this reason, the school is not the right environment for language revitalization.<sup>311</sup>

As a language activist and coordinator of an online group “Strana Yazikov” (Country of Languages), Vasily Kharitonov argues that linguistic communities should not rely only on formal education and thereby limit their revitalization measures to the mere creation of textbooks. Kharitonov argues that grassroots-level language initiatives

307. CHIEF ATAHM SCHOOL CURRICULUM TEAM, FIRST NATIONS LANGUAGE NESTS: YOUR GUIDE TO OPERATING A SUCCESSFUL LANGUAGE PROGRAM FOR THE VERY YOUNG 8 (2009) (detailing the language nest concept and providing practical guidance for creating a youth language immersion program).

308. *New Zealand: The Maori*, AL JAZEERA (Jul. 14, 2014, 7:10 PM), <https://www.aljazeera.com/programmes/livingthelanguage/2012/04/2012416141630195978.html> [<https://perma.cc/XG7S-92AGJ>] (reporting on the success of the language nest model in New Zealand).

309. Ulla Aikio-Puoskari, *Revitalization of Sámi Languages in Three Nordic Countries*, in ROUTLEDGE HANDBOOK OF LANGUAGE REVITALIZATION 355, 357 (2018).

310. *Language Shift and Revitalization of Te Reo Māori*, LANGUAGE CONTACT, <https://sites.google.com/site/hongkonglinguistics/Downhome/language-shift/te-reo-maori> [<https://perma.cc/8T32-2SNHJ>].

311. *Liudi ne mogut byt' eksponatami etnograficheskogo muzeia [People Cannot be Exhibits in an Ethnographic Museum]*, KOMMERSANT (Mar. 21, 2019, 1:02 PM), <https://www.kommersant.ru/doc/3917580> [<https://perma.cc/7XSW-249EJ>].

can have a much more significant impact on indigenous language preservation.<sup>312</sup> Although the primary responsibility for the vitality of a language belongs to the linguistic community that speaks that language, it is crucial for other stakeholders to support the right to revitalize native languages. Many indigenous local communities and individual language activists across Russia exercise this right through activities and projects devoted to enlarging spheres of language use. Thanks to this community-based civic activism, indigenous peoples can create contemporary and unique content which need not always relate to the history and culture of the respective language community.<sup>313</sup> One example is creation of a video course of breathing exercises for women in the Karelian language, which contributes both to enhancing health and learning new vocabulary in the language.<sup>314</sup>

Furthermore, six civil society organizations in the Baltic Sea region from Russia, Estonia, Latvia, and Finland are building a Civil Society Network for Revitalizing Indigenous Languages.<sup>315</sup> In practical terms, this network provides mini grants for innovative local initiatives, which are implemented at the intersection of crafts, arts, cuisine, and languages. Indigenous activists offer language quests for children, popularize indigenous wisdom via car stickers, revive traditional place names through 3D maps, and promote scripts by making design product lines for offices. The concluding document of the First Forum of Finno-Ugric Language Activism suggests that the educational system and civic activism are interlinked and have equal significance in the preservation of languages. For example, a civil society might work with parents, in order to convince them of the importance of learning indigenous languages and popularizing languages via implementing informal language initiatives.<sup>316</sup>

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312. Vasily Kharitonov, Remarks at the International Symposium on Indigenous Languages in Sakhalin, Russia (Feb. 22–23, 2019).

313. See, e.g., *Karelian Movement*, NUORI KARJALA, <http://nuorikarjala.ru/en/motion/news/korennnye-narody-berut-otvetstvennost-za-sokhranenie-yazykov> [https://perma.cc/73VZ-RLC3].

314. See Association of Ethnocultural Centres and Heritage Organisations (ECHO), *Breathing Exercises Video Course in Karelian*, SANA 2019, <http://sana2019.ee/en/breathing> [https://perma.cc/LKA6-9KY6] (last visited Jan. 31, 2020).

315. *Ten Initiatives by Language Activists to be Implemented During the International Year of Indigenous Languages 2019*, NUORI KARJALA, <http://nuorikarjala.ru/en/motion/news/desyat-proektov-yazykovykh-aktivistov-budut-realizovany-v-mezhdunarodnyy-god-yazykov-korennnykh-narod> [https://perma.cc/6BDL-HTUS].

316. *Outcome Document, First Forum of Finno-Ugric Language Activism*, NUORI KARJALA, [http://nuorikarjala.ru/download/Outcome%20document\\_Language%20activism%20forum\\_ENG.pdf](http://nuorikarjala.ru/download/Outcome%20document_Language%20activism%20forum_ENG.pdf) [https://perma.cc/9VZA-WR47].

One of the Forum participants, Natalia Antonova, a language activist from the Republic of Karelia, posits that language activists play an important role in society, but should not be overburdened by functions that belong to the governmental educational system.<sup>317</sup> The forum of Finno-Ugric Language Activism further suggests that the civil society must work in partnership with the state and should not serve the government's function with respect to ensuring language rights. Removing indigenous languages from the educational system is certain to negatively impact the status, standing, and prestige of these languages.<sup>318</sup>

One novel approach to language preservation worth highlighting is that of Karelian Language House. Karelian Language House is not only an indigenous NGO, but a physical coworking space in the village of Vielyarvi, where the local linguistic community can come together in the spirit of revitalizing the use of a native language through one of many group activities: producing handicrafts, cooking, singing in a village chorus, or performing in a local amateur theatre. This small local community has also been commended for taking the lead on an additional program called "the language nest," which has been recognized by the United Nations as an advanced practice in indigenous language preservation.<sup>319</sup>

Following its inception by the Maori in New Zealand, the language nest approach came to Russia via Finland, where it has been successfully used for the revitalization of the Inari Sami and Skolt Sami languages.<sup>320</sup> However, Russian federal authorities refused to adopt the language nest program, suggesting that the method causes the ethnic segregation of children, and creates inequality and unequal access to opportunities among students.<sup>321</sup> Despite the lack of support from the Russian government, Russian linguist Andrey Kibrik denies that fluency in an indigenous language constitutes an obstacle to learning the state language of the country, obtaining a general or higher education, and being competitive in the labor market.<sup>322</sup> In fact, he suggests that the opposite is true: language nests facilitate bilingual

317. See *Indigenous Peoples Hold Primary Responsibility for the Preservation of Their Languages*, NUORI KARJALA, <http://nuorikarjala.ru/en/motion/news/korennyie-narody-be-rut-otvetstvennost-za-sokhranenie-yazykov> [https://perma.cc/6G5K-8QFM] (last visited Mar. 3, 2020).

318. *Outcome Document*, *supra* note 316.

319. U.N. Econ. & Soc. Council, Permanent Forum on Indigenous Issues, 15th Sess., expert group mtg., U.N. Doc.E/C.19/2016/10 (Feb. 29, 2016).

320. Association of Ethnocultural Centres and Heritage Organisations (ECHO), *supra* note 314.

321. COUNCIL OF EUROPE, *supra* note 51.

322. KOMMERSANT, *supra* note 311.

education, providing a competitive advantage both in education and the job market.<sup>323</sup>

As noted above, ILO Convention 169, Article 28 also speaks in favor of methods such as language nests. Experts read Article 28 of ILO Convention 169 as endorsing a model of “controlled segregation” versus integration into the dominating population.<sup>324</sup> This model is not directed against the majority in society, but should instead be seen as a positive measure, as it serves as a final effort at creating a safeguard that enables intergenerational communication in indigenous languages. Indeed, linguistic communities themselves do not tend to consider language nests as an effort to segregate, but rather, view them as an effort to welcome representatives of other peoples and to learn their languages.

The European Charter for Regional or Minority Languages introduces and legally stipulates the concept of positive measures for indigenous language preservation:

It is clear today that, by reason of the weakness of numerous regional or minority languages, the mere prohibition of discrimination is not sufficient to ensure their survival. They need positive support . . . . [I]t is left up to the States to determine the manner in which they intend to act to promote regional or minority languages in order to preserve them, but the charter emphasizes that such action must be resolute.<sup>325</sup>

On the other hand, the Charter underlines that these measures do not promote the supremacy of a supported language or destroy linguistic equality.<sup>326</sup>

The adoption of special measures in favor of regional or minority languages aimed at promoting equality between the users of these languages and the rest of the population or which take due account of their specific conditions is not considered to be an act of discrimination against the users of more widely-used languages.

While language nests are useful for settled communities, nomadic indigenous communities would need other culturally appropriate models. Understanding the negative experience of boarding schools, the Russian government has introduced a nomadic school method, which ensures access to education without taking children from their families,

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323. Psychologists debate the relationship between bilingualism and mental control. See Ed Yong, *The Bitter Fight Over the Benefits of Bilingualism*, THE ATLANTIC (Feb. 10, 2016), <https://www.theatlantic.com/science/archive/2016/02/the-battle-over-bilingualism/462114> [https://perma.cc/82JT-DUJT].

324. MART RANNUT, POSOBIE PO JAZYKOVOL POLITIKE [THE LANGUAGE POLICY GUIDE] 94–95 (2004).

325. ECRML, *supra* note 73, ¶ 61.

326. Kryazhkov, *supra* note 281.

and without harm to their physical and mental health. This method also allows for the preservation of native languages and cultures via traditional occupations. When children grow up in their natural environment, they learn traditional vocation-related vocabulary in the proper context by learning this vocabulary through the practice of a traditional vocation. This educational practice might be appropriate for indigenous peoples living in the conditions of the Arctic and practicing reindeer husbandry in the tundra. Nenets elders claim that their children can manage reindeer alone by the age of twelve if they stay with the family and learn the language and vocabulary associated with the profession, whereas children at the age of sixteen are incapable of managing reindeer alone if they are taken to a boarding school.<sup>327</sup> For children to be raised with competence in their cultural traditions, they must have mobile schools that can accompany them and the reindeer.

Some parents, however, are inclined to be skeptical of mobile schools and native language preservation in general because they believe that indigenous languages are not viable and not practically useful for children. In some communities, this skepticism is tied to the assumption that indigenous languages are underdeveloped, lack sufficient modern vocabulary and sophisticated legal terminology, and therefore cannot be used in higher education, courts, or science. Indigenous peoples' rights to determine their future should naturally include the right to develop of their languages. In Russia, language commissions (Terms and Spelling Commissions) normally work under executive authorities, in some cases even under the heads of republics.<sup>328</sup> The duties of these commissions include language planning, rationing, and the development of vocabulary and official translations. The United Nations Declaration on the Rights of Indigenous Peoples has been translated into various Finno-Ugric languages in Russia with the support of language commissions. Sometimes language development is the subject of cooperation between indigenous communities and the private sector. In the Russian Far East, for example, Sakhalin Energy Company, in conjunction with indigenous peoples and government authorities, has adopted a cooperation plan with a strong language component, including yearly conferences in indigenous languages and

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327. Sergey Kharychi, Remarks at the International Symposium on Indigenous Languages in Sakhalin, Russia (Feb. 22, 2019).

328. Alexey Tsykarev & Vasily Nemechkin, *Expert Mechanism on the Rights of Indigenous Peoples, Indigenous Peoples and Access to Information (Examples of the Republic of Karelia and the Republic of Mordovia)*, at 17, U.N. Doc. A/HRC/EMRIP/2018/CRP.3 (Jul. 9, 2018) (detailing the structure of language commissions in Karelia and Mordovia).

translation of laws and artistic masterpieces into local Nivkh indigenous language.<sup>329</sup>

In modern societies, the vitality of languages depends on more than just their use in education, media and administration.<sup>330</sup> Indigenous peoples would like to have access to the Internet and modern information and communication technologies. Countries such as Estonia push for access to the Internet as a human right, which also includes the right to information, income and communication.<sup>331</sup> This emerging human right should also apply to indigenous peoples.<sup>332</sup> The International Conference on Preservation of World Languages in Cyberspace addressed the issue of substandard cyberinfrastructure in remote indigenous settlements. Poor cyberinfrastructure denies teachers of the ability to use the Internet for language teaching purposes, and to communicate with common indigenous language speakers from settlements thousands of kilometers away. To remedy this problem, indigenous languages should be well-represented in cyberspace and increased use of technology. Indigenous language activists have begun the process of increasing access to Internet and information by developing indigenous language versions of Wikipedia, translating interfaces of social media resources into indigenous languages, and creating online dictionaries, and therefore providing access to Internet in the language indigenous peoples can understand. The interregional Laboratory of Information Support for Finno-Ugric Languages in the Republic of Komi has contributed to the digitalization and documentation of many indigenous languages of Russia.<sup>333</sup> In the republics of Sakha (Yakutia)<sup>334</sup> and Karelia,<sup>335</sup> indigenous

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329. *Sakhalin Indigenous Minorities Development Plan*, SAKHALIN ENERGY, <http://www.sakhalinenergy.ru/en/social/programmes/simdp> [<https://perma.cc/7JCF-GS9D>] (last visited Jan. 31, 2020).

330. KONSTANTIN ZAMIATIN ET. AL, KAK I ZACHEM SOKHRANIAT' IAZYKI NARODOV ROSSII? [HOW AND WHY TO SAVE THE LANGUAGES OF THE PEOPLES OF RUSSIA?] 24 (2012).

331. *Estonia is a Digital Society*, VISIT ESTONIA (last updated Jan. 3, 2020), <https://www.visitestonia.com/en/why-estonia/estonia-is-a-digital-society> [<https://perma.cc/T28G-XQRU>].

332. Oliver Loode, *Remarks at the 11th Session of the U.N. Permanent Forum on Indigenous Peoples*, YOUTUBE (May 16, 2012), <https://www.youtube.com/watch?v=t71V9O3txcM>.

333. *Mezhregional'naiia laboratoriia informatsionnoi podderzhki funktsionirovaniia finno-ugorskikh iazykov* [Interregional Laboratory of Information Support for the Functioning of Finno-Ugric Languages], FU-LAB, <http://fu-lab.ru/laboratoriya> [<https://perma.cc/U24T-ZFUU>] (last visited Jan. 16, 2020).

334. *Mul'timediinyi portal dlia obshcheniia na iazykax narodov Severa razrabotali v Iakutii* [A Multimedia Portal for Communication in the Languages of the Peoples of the North Was Developed in Yakutia], RAMBLER (Feb. 7, 2019), <https://news.rambler.ru/other/41684526-multimediynny-portal-dlya-obscheniya-na-yazykah-narodov-severa-razrabotali-v-yakutii> [<https://perma.cc/DP53-49D4>].

335. Human Rights Council, *supra* note 284, at 5.

peoples work on multilingual internet portals in order to create unique content in indigenous languages. Indigenous community-led language revitalization initiatives in Kamchatka have reached young audiences and made use of new technological opportunities without significant financial resources: online music channels with subtitled recordings of indigenous language songs (Itelmen karaoke) and a smartphone application to facilitate language discussion groups in Itelmen have been particularly useful.<sup>336</sup>

### 3. Implementing Human Rights

The Russian Constitutional Court has interpreted Article 68.3 of the Constitution to ensure the rights of all peoples of the Russian Federation to preserve their native language and to guarantee the conditions necessary for their study and development.<sup>337</sup> This interpretation has the potential to meet the standards of international human rights law, including the recognition of both Russian and indigenous languages as state languages in each Republic.<sup>338</sup> A bilingual or multilingual model would better serve the rights of indigenous peoples to obtain education in their own language and to learn the national state language of the country, as envisioned by the Declaration. In our view, this approach would not only improve the general quality of education and assist in sustainable nationbuilding efforts, but would also promote peace and prevent additional societal conflict.

Yet, while the Constitutional Court seems to support this approach as a matter of law, there are a number of political impediments to its realization, including a failure to respect the self-determination of indigenous peoples in setting language policy and the perception that multilingualism undermines national security.

The Russian Federation has failed to acknowledge indigenous peoples as equal partners in determining language policy.<sup>339</sup> As a result, while Russia has a highly detailed legislative framework on languages, it is not consistent with the real needs of linguistic communities who require flexibility to adopt novel and particularized measures for language revitalization and maintenance. Moreover, by failing to recognize historical harms or intergenerational trauma caused by denial of

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336. U.N. Econ. & Soc. Council, *supra* note 319.

337. Resolution of the Constitutional Court No. 16, *supra* note 298.

338. *Id.*

339. For treatment of the issue of indigenous peoples' participation in issues of language and culture in Russia, *see, e.g.*, Alexandra Xanthaki, *Indigenous Rights in the Russian Federation: The Case of Numerically Small Peoples of the Russian North, Siberia, and Far East*, 26 HUM. RTS. Q. 74, 84–88 (2004).

indigenous language rights in the past, Russian language policy is bereft of remedial insights and approaches to current language issues. Going forward, linguistic communities must have the opportunity to provide free and informed consent in all efforts that relate to their languages. Cooperation based on proper consultation, participation and consent would avoid the mistakes made by governments and researchers when they imposed scripts, methodologies or strategies on how to save indigenous and minority languages from extinction. In Karelia, for example, after significant resources were devoted to developing a “unified language” by a small group of elite researchers in academic institutions, the initiative was rejected by the Karelian people who had their own pedagogies and insights for language revitalization.

Relatedly, cooperation with indigenous peoples can help to develop the data that will be instrumental to enhancing language policy-making. Indigenous peoples can assist federal and regional authorities to better train census employees and improve questionnaires tracking indigenous population demographic data. One small step recently undertaken toward this goal was allowing for census respondents to mention two native languages instead of one. In terms of comparative lessons of this Article, it may be helpful for Russian advocates to consider research in the United States that has begun to explore the role of indigenous peoples in contributing to assessments of language vitality.<sup>340</sup>

The next step to be taken after full inclusion of indigenous peoples in policymaking processes, is public promotion of linguistic diversity as a substantive matter. Indigenous languages benefit when their prestige is restored and they are considered assets to economic and social wellbeing. Research can help to dispel assumptions that indigenous languages burden states, by showing for example how multilingualism

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340. See, e.g., Tyler Peterson & Ofelia Zepeda, *Workshop: Assessing and Documenting the Vitality of Native American Languages* (2016) (abstract available at [https://www.nsf.gov/awardsearch/showAward?AWD\\_ID=1601738](https://www.nsf.gov/awardsearch/showAward?AWD_ID=1601738)) (“Currently, there is no systematic assessment of the Native American languages of the United States and their vitality . . . [T]his project will review existing assessment tools and survey methodologies with the goal of enabling participants to create new and innovative assessment tools that address this need. Participants will [include] Native Americans who are currently engaged in language work, as citizen scientists, educators, and staff and students at tribal colleges and universities. This project has the potential to inform policy decisions and implementations in national and international contexts. In addition, it will create a cohort of indigenous citizen scientists well-versed in scientific activities that include research protocols, assessment design and use, data analysis and more.”).



fosters diversity in the labor market.<sup>341</sup> Studies by the World Bank<sup>342</sup> and United Nations,<sup>343</sup> moreover, reveal that indigenous languages may help to foster tourism and culture-based businesses in rural areas. Use of indigenous minority languages has also been linked to social cohesion, social status, and the economic wellbeing of speakers—fostering the political and social stability of states and peace in indigenous communities.<sup>344</sup>

Despite these positive accounts in Russia, many policy makers continue to see indigenous languages as undermining national security. Consider, for example, the Karelian peoples' movement to secure state status for the indigenous Karelian language in the Republic of Karelia. Because the Karelian language is related to Finnish, some members of the republican parliament consider this effort as potentially threatening to Russian hegemony, and therefore, unsettling to peace and security in the region. Proponents of the national security approach also argue that a recognizing Karelian as a state language would disadvantage citizens who do not speak Karelian. Such arguments successfully led to the amendment of the Constitution of the Republic of Karelia now requiring a referendum to establish any state language beyond Russian in the Republic. Because Karelians represents only seven percent of the population of the Republic, the Constitutional amendment make it highly unlikely that the indigenous language of the Republic will ever be recognized as a state language.

Finally, states should understand the multidimensional character of indigenous languages and the indivisibility of human rights. It is not possible to reform healthcare services in indigenous language-speaking areas without using these languages in hospitals. Sociocultural assessment of infrastructure projects on indigenous lands must include use of the languages and an assess impact of economic activities on languages, cultures and health.<sup>345</sup> For many linguistic communities divided

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341. See generally Ruslan Garipov, *Labor Market Integration of Indigenous Youth in the Republic of Karelia, Russia*, INT'L J. MINORITY & GROUP RTS. 1 (2019).

342. Svetlana Kolchurina et al., *Socio-Economic Development Through Finno-Ugric Culture in Kalevsky District, the Republic of Karelia: Final Report*, WORLD BANK 75 (2016).

343. Expert Mechanism on the Rights of Indigenous Peoples, Good Practices and Challenges, Including Discrimination, in Business and in Access to Financial Services by Indigenous Peoples, in Particular Indigenous Women and Indigenous Persons with Disabilities, U.N. Doc. A/HRC/36/53, at 14 (Aug. 8, 2017).

344. Tove Skutnabb-Kangas & Robert Phillipson, *Linguistic Rights, Past and Present*, in LINGUISTIC HUMAN RIGHTS: OVERCOMING LINGUISTIC DISCRIMINATION 96 (Skutnabb-Kangas & Robert Phillipson eds., 1995).

345. See, e.g., D.H. Whalen et al., *Healing Through Language: Positive Physical Health Effects of Indigenous Language Use*, 5 F1000 RES. 852, 856 (2016).

by international and administrative borders, it is also crucial to ensure equal rights and guarantees for all community members on different sides of the borders. The right to use indigenous languages is often critical to voting, political participation, and expression of conscience in indigenous peoples. In short, if the Russian Federation and other countries wish to ensure democratic processes, they must protect the right to indigenous languages.

## CONCLUSION

Indigenous peoples' languages are critical to indigenous worldviews, as well as democracy and human right more broadly.<sup>346</sup> IYIL2019 ushered in awareness of the possibilities and challenges associated with indigenous peoples and their language rights. International human rights instruments and frameworks have developed in recent years, particularly with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples, and now offer guidance regarding the rights of indigenous peoples and the obligations of states in the realm of indigenous peoples' languages. There is additional interpretive guidance and advice available from the United Nations.<sup>347</sup> At the same time, indigenous peoples, are increasingly asserting rights to speak their languages and pressing for measures to realize these rights. Their empowerment is an aspect of the local, national, and international dynamics of the indigenous languages movement.

Accordingly, the Strategic Outcome Document of IYIL2019 calls for a multistakeholder approach to a multilingual future.<sup>348</sup> Recognizing that universal human rights "can be more fully realized when indigenous peoples are free to speak, think, and live in their own languages" and that "the impacts of hundreds of years of language suppression or neglect cannot be reversed in one single year," the General Assembly proclaimed a full decade to work on these issues going forward. Our understanding is that the decade will build on the awareness raised

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346. *Evo Morales: 'Indigenous Languages Are Part of Our Identities'*, TELESUR (Feb. 1, 2019), <https://www.telesurenglish.net/news/Evo-Morales-Indigenous-Languages-Are-Part-of-Our-Identities-20190201-0016.html> [<https://perma.cc/Z49H-AF4W>] ("The loss of a language means the loss of a worldview; a decline and belittling of human intelligence . . . Today we keep resisting the post-colonial anger that tries to crush our rebellions against injustice . . . They speak to Indigenous people about democracy and human rights. Can there be democracy or rights when our indigenous peoples live crushed by the tyranny of capital.").

347. See, e.g., Expert Mechanism on the Rights of Indigenous Peoples, *supra* note 13.

348. Records of the General Conference, *UNESCO Strategic Outcome Document of the 2019 International Year of Indigenous Languages*, UNESCO Doc. 40 C/68 (Nov. 15, 2019).

during 2019 and create platforms for cooperative implementation of indigenous peoples' language rights going forward. These efforts will be guided by a human rights framework and involve other domains from biodiversity to reconciliation.<sup>349</sup> Goals include understanding and facilitating the role of indigenous languages in peacebuilding and sustainable development.<sup>350</sup>

Additionally, our analysis of the situation in the United States and Russia suggests several points that we would like to offer for further consideration during the IDIL2022–2032.

Even amongst the widely divergent histories and political identities of the United States and Russia, it is clear that indigenous peoples' languages have been perceived as threatening to national hegemony. Both countries suppressed indigenous languages in ways that contributed to the endangered status of indigenous languages and discrimination faced by speakers. Observers may note that these policies are largely in the past and indigenous peoples are “free” to learn and use their languages today. But this is not entirely accurate for two reasons. First, these past acts have not yet been remedied. The historical suppression of indigenous languages disrupted intergenerational learning, brought about individual and collective trauma, and diminished confidence and pride in the language. It has also created gaps in usage such that many communities lack not only fluent speakers but also contemporary media, schools, literatures, and professional terminologies in their indigenous languages. These problems remain, albeit complicated and contextualized through the experiences of each country.

Second, even while policies have changed somewhat in favor of indigenous peoples' self-determination in the realms of language and culture, contemporary iterations of nationalism continue to suppress indigenous languages. In the United States, indigenous peoples find themselves enveloped in both formal and informal discrimination against racial minorities and non-Englishspeaking migrants, in the areas of legal services, health, education, employment, and voting. In Russia, the move for independence by former Soviet republics undergirds concerns that indigenous peoples might follow suit, leading to laws that diminish the status of indigenous languages and ostensibly the political

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349. See *id.* annex, 4 (“Highlight[ing] an urgent need to promote, strengthen and mainstream indigenous languages across social, cultural, economic, environmental, political, scientific and technological domains, and to acknowledge their importance for peace-building, sustainable development, biodiversity, the mitigation, and adaptation of climate change, and reconciliation processes in society”).

350. See *id.* annex, 4.

and cultural unity that accompany them. Thus discrimination against indigenous peoples and their languages is not fully in the past.

It is important for indigenous peoples in these countries, and in all countries, to consider the deeper sources of opposition to their language aspirations. When critics claim that indigenous peoples are indifferent about their languages or ascribe the lack of resources for language programs to benign forces, a deeper inquiry may reveal more insidious or structural problems. Surely indigenous peoples have individual and collective responsibilities to learn and transmit the languages, but they are often up against iterations of nationalism that have not fully embraced the multilingual or plurilingual realities of today's global society.<sup>351</sup> While concerns about national unity and security are often paramount, contemporary democracies must recognize that these concerns must go hand in hand with human rights, including indigenous peoples' language rights.

Against all of these historical challenges and their contemporary legacies, indigenous peoples in both countries are determined to protect and revitalize their languages. As examples throughout this Article suggest, this movement is not about outsiders saving indigenous languages but rather about indigenous peoples' own activism and aspirations.<sup>352</sup> Myriad examples from the United States and Russia reveal how indigenous peoples desire to reclaim, use, revitalize, and transmit their languages. Whether Cherokee or Karelian, Wampanoag or Nenets, indigenous peoples in settings rural, urban, traditional, and developed, are working on their languages. They often have deeply felt aspirations, difficult to put into practice after generations of discrimination and oppression.

As we have argued, the UN Declaration on the Rights of Indigenous Peoples can support indigenous peoples' language rights advocacy. The Declaration sets a baseline that indigenous peoples have the rights to revitalize, use, develop, and transmit their languages to future generations. States must, at a minimum, incorporate the Declaration's standards on language rights in their national laws and policies, whether

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351. See Claudia Josi, *The Recognition Of Diversity In The New Bolivian Constitution: Reliance On Traditional Perspectives And Respect Of International Law*, 47 REV. JURIDICA U. INTER. P.R. 701, 701 (2012–13) ("The Bolivian constitutional reform of 2005 was the beginning of a political process that lead to the redefinition of national identity in the new constitution. Ancestral values and traditions, as well as internationally recognized standards concerning the rights of indigenous people, have been incorporated in this reform and have modified and strengthened the respect for diversity in this new constitution").

352. See generally Gregory Bigler & Mary S. Linn, *Acting Responsibly: Linguists in American Indian Communities*, 21 PRACTICING ANTHROPOLOGY 34 (1999).

by constitution, statute, or other mechanism. States must also remedy past harms in the realm of language and related rights. Society must create the conditions where these rights can flourish in realms including family, media, communications, education, health, science, governance, economy, and entertainment.<sup>353</sup>

Even states with existing legislation supporting indigenous peoples' language rights, like the United States, must do better in terms of consulting with indigenous peoples regarding legal reform going forward. During the International Year, Russia announced a national action plan and national organizing committee on indigenous languages. This helped to facilitate indigenous peoples' participation in the United Nations' events and cooperation between indigenous peoples and the state. The United States and all countries should have national organizing committees, comprised of both state and indigenous leaders, for the Decade. The norms of self-determination, participation, and free, prior, and informed consent must guide these interactions between states and indigenous peoples during the Decade and beyond.

Recognizing language rights as human rights, both generally and in the indigenous peoples' context, would advance individual and collective dignity, culture, biodiversity and societal wellbeing going forward. In these ways, a human rights approach to indigenous languages transcends all of the legal and policy points that we have discussed. It involves solidarity among indigenous peoples and change in society more broadly, and an understanding that freedom of expression in indigenous languages is critical to humanity on an individual and collective basis. Inspired by the International Year, states and indigenous peoples have the opportunity to work together to ensure the use, preservation, revitalization, and transmission of indigenous languages into the International Decade. The time is now, before one more language or one more voice goes silent.

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353. For sources focusing on revitalization efforts in urban indigenous communities, *see, e.g.*, SARAH SHULIST, *TRANSFORMING INDIGENEITY: URBANIZATION AND LANGUAGE REVITALIZATION IN THE BRAZILIAN AMAZON* (2018); JENANNE FERGUSON, *WORDS LIKE BIRDS: SAKHA LANGUAGE DISCOURSES & PRACTICES IN THE CITY* (2019).

# RACE, GENDER, AND NATION IN AN AGE OF SHIFTING BORDERS: THE UNSTABLE PRISMS OF MOTHERHOOD AND MASCULINITY

Catherine Powell\*

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## INTRODUCTION

The contributions that critical race theory scholars have made to the literature on nation, borders, and sovereignty have become even more salient in the Age of Trump. However, what remains undertheorized is how *gender* intersects with race in the legal construction of nation and borders.<sup>1</sup> In particular, this Article analyzes two common tropes in the current immigration debate—the “welfare cheat” and the “criminal”—to demonstrate how these narratives shape legal constructs of nationhood and borders as both raced and gendered.<sup>2</sup> As part of

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1. This Article draws inspiration from the work of Kimberlé Crenshaw and others, whose pioneering work on intersectionality informs my work. See, e.g., Kimberlé W. Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberlé W. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

For foundational scholarship on intersectionality in the context of immigrant in particular, see, e.g., Leti Volpp, *Talking Culture: Gender, Race, Nation, and the Politics of Multiculturalism*, 96 COLUM. L. REV. 1573 (1995) (critiquing the use of the “cultural” defenses to justify violence against immigrant women); Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181 (2001) (critiquing Susan Moller Okin’s claim that immigrant communities are often less feminist-oriented); Kerry Abrams, *Polygamy, Prostitution, and the Federal Immigration Law*, 105 COLUM. L. REV. 641–716 (2005) (discussing how the nation’s first restrictive federal immigration statute targeted Chinese women immigrating to the United States); Rupaleem Bhuyan et al., *Regulating Spousal Migration Through Canada’s Multiple Border Strategy: The Gendered and Racial Effects of Structurally Embedded Borders*, 40 LAW & POL’Y 346 (2018) (examining how the regulation and discourse concerning marriage “fraud” in Canada continues to racialize immigrants in exclusionary ways, disproportionately impacting women). See also Laura Ho, Catherine Powell, and Leti Volpp, *(Dis)Assembling Rights of Women Workers Along the Global Assembly Line: Human Rights and the Garment Industry*, 31 HARV. C.R.-C.L. REV. 383, 384, n.5 (1996) (discussing how race and ethnicity have been used to limit the rights of certain categories of workers in predominantly female sectors).

While scholarship on the intersection of race and gender in the *current* immigration context is sparse, one scholar who has engaged this nexus in the context of Trump—though quite distinct from the focus of this Article is Leti Volpp. Building on her earlier work on how gender and race infuse immigration law and policy debates to pathologize immigrant culture, in her more recent work, Volpp brilliantly interrogates how the focus on “honor killings” in the Trump travel ban executive orders mainly serves to exoticize immigrant women from the excluded countries. Leti Volpp, *Protecting the Nation from “Honor Killings”: The Construction of a Problem*, 34 CONST. COMMENT. 101, 136–37 (2019) (critiquing the focus on “honor killings” in the Trump travel ban as a “cynical deployment of feminist concerns as a proxy for xenophobic exclusion[.]” where “[t]he project of ‘saving women’ is knitted into Islamophobia in the United States, with the literal barring of Muslims bodies from entering the United States in the name of purportedly protecting Muslim women from violence.”).

2. By adding gender explicitly into the equation for *men* (as well as women) of color, this Article builds on a conversation I hosted with Muneer Ahmad. In that conversation, Ahmad spoke about the use of *racialized* tropes in the immigration debate. See Catherine Powell & Abigail Van Buren, *Litigating the Family Separation Policy: A Conversation with Muneer Ahmad*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (NOV.

UCLA Law's symposium on *Critical Perspectives on Race and Human Rights: Transnational Reimaginings*, this Article seeks to address a gap in the literature, not only by examining what gender adds to today's legal debate over immigration, but also how gendered racial constructs of citizenship impact the legal rights of women *and* men, particularly through the unstable prisms of motherhood and masculinity. Based on tropes that are both raced and gendered—and specifically through the lenses of motherhood and masculinity—Trump promotes restrictive immigration policies, in effect, shifting U.S. borders inward and outward.<sup>3</sup> My analysis here builds upon and creatively expands the “shifting border” framework developed by Ayelet Shachar, who has called our attention to the colossal governmental authority gained by the ability to “shift” the location of the border—as a matter of law.<sup>4</sup>

On the one hand, Trump has mobilized stereotypes based on race and gender to “shift” borders *inward*, expanding “constitution-free” zones within U.S. borders.<sup>5</sup> As discussed more fully in Part II, the President accomplishes this by characterizing Latinas in particular as irresponsible mothers who bring their children to the United States or give birth to “anchor babies” in the country as a way to take advantage of the American welfare state.<sup>6</sup> By painting immigrant mothers in this way and separating children from their parents, Trump has sought to undermine longstanding legal standards that protect families who have crossed the border. By placing these families *outside* the law's protection, as if they had not crossed the border, Trump shifts the border inward.<sup>7</sup>

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5, 2018), <https://www.cfr.org/blog/litigating-family-separation-policy-conversation-muneer-ahmad> [https://perma.cc/8UVR-W59S] (blog summarizing Council on Foreign Relations roundtable conversation, led by Catherine Powell and Muneer Ahmad). By adding a gendered framing of men of color into the analysis, this Article also builds on my collaborative work with Camille Gear Rich on women of color. Catherine Powell and Camille Gear Rich, *The New “Welfare Queen”: Donald Meet Ronald, Ronald Meet Donald*, JUST SECURITY (Oct. 23, 2018), <https://www.justsecurity.org/61164/welfare-queen-donald-meet-ronald-ronald-meet-donald> [https://perma.cc/Q9JD-JCGL]. See also Camille Gear Rich, *Reclaiming the Welfare Queen: Feminist and Critical Race Theory Alternatives to Existing Anti-Poverty Discourse*, 25 S. CAL. INTERDISC. J. 257 (2016).

3. I am borrowing the notion of border shifting from Ayelet Shachar and Ran Hirschl. See Ayelet Shachar, *Bordering Migration, Migrating Borders*, 37 BERKELEY J. INT'L L. 93 (2019); Ran Hirschl & Ayelet Shachar, *Spatial Statism*, 17 INT'L J. OF CONS. L. 383 (2019).

4. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3.

5. For discussion and other examples of countries shifting borders inward (and creating “constitution-free” zones) see *id.* at 97, 104–108; Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 395–98.

6. Powell and Rich, *supra* note 2.

7. As discussed further, *infra*, in Subpart II.B, immigrant children in the United



Simultaneously, Trump “shifts” U.S. borders *outward* by stopping asylum seekers even before they arrive.<sup>8</sup> In order to do so, the President uses tropes of Latino and Muslim masculinity in ways that are both raced and gendered—deploying images of “bad hombres”<sup>9</sup> and “unknown Middle Eastern men”<sup>10</sup>—whom Trump unfairly stereotypes as threats, whether as criminals, gang members, rapists, or terrorists poised to spill over the Southern Border.<sup>11</sup> While commentators rightly note the racist assumptions underlying these stereotypes, few note the gendered dimensions of these tropes. For example, Trump’s invocation of rape as a gendered trope is no accident. He has cleverly manipulated stereotypes about the sexuality of Latin men as a means of dogwhistling to the anxieties of whites, given the long history of weaponizing these biased stereotypes, associating men of color with alleged crimes of sexual violence against white women in particular (from slavery to Emmett Till to the “Central Park Five” jogger case and beyond). After pitching the border wall as necessary to keep dangerous criminals and drugs from crossing over from Mexico, yet failing to secure congressional approval to sufficiently fund the wall,<sup>12</sup> Trump has been forced to

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States have certain protections by virtue of the *Flores* Settlement Agreement, a court settlement that has been in place for over two decades and that sets limits on the length of time and conditions under which children can be incarcerated in immigration detention, regardless of whether they come accompanied or unaccompanied by an adult to the United States. See *The Flores Settlement and Family Incarceration: A Brief History and Next Steps*, HUMAN RTS. FIRST (Oct. 30, 2018), <https://www.humanrightsfirst.org/resource/flores-settlement-and-family-incarceration-brief-history-and-next-steps> [https://perma.cc/DWH7-YNJH].

8. For other examples of countries shifting borders outwards, see Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 96–97, 108–15; Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 398–404.

9. Lizzy Gurdus, *Trump: ‘We Have Some Bad Hombres and We’re Going to Get Them Out’*, CNBC (Oct. 19, 2016), <https://www.cnbc.com/2016/10/19/trump-we-have-some-bad-hombres-and-were-going-to-get-them-out.html> [https://perma.cc/HN9L-T4M7] (quoting Trump in the third and final presidential debate with Democratic candidate, Hillary Clinton).

10. Sam Wolfson, *Are Donald Trump’s Claims About the Caravan of 7,000 Migrants Accurate?*, THE GUARDIAN (Oct. 24, 2018), <https://www.theguardian.com/us-news/2018/oct/22/fact-check-trumps-claims-migrant-caravan> [https://perma.cc/L9AY-T2XM].

11. For further discussion, see *infra* the discussion in Subparts III.A–B.

12. When Congress only approved a fraction of the money Trump sought, and following a lengthy government shutdown based on the impasse over border wall funding, the President declared a national emergency along the Mexican border as a basis for unilaterally spending billions more for “unforeseen military requirements.” Adam Liptak, *Supreme Court Lets Trump Proceed on Border Wall*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/us/politics/supreme-court-border-wall-trump.html> [https://perma.cc/FF3D-JAP7]. Note that at the time of writing this Article, the legality of the President’s decision to unilaterally fund the wall is playing out in the courts, with the Supreme Court having stayed a lower court injunction against the Trump administration, handing the President

settle for a variety of other tactics to stop individuals before they even arrive at a U.S. border (as discussed more fully in Part III).

Even as new border walls continue to be erected, as Ayelet Shachar notes, “a new and striking phenomenon—the *shifting border*—has emerged.”<sup>13</sup> As Shachar explains, “[t]he border itself has become a moving barrier, an unmoored legal construct” whereby “the fixed black lines we see in our world atlases do not always coincide with those comprehended in—indeed, created by—the words of law.”<sup>14</sup> As discussed in Part I, *infra*, the notion of the border as a legal construct is not new. But, using the framework of the “shifting border” provides a helpful spotlight on “the surge of state-controlled *invisible* borders—borders that rely on sophisticated legal techniques to detach migration control functions from a fixed territorial location[.]”<sup>15</sup>

By applying an analysis to the crossroads of gender and race in the Age of Trump, this Article provides new insights for understanding mechanisms underlying the border as a legal construct—even as Trump manipulates gender and race as socially constructed borders. By providing a new way of comprehending the work of raced and gendered narratives in shifting borders, this Article uncovers how Trump’s uses of these tropes are not only deeply offensive, but also materially devastating for those seeking entry into the United States.<sup>16</sup>

Trump’s policies are the latest iteration of oft-used tropes—which characterize female (and male) immigrants of color as undesirable—and yet, the gendered dimensions of Trump’s policies are not well-understood. In tracing the migration of race/gender tropes from African American exclusion to Latino and Muslim immigrant exclusion, this

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a temporary victory. *Trump v. Sierra Club*, 588 U.S. (2019), [https://www.supremecourt.gov/opinions/18pdf/19a60\\_o75p.pdf](https://www.supremecourt.gov/opinions/18pdf/19a60_o75p.pdf) [<https://perma.cc/MPL5-WRXG>].

13. Ayelet Shachar, *After the Berlin Wall: Shifting, Not Disappearing, Border 1* (unpublished Dec. 2018 draft paper on file with the author) [hereinafter Shachar, *Shifting, Not Disappearing, Border*].

14. *Id.* at 96. Elsewhere, Shachar notes, “This is so even as politicians frequently revert to images of a fixed legal spatiality when it comes to the rhetoric surrounding the exercise of sovereign authority, as in Donald Trump’s election promise to build an “impenetrable, physical, tall, powerful, beautiful . . . border wall.” *Id.* at 1, n.3.

15. Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 395.

16. See Adam Serwer, *The Cruelty is the Point*, THE ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104> [<https://perma.cc/TU9Z-FVWJ>] (noting “the Trump era is such a whirlwind of cruelty, that is can be hard to keep track”). There is an intimate connection between Trump’s “ritual rhetorical flaying of targets before his supporters” (often with mocking laughter concerning his glee toward exercising sheer power and sovereignty over the vulnerable) and the actual real world consequences of his policies, which restrict the life chances of the vulnerable (often fleeing violence and poverty). *Id.*

Article draws on what Jennifer Chacón refers to as “liminal legalities,” which “enable governmental actors to reassert and maintain control over populations identified as risky in ways that do not trigger the rights-protective schemes.”<sup>17</sup> Shifting borders permit the government to create and take advantage of these liminal legalities. Trump’s racial tropes, which turn on narratives of worthiness and “law and order,” entrench this liminal legal status.<sup>18</sup> This Article extends the notion of liminal legalities to the ways that gender intersects with race.

In so doing, this Article builds on the work of other scholars who have analyzed earlier uses of gender and race in restricting immigration and limiting the ability of certain categories of immigrant women to give birth in the United States. For example, as Kerry Abrams illustrates, the nation’s first restrictive federal immigration statute, the Page Law of 1875, targeted Chinese women immigrating to the United States and prevented the birth of their children in the country, thereby curbing the growth of a new generation of Chinese Americans.<sup>19</sup>

By examining how race and gender are woven together to produce this marginalized, liminal status in law—in the shadow of shifting borders—this Article seeks to address oversights in the literature. First, I demonstrate how an intersectional perspective can be a useful way of explaining the marginal status of both women and men of color in the current immigration context.<sup>20</sup> Here, I seek to provide a window into the recuperative project Trump is engaged in to “restore” the nation—and law—to the status quo ex ante of white male hegemony (“Mak[ing] America Great Again”). Second, by illustrating how these intersectional race/gender tropes have migrated from African Americans to Latinx and Muslim immigrants, the Article supports linkages for a politics that is at once feminist and transracial—bolstering the possibility for

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17. Jennifer M. Chacón, *Producing Liminal Legalities*, 92 DENV. U. L. REV. 709, 709 (2015).

18. Christopher Lasch, *Sanctuary Cities and Dog Whistle Politics*, 42 NEW ENG. J. CRIM. & CIV. CONFINEMENT 159, 163 (2016) (tracing the “law and order” discourse back to President Richard Nixon); Powell & Van Buren, *supra* note 2 (discussing Ahmad’s examination of “worthiness”).

19. Abrams, *Polygamy, Prostitution, and the Federal Immigration Law*, *supra* note 1. While it is useful to consider how gender and race tropes may have migrated from the context of Asian immigrants to the current context involving Latinos, it is beyond the scope of this Article.

20. For important exploration of the role of gender and masculinity for men in other contexts, *cf.* BLACK MEN ON RACE, GENDER, AND SEXUALITY: A CRITICAL READER (Devon Carbado ed., 1999); POLICING THE BLACK MAN: ARREST, PROSECUTION, AND IMPRISONMENT (Angela J. Davis ed., 2017).

solidarity across difference to build a more inclusive vision of nationhood and governance.

While neither Latinx nor Muslim identity are racial statuses per se, this Article explores Trump's deployment of these identities as "raced." Critical race scholars have noted how Latinx and Muslim identities (and identities of other immigrants of color) have been racialized to the extent social construction of these identities operates along similar lines as racial hierarchies of dominance and subordination.<sup>21</sup> As discussed in further detail, *infra* (in Part III), Muslims have often been unfairly profiled based on race: identified as "terrorists" based on perceptions of physical markers of "Muslim-looking" identity (as opposed to actual religious affiliation), which has led to Sikhs, Hindus, and other non-Muslim men being suspected of terrorism.<sup>22</sup> Further, as Chacón notes, Latinos who are noncitizens and citizens alike are profiled—including in the context of immigration enforcement—and can be "policed more heavily because they bear the visible markers of race or ethnicity that correlate to other forms of liminal legal status."<sup>23</sup>

In order to create space for alternative national stories, it is necessary to destabilize illiberal constructions of nationhood and borders. As Jill Lepore points out, "A nation born in contradiction will forever fight over the meaning of its history."<sup>24</sup> Without coherent national stories, tribal and illiberal forces have sought to coopt what it means to be America. A thorough deconstruction of how race and gender enable law to construct new borders in ways that restrict rights and devastate lives is valuable to clear the way for transformative law reform.

Part I examines how even as the nationstate is in decline, other forms of power and regulation are on the rise. Trump has learned to manipulate the fluidity of borders as legal constructs to recast and reinforce a notion of nationhood based on a bygone era of white nationalism and patriarchy. Even if he does not get his border wall, he has learned how to secure his anti-immigrant agenda through legal, if not physical,

21. See, e.g., Chacón, *supra* note 17; Muneer I. Ahmad, *The Muslim as Terrorist*, Immigration Law Professors Conference, Drexel Kline School of Law (2018); Devon Carbado, *Racial Naturalization*, 57 AM. Q. 633, 637 (2005), reprinted in *LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS* (Mary L. Dudziak & Leti Volpp eds., 2006).

22. See also Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 72 SOCIAL TEXT 101 (2002).

23. Chacón, *supra* note 17, at 753. See also Jennifer M. Chacón, *Citizenship Matters: Conceptualizing Belongings in an Era of Fragile Inclusions*, 52 U.C. DAVIS L. REV. 1, 64 (2018) ("[F]ormal citizenship does not protect people from discriminatory policing.").

24. Jill Lepore, *A New Americanism: Why a Nation Needs a National Story*, FOREIGN AFFAIRS, <https://www.foreignaffairs.com/articles/united-states/2019-02-05/new-americanism-nationalism-jill-lepore> [<https://perma.cc/W7ZW-R5UA>] (last updated Feb. 26, 2019).

barriers—using both race and gender to shift legal scripts. Part II turns to ways that Trump has used the “welfare fraudster” narrative to gain support for shifting borders “inward.” Part III analyzes Trump’s use of the tropes of “the criminal” and, relatedly, “the terrorist” to shift borders “outward.” The conclusion ends with thoughts on the possibilities for solidarity across race and gender boundaries to counter the ways border shifting is being used to deny rights.

## I. NATIONHOOD, BORDERS, AND FLUIDITY

As Mary L. Dudziak and Leti Volpp note, beyond being territorial boundaries,<sup>25</sup> “[b]orders are constructed in law, not only through formal legal controls on entry and exit but also through the construction of rights of citizenship and noncitizenship, and the regulation or legitimization of American power in other parts of the world.”<sup>26</sup> More broadly, critical race, third world, feminist, and critical race feminist scholars have examined the notion of borders and nationhood not as inherent, but as socially constructed exercises of power.<sup>27</sup>

This more nuanced perspective is important. While globalization led commentators to observe that the traditional nationstate and borders were in decline,<sup>28</sup> since 9/11, “the legal distinction between member and stranger is, if anything, back with renewed vengeance[.]”<sup>29</sup>

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25. LEGAL BORDERLANDS: LAW AND THE CONSTRUCTION OF AMERICAN BORDERS (Mary L. Dudziak & Leti Volpp eds., 2006).

26. *Id.* at 2.

27. For examples of critiques of sovereignty, nationhood, borders, and citizenship in critical race scholarship *see, e.g.*, E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509 (2019); ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge Univ. Press 2005); Ariela J. Gross & Chantal Thomas, *The New Abolitionism, and the Memory of Slavery*, 35 L. & HIST. REV. 99 (2017). For an example of critical feminist scholarship criticizing sovereignty and nationhood, *see, e.g.*, Hillary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 644 (1991) (deconstructing the public/private dichotomy in international law, which views international law as a system of states). For an example of critical race feminist scholarship criticizing sovereignty and nationhood, *see, e.g.*, Vasuki Nesiah, *Decolonial CIL: TWAII, Feminism, and an Insurgent Jurisprudence*, 112 AM. J. INT'L L. UNBOUND 313 (2018) (symposium on B.S. Chimni, *Customary International Law: A Third World Perspective*, 112 AM. J. INT'L L. 1 (2018)).

28. For an early observation of the decline of the nationstate, *see, e.g.*, Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989). The modern notion of the nationstate emerged from the Treaty of Westphalia, which ended religious wars by establishing secular rule over defined territory. As I have discussed elsewhere, many scholars have speculated that sovereignty is undergoing a significant rethinking in both constitutional law and international law. *See* Catherine Powell, *We the People: These United Divided States*, 40 CARDOZO L. REV. 2685, 2692–93 (2019).

29. Hirschl & Shachar, *Spatial Statism*, *supra* note 3, at 394 (citing Catherine Dauvergne, *Citizenship with a Vengeance*, 8 THEORETICAL INQUIRIES L. 498 (2007)).

At the same time, aspects of regulation—including immigration regulation—are becoming “*de-territorialized*.”<sup>30</sup> Far from undermining national power, this “freeing up sovereignty from a rigid and static ‘Westphalian’ understanding of fixed territoriality is a power transformation.”<sup>31</sup> In fact, “relaxing the relationship between law and territoriality, and blurring the distinction between ‘inside’ and ‘outside,’ opens up a whole new purview for exercising power in the name of securing the integrity of the home territory and vigilantly protecting its membership boundaries.”<sup>32</sup> From this perspective, we can view borders as “crucial sites from which the nation-state is narrated and constituted.”<sup>33</sup>

This Article provides a detailed case study, with a particular focus on Trump’s use of race and gender to reinforce not only the physical border, but to construct “bureaucratic walls.”<sup>34</sup> Even as federal courts have enjoined various Trump immigration policies, “Trump officials bounce back by debuting new measures to diversify their enforcement efforts and put up new bureaucratic obstacles at the border even as others are knocked down.”<sup>35</sup> By running for president on a nativist “America First” platform to “Make America Great Again,”<sup>36</sup> Donald Trump ran an explicitly anti-immigrant campaign. Borrowing the notion of “shifting borders,”<sup>37</sup> we can see how Trump has used race and gender tropes to bolster legal claims that move the border inward in certain instances and outward in others. The following case studies demonstrate how Trump has sought to shift borders *inward*, by limiting legal protection for immigrants through his family separation policy, based on characterizing Latina women as irresponsible “welfare mothers.” Simultaneously, Trump has characterized men of color arriving at

30. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 101.

31. Shachar, *Shifting, Not Disappearing, Border*, *supra* note 13, at 5.

32. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 103.

33. Anthea Vogl, *Over the Borderline: A Critical Inquiry into the Geography of Territorial Excision and the Securitisation of the Australian Border*, 38 U. NEW S. WALES L.J. 114, 117 (2015).

34. *Trump Builds a Bureaucratic Wall to Keep out Migrants*, THE ECONOMIST (July 20, 2019), <https://www.economist.com/the-americas/2019/07/20/trump-builds-a-bureaucratic-wall-to-keep-out-migrants> [<https://perma.cc/DS62-7NRK>].

35. Nick Miroff, *Trump Officials Tighten Asylum Rules, Enlist Foreign Nations to Deter Migration*, WASH. POST (July 31, 2019, 8:42 AM), [https://www.washingtonpost.com/immigration/to-deter-migrants-trump-administration-builds-elaborate-scaffolding-at-the-border-and-on-the-books/2019/07/31/6ce7eb2e-b2e9-11e9-951e-de024209545d\\_story.html?noredirect=on&utm\\_term=.01332739ce40&wpisrc=nl\\_most&wpmm=1](https://www.washingtonpost.com/immigration/to-deter-migrants-trump-administration-builds-elaborate-scaffolding-at-the-border-and-on-the-books/2019/07/31/6ce7eb2e-b2e9-11e9-951e-de024209545d_story.html?noredirect=on&utm_term=.01332739ce40&wpisrc=nl_most&wpmm=1) [<https://perma.cc/QE43-84JP>].

36. Kelly J. Baker, *Make America White Again?*, THE ATLANTIC (Mar. 12, 2016), <https://www.theatlantic.com/politics/archive/2016/03/donald-trump-kkk/473190> [<https://perma.cc/U4X3-Q3XU>].

37. Hirschl & Shachar, *Spatial Statism*, *supra* note 3.

the Southern Border as criminals, gang members, rapists, and terrorists, as a way of shifting the borders *outward*, by stopping asylum seekers even before they cross into the United States.

## II. THE “WELFARE CHEAT” NARRATIVE: USING THE RACE AND GENDER OF LATINA MOTHERS TO SHIFT BORDERS INWARD

This Part of the Article turns to ways that Trump deploys stereotypes at the intersection of race and gender to enlist the “welfare fraudster” trope as a vehicle to gain support to shift borders inward (undermining legal protections for immigrants within U.S. borders).<sup>38</sup> In Subpart II.A, I analyze the gendered and racially loaded ways in which Trump constructs Latina immigrants as irresponsible mothers—or what Camille Gear Rich and I have called “the new ‘welfare queen.’”<sup>39</sup> Subpart II.B then explores how Trump has used the welfare queen trope to shift the border inward through his family separation policy.

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38. Beyond these tropes, Trump has framed the immigration debate in racial terms in other ways as well, which—while beyond the scope of this Article—include statements such as reportedly referring to African countries and Haiti as “shithole” countries and indicating, by contrast, a preference for visitors from Norway. “*Sh\*thole Countries*” Respond to Trump’s Rhetoric, CBS NEWS (Jan. 12, 2018, 10:29 AM), <https://www.cbsnews.com/news/donald-trump-shithole-countries-response-from-haiti-africa-el-salvador> [perma.cc/YX5T-4D2V]. Additionally, the President recently tweeted that four members of the House of Representatives—all women of color—should “go back” to their home countries “and help fix the totally broken and crime infested places from which they came.” Donald J. Trump (@realDonaldTrump), TWITTER (July 14, 2019, 5:27 AM), <https://twitter.com/realDonaldTrump/status/1150381395078000643> [perma.cc/72WL-AJW2]. Only one of the four women—Minnesota Representative Ilhan Omar—was born abroad (in Somalia). In any event, all four women are American citizens. Julie Hirschfeld Davis, *House Condemns Trump’s Attack on Four Congresswomen as Racist*, N.Y. TIMES (July 16, 2019), <https://www.nytimes.com/2019/07/16/us/politics/trump-tweet-house-vote.html> [https://perma.cc/EMZ2-2CCL]. According to the U.S. Equal Employment Opportunity Commission, “examples of potentially unlawful conduct include insults, taunting, or ethnic epithets, such as making fun of a person’s foreign accent or comments like ‘Go back to where you came from,’ whether made by supervisors or co-workers[.]” Sanjana Karanth, *Federal Law Says “Go Back to Where You Came From” Counts as Discrimination*, HUFFPOST (July 17, 2019), [https://www.huffpost.com/entry/federal-law-go-back-came-from-discrimination\\_n\\_5d2e815de4b085eda5a390c-c?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuaHVmZnBvc3QuY29tL2F1dGhv-ci9zYW5qYW5hLWthcmFudGg\\_Z3VjY291bnRlcj0x&guce\\_referrer\\_sig=AQAAAGWs-dJTyl\\_PXVmR5dxbKiQHxYzPFRvCuu4e-hC24JONjlr1QNxjCA6q7wS19xgQWWvzH-kXDAY5dOPb2fDbfj\\_\\_raS-Smk5utPvxunmmYxiMERxvp1JJ3CBzBZR09oDv8SdUCH-f6oM2cxkzjM2u7SQ81c\\_Mcs3OWHFa6Wy\\_G9I0cT](https://www.huffpost.com/entry/federal-law-go-back-came-from-discrimination_n_5d2e815de4b085eda5a390c-c?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuaHVmZnBvc3QuY29tL2F1dGhv-ci9zYW5qYW5hLWthcmFudGg_Z3VjY291bnRlcj0x&guce_referrer_sig=AQAAAGWs-dJTyl_PXVmR5dxbKiQHxYzPFRvCuu4e-hC24JONjlr1QNxjCA6q7wS19xgQWWvzH-kXDAY5dOPb2fDbfj__raS-Smk5utPvxunmmYxiMERxvp1JJ3CBzBZR09oDv8SdUCH-f6oM2cxkzjM2u7SQ81c_Mcs3OWHFa6Wy_G9I0cT) [perma.cc/RH78-ZGSW]. See also U.S. EQUAL EMP. OPPORTUNITY COMM’N, IMMIGRANTS’ EMPLOYMENT RIGHTS UNDER FEDERAL ANTI-DISCRIMINATION LAWS, <https://www.eeoc.gov/eeoc/publications/immigrants-facts.cfm> [perma.cc/C7B5-RA48] (last visited Nov. 22, 2019).

39. Powell & Rich, *supra* note 2. This Part of the Article draws on that piece.

As Rich notes in her own earlier work, on a broader level, the “welfare queen” has a megatrobe type of status.<sup>40</sup> She is able to colonize nearly any space and pathologize any figure that makes a claim for support or relief from the state in any form. Corporate bailout regimes create corporate welfare queens. Family farm owners are welfare queens. The unemployed run the risk of being labeled welfare queens, too. In a sense, this megatrobe transcends left/right boundaries, and both sides now use the trope to cast people outside of the sphere of the deserving and the belonging—and outside of the boundaries of citizen and nation.<sup>41</sup>

#### A. The New Welfare Queen

While largely criticized for its racially coded nature, Trump’s policy of separating immigrant parents from their children opened a new avenue in his efforts to demonize immigrants using not only raced, but gendered tropes as well. As Rich and I have demonstrated, with his family separation policy,<sup>42</sup> Trump has mixed sexist stereotypes into his efforts to restrict immigration. Going beyond stoking racial anxiety, Trump has tapped into the anxiety that ostensibly fertile brown mothers<sup>43</sup> are a drain on the welfare state. In sum, we concluded that Trump “has updated the ‘welfare queen’ trope that President Ronald Reagan used to disparage black women in the 1980s.”<sup>44</sup>

Reagan told *the apocryphal story of Linda Taylor*, whom he described as a welfare fraudster who “used 80 names, 30 addresses, 15 telephone numbers to collect food stamps, Social Security, veterans’ benefits for four nonexistent deceased veteran husbands, as well as welfare, [whose] tax-free cash income alone has been running \$150,000 a year[.]”<sup>45</sup> While in the popular imagination, the “welfare queen” was thoroughly raced as a black woman, Linda Taylor’s racial identity was actually not entirely clear, and at least some official records *reflect* that she was, in fact, white (an ambiguity highlighting how racial constructs can be manipulated to achieve various personal and political goals).<sup>46</sup>

40. Rich, *Reclaiming the Welfare Queen*, *supra* note 2, at 268–69.

41. *Id.* I am grateful to Professor Rich for conversations on this and acknowledge her work for the “welfare queen” framing, from which these ideas are drawn. See, e.g., *id.*

42. I discuss the family separation policy in greater detail in Part II.B, *infra*.

43. As discussed, *infra*, the image of black and brown women having many children became especially prominent during Ronald Reagan’s presidency.

44. Powell & Rich, *supra* note 2.

45. Josh Levin, *The Welfare Queen*, SLATE (Dec. 18, 2013), [http://www.slate.com/articles/news\\_and\\_politics/history/2013/12/linda\\_taylor\\_welfare\\_queen\\_ronald\\_reagan\\_made\\_her\\_a\\_notorious\\_american\\_villain.html](http://www.slate.com/articles/news_and_politics/history/2013/12/linda_taylor_welfare_queen_ronald_reagan_made_her_a_notorious_american_villain.html) [perma.cc/2J9V-Y47V].

46. Gene Demby, *The Truth Behind the Lies of the Original “Welfare Queen”*, NPR (Dec. 13, 2013), <https://www.npr.org/sections/codeswitch/2013/12/20/255819681/>



Based on the Reagan-era stereotype, a common misconception is that “irresponsible” black women have an excessive number of children in order to extract steady welfare checks from the government. In effect, Trump tells us that “irresponsible” brown immigrant mothers play a similar game to gain a fast-track to U.S. citizenship. According to Trump, these women essentially smuggle their children to the Southern Border in an effort to jump the queue for citizenship. As discussed in Subpart II.B, legal protections safeguard immigrant children from lengthy immigration detention, and in the past, parents have been released from detention along with their children. From Trump’s view, however, “‘fairness’ demands that these would-be welfare cheats be separated from their children and duly prosecuted,<sup>47</sup> in effect, to punish these “irresponsible” mothers for smuggling their children into the United States.<sup>48</sup> Ideally, the entire family would be deported, rather than offer the family an unfair leg up along the path to U.S. citizenship. Yet the Trump administration cannot deport families once they have crossed the border without overstepping immigration legal requirements, which Trump has criticized as time-consuming and for allowing immigrants to melt into the U.S. population if the parents and children cannot be detained while awaiting the deportation determination.<sup>49</sup>

As Rich and I discuss, similarities abound between the Reagan-era pathologizing of so called “welfare mothers” and immigrant mothers in the Trump narrative. On the campaign trail, Trump complained that Mexican women are strategically giving birth to “*anchor babies*” in the

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the-truth-behind-the-lies-of-the-original-welfare-queen [perma.cc/RZZ8-BGKL].

47. Powell & Rich, *supra* note 2.

48. Trump’s view that Latina immigrant women are “irresponsible” is clearly demonstrated by his comments about Latina women coming to the United States to have “anchor babies,” to facilitate “chain migration,” or to “smuggle” their children into the United States (discussed *infra*). For a discussion of “anchor babies,” see *infra* note 50 and accompanying text. For a discussion of “chain migration,” see *infra*, notes 51–52 and accompanying text. For a discussion of immigrant parents “smuggling” children, see *infra* note 69 and accompanying text. Although Trump criticizes parents who flee violence (whether government-sponsored, gang-related, or domestic in nature) and come to the United States as seeking to game the system, such behavior may also be characterized as highly responsible and highly motivated parenting behavior. After all, what parent would not do whatever they could to protect their child from a life of violence and poverty?

49. Trump has repeatedly criticized what he calls the “‘catch and release’ of families from Central America and elsewhere,” and the administration would rather not release immigrant parents and children “while they waited for their cases to be heard.” Michael D. Shear & Zolan Kanno-Youngs, *Migrant Families Would Face Indefinite Detention Under New Trump Rule*, N.Y. TIMES (Aug. 22, 2019), [https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html?emc=edit\\_na\\_20190821&ref=cta&nl=breaking-news?campaign\\_id=60&instance\\_id=0&segment\\_id=16348&user\\_id=758db07a98a5a67a90badbc4501e9653&regi\\_id=17436275ing-news](https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html?emc=edit_na_20190821&ref=cta&nl=breaking-news?campaign_id=60&instance_id=0&segment_id=16348&user_id=758db07a98a5a67a90badbc4501e9653&regi_id=17436275ing-news) [perma.cc/7UYG-F4BK].

*United States*, claiming that immigrant women from Mexico “move over here [to the United States] for a couple of days [and] they have the baby.”<sup>50</sup>

Since becoming president, Trump has continued to use Reagan’s “welfare queen” trope, for example, in invoking “the problem” of “chain migration,” a phrase Trump uses to explain and criticize the process through which, supposedly, one immigrant can rapidly bring in “24 family members[.]”<sup>51</sup> In fact, it usually takes years—and even decades—to bring a relative from abroad to the United States. In critiquing “chain migration,” Trump takes a page from Reagan’s playbook, with the claims that women are essentially rigging the system by getting a foot in the door and then bringing in multiple relatives. However, apparently Trump’s *own in-laws*—Melania Trump’s parents—became citizens through so-called chain migration.<sup>52</sup>

Like Reagan, Trump uses the raced and gendered welfare trope to justify particular legal maneuvers and to appeal to and mobilize his base. Conveniently ignoring the fact that *unauthorized immigration from Mexico has dropped* since the 2007–2009 recession,<sup>53</sup> Trump refers to immigrants coming across the Southern Border as “*an infestation*,”<sup>54</sup> akin to the way black residents moving into predominantly white neighborhoods and schools have been perceived. For example, when black students integrated predominantly white schools in countless neighborhoods across the country, white parents and students countered with

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50. Reena Flores, *Donald Trump: “Anchor Babies” Aren’t American citizens*, CBS NEWS (Aug. 19, 2015), <https://www.cbsnews.com/news/donald-trump-anchor-babies-arent-american-citizens> [perma.cc/4NGK-7ZA3]. See also Carly Haden Foster, *Anchor Babies and Welfare Queens: An Essay on Political Rhetoric, Gendered Racism, and Marginalization*, 5 WOMEN, GENDER, AND FAMILIES OF COLOR 50 (2017). While children over the age of 21 with citizenship can sponsor their parents through the immigration and naturalization process, the INA does not grant citizenship to those mothers who give birth to children in the United States while remaining in the United States unlawfully. See Immigration and Nationality Act, §§ 202, 212, 301, 8 U.S.C. §§ 1151 (b), 1192, 1401 (2018).

51. Nick Gillespie, *Lies About Chain Migration Are Donald Trump’s “Welfare Queen,” A Tale to Comfort the Base*, REASON (May 24, 2018), <https://reason.com/blog/2018/05/24/lies-about-chain-migration-are-donald-tr> [perma.cc/F44A-A3PX] (quoting Trump as calling “chain migration” a “disaster”).

52. Annie Correal & Emily Cochrane, *Melania Trump’s Parents Become U.S. Citizens, Using “Chain Migration” Trump Hates*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/nyregion/melania-trumps-parents-become-us-citizens.html> [perma.cc/MYT7-RHSU].

53. Jie Zong et al., *Frequently Requested Statistics on Immigrants and Immigration in the United States*, MIGRATION POL’Y INST. (Feb. 8, 2018), <https://www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-7> [perma.cc/C9Z9-MFK7].

54. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2018, 3:49am), <https://twitter.com/realDonaldTrump/status/1014098721460686849> [perma.cc/9KFG-9XXA].

similarly strong hostility, spearheading an often-violent campaign of massive resistance.

The connection between Reagan's old welfare queen motif and Trump's new one is underscored by the Trump administration's rule to limit welfare benefits to even legal immigrants. The rule (which is going into effect as this Article goes to press) punishes legal immigrants for accepting Medicaid, food stamps, public housing, and other government benefits to which they are entitled—making it harder for these immigrants to apply for green cards and visas, based on the assumption that they are more likely to become “public charges.”<sup>55</sup> However, studies illustrate that immigrants are net-contributors of taxes. *The average immigrant pays up to \$259,000 more in taxes than she receives in government support.*<sup>56</sup>

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55. Ted Hesson, *Emails Show Stephen Miller Pressed Hard to Limit Green Cards*, POLITICO (Aug. 2, 2019), <https://www.politico.com/story/2019/08/02/stephen-miller-green-card-immigration-1630406> [perma.cc/GXR5-SPNR] (discussing new rule to allow Department of Homeland Security “to bar *legal* immigrants from obtaining green cards if they receive certain government benefits”) (emphasis added). At the time this Article went to press, the rule is going into effect, shortly after the U.S. Supreme Court stayed a nationwide injunction on the rule. Chantal Da Silva, *What the Trump Administration's New 'Public Charge' Rule Means for Immigrants*, Newsweek (Feb. 23, 2020), <https://www.newsweek.com/what-trump-administrations-new-public-charge-rule-will-mean-immigrants-u-s-1488630> [https://perma.cc/JSJ2-F6M8]; Susannah Luthi, *Supreme Court Allows Trump to Enforce 'Public Charge' Immigration Rule*, Politico (Jan. 27, 2020), <https://www.politico.com/news/2020/01/27/supreme-court-enforce-trump-immigration-rule-106520> [https://perma.cc/E3UX-6RSB]. See also *Dept of Homeland Security v. New York*, 589 U.S. \_\_ (Jan. 27, 2020) (on application for stay); *Wolf v. Cook County Illinois*, 589 U.S. \_\_ (Feb. 21, 2020) (same). The new rule—which is based on a provision of the Immigration and Nationality Act that renders inadmissible any noncitizen who “is likely at any time to become a public charge[.]” 8 U.S.C. § 1182(a)(4)(A)—essentially expands the category of noncitizens considered likely to become a public charge. *Wolf v. Cook County Illinois*, 589 U.S. \_\_ p. 2 (slip op.) (J. Sotomayer, dissenting) (providing background on the rule change).

In fact, historically, immigration in the United States has been restricted by fears stoked by the “public charge” trope—whether in the context of the Chinese exclusion or efforts to limit non-Western European immigration to the United States in the nineteenth and twentieth centuries. See Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, *supra* note 1, at 676–77 (2005) (discussing federal and state laws aimed at “public charges” in the context of Chinese immigration to the West Coast); Julia G. Young, *Making America 1920 Again? Nativism and U.S. Immigration, Past and Present*, 5 J. ON MIGRATION & HUM. SEC. 217 (2017) (discussing the public charge trope and immigration from Southern and Eastern Europe in the twentieth century). See also *Yamataya v. Fisher*, 189 U.S. 86, 97 (1903) (upholding the amendments to the Immigration Act of 1882 which allowed for the exclusion of “paupers or persons likely to become a public charge”).

Even as it regards *citizens*, President Trump recently signed an executive order extending the welfare-to-work requirements of the 1990s by mandating that any recipient of food assistance, Medicaid, and low-income housing subsidies must join the work force or face the losing their benefits. Glenn Thrush, *Trump Signs Order to Require Recipients of Federal Aid Program to Work*, N.Y. TIMES (Apr. 10, 2018), <https://www.nytimes.com/2018/04/10/us/trump-work-requirements-assistance-programs.html> [perma.cc/RUZ9-S3C6].

56. Max Ehrenfreund, *Trump Touts Study That Says Immigrants Could Actually Save*

As Muneer Ahmad has pointed out, immigrants are caught in a “double bind.”<sup>57</sup> They are trapped between stereotypes: called lazy welfare cheats, while simultaneously accused of “taking our jobs.”<sup>58</sup> Citing the piece Rich and I coauthored, Ahmad explains that the “welfare queen” was such a successful trope in the Reagan years, that we could “sent her packing” with welfare reform under Bill Clinton. But now, Trump needs the “welfare queen” stereotype to do more work—both for immigrants and citizens alike.

#### B. Shifting the Border Inward: A New Way of Understanding the Family Separation Policy

By using these unfair stereotypes based on gender and race, Trump has sought to shift borders inward, undermining protections for families *within* the United States. In particular, the family separation policy exploits the legal fiction that distinguishes immigrants physically present from those legally present in the United States.<sup>59</sup> With this legal maneuver, being physically present in the United States is not the same as “being here.”<sup>60</sup> U.S. immigration law effectively creates a legal fiction distinguishing “admission” from “entry” such that an individual can be physically present in the country, but without authorization to be lawfully admitted. Where an individual has not been lawfully admitted, her status is that which it would have been had she been stopped at the border. Thus, the key criteria is not whether an individual has crossed the physical frontier of a territory, but whether she “has crossed [] through the law’s gates of admission, which, as the authorizing legislation proclaims, are *not* territorially fixed but rather designated by the executive branch of government.”<sup>61</sup>

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*Taxpayer Dollars*, WASH. POST. (Mar. 1, 2017, 2:17pm) [https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-touts-study-that-says-immigrants-could-actually-save-taxpayer-dollars/?noredirect=on&utm\\_term=.f9c362f7653c](https://www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-touts-study-that-says-immigrants-could-actually-save-taxpayer-dollars/?noredirect=on&utm_term=.f9c362f7653c) [perma.cc/M98V-A3MB].

57. See Powell & Van Buren, *supra* note 2.

58. *Id.* (hyperlinking to *Trump: Immigrants are ‘Taking Your Jobs’*, WASH. POST (Mar. 6, 2014), [https://www.washingtonpost.com/video/politics/trump-immigrants-are-taking-your-jobs/2014/03/06/6998bb82-a576-11e3-b865-38b254d92063\\_video.html?utm\\_term=.09ccd08a62d6](https://www.washingtonpost.com/video/politics/trump-immigrants-are-taking-your-jobs/2014/03/06/6998bb82-a576-11e3-b865-38b254d92063_video.html?utm_term=.09ccd08a62d6) [perma.cc/BCV4-KFWU]).

59. As Shachar notes, “the shifting border distinguishes between physical entry into the country (which does not count for immigration purposes) and *lawful admission* through a recognized port-of-entry (which makes one’s presence in the territory permissible, and therefore visible, in the eyes of the regulatory state).” Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 107.

60. See generally Linda Bosniak, *Being Here: Ethical Territoriality and the Rights of Immigrants* 8 THEORETICAL INQUIRIES L. 389–410 (2007).

61. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 108 (citing 8 U.S.C. § 1182(a)(6)(A)(i)).

Taking advantage of this distinction—and the fact that the border is effectively shifted inward for immigrants who are out of status—the Trump administration threatened to prosecute “irresponsible” immigrant mothers who bring their children over the Southern Border. However, immigrant children in the United States have certain protections by virtue of the *Flores* Settlement Agreement, a court settlement that has been in place for over two decades.<sup>62</sup> The *Flores* Settlement sets limits on the length of time and conditions under which children can be incarcerated in immigration detention, regardless of whether they come accompanied or unaccompanied by an adult to the United States.<sup>63</sup> This settlement grew out of a 1985 class action lawsuit filed on behalf of detained immigrant children, challenging the former Immigration Naturalization Service (INS), based on procedures concerning the detention, treatment, and release of children.<sup>64</sup> After several years of litigation, the parties agreed upon on a 1997 settlement, including three basic requirements imposed on immigration authorities:

Releasing children without delay to, preferably, parents or, alternatively, other adult relatives (or licensed programs willing to take custody)

If suitable placement is not available, the government must place children in the “least restrictive” setting suitable for the age and any special needs of the children

Implement safeguards concerning the care and treatment of children in immigrant detention[.]<sup>65</sup>

While President Barack Obama’s administration incarcerated thousands of families for over a year starting in 2015, two court orders required the government to scale back the practice, applying the *Flores* Settlement protections—beyond unaccompanied minors—to children accompanied by their parents.<sup>66</sup>

The Trump administration has gone further, not only opposing the expansion of protections for immigrant children, but also diluting preexisting protections established in the *Flores* Settlement. In April 2018, then–Attorney General Jeff Sessions announced a new “zero-tolerance policy,” calling for “the criminal prosecution of all migrants who cross between ports of entry, including individuals seeking U.S. refugee protection and parents traveling with children.”<sup>67</sup> Even before this

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62. For background, see, e.g., *A Brief History*, HUMAN RTS. FIRST, *supra* note 7.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Zero Tolerance Cruelty: Separating Families at our Southern Border*, HUMAN RTS.

new approach was formally announced, the Trump administration had begun to separate families. Children were classified as unaccompanied and sent to shelters without their parents and without a clear system in place for parents to track and eventually reunite with their children.<sup>68</sup>

The Trump administration's goal was reportedly to deter mothers from bringing their children into the United States, equating these mothers with criminal smugglers.<sup>69</sup> Jeff Sessions warned, "If you smuggle illegal aliens across our border, then we will prosecute you. If you are smuggling a child, then we will prosecute you and that child will be separated from you as required by law."<sup>70</sup> On June 15, 2018, the DHS reported 1995 children were separated between April and May of 2018. The government later revealed that thousands more children had been separated than had previously been disclosed and acknowledged that the government had not effectively tracked to whom children had been released.<sup>71</sup>

Following significant criticism, on June 20, 2018, President Trump signed *Executive Order 13841*, restricting family separations.<sup>72</sup> However, this Executive Order concurrently instructed the Justice Department to overturn the *Flores Agreement*.<sup>73</sup> *The President emphasized that the government was "keeping families together . . . [but the policy] continues to be a zero tolerance policy."*<sup>74</sup> That same month, a federal court in San Diego ordered the administration to reunify all separated families.<sup>75</sup> However, according to court documents recently filed, the

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FIRST (June 1, 2018), <https://www.humanrightsfirst.org/resource/zero-tolerance-cruelty-separating-families-our-southern-border> [<https://perma.cc/8FV3-TTY7>].

68. Lisa Riordan Seville & Hannah Rappleye, *Trump Admin Ran 'Pilot Program' for Separating Migrant Families in 2017*, NBC NEWS (June 29, 2018, 1:30 AM), <https://www.nbc-news.com/storyline/immigration-border-crisis/trump-admin-ran-pilot-program-separating-migrant-families-2017-n887616> [<https://perma.cc/EMW3-8Y4E>].

69. Joshua Barajas, *How Trump's Family Separation Policy Became What it is Today*, PBS (June 14, 2018, 12:14 PM), <https://www.pbs.org/newshour/nation/how-trumps-family-separation-policy-has-become-what-it-is-today> [<https://perma.cc/26QY-6T3D>].

70. *Id.*

71. *Separated Children Placed in Office of Refugee Resettlement Care*, U.S. DEPT OF HEALTH AND HUMAN SERVS., OFFICE OF THE INSPECTOR GENERAL, (2019), <https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf> [<https://perma.cc/3BLB-RZCJ>].

72. Exec. Order No. 13,841, 83 Fed. Reg. 29,435 (June 20, 2018), <https://www.whitehouse.gov/presidential-actions/affording-congress-opportunity-address-family-separation> [<https://perma.cc/R8JJ-RX2L>].

73. *Id.*

74. Meg Wagner, Veronica Rocha, Brian Ries, & Amanda Wills, *What's Happening at the U.S. Border*, CNN (June 22, 2018), [https://edition.cnn.com/politics/live-news/immigration-border-children-separation/h\\_736e0a322bf643474f887e8077d1454b](https://edition.cnn.com/politics/live-news/immigration-border-children-separation/h_736e0a322bf643474f887e8077d1454b) [<https://perma.cc/TLJ2-PN3X>].

75. Miriam Jordan, *No More Family Separations, Except These 900*, N.Y. TIMES (July 30, 2019), [https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html?campaign\\_id=60&instance\\_id=0&segment\\_id=15693&user\\_id=758db07a98a5a67a90badb-](https://www.nytimes.com/2019/07/30/us/migrant-family-separations.html?campaign_id=60&instance_id=0&segment_id=15693&user_id=758db07a98a5a67a90badb-)

Justice Department concedes that immigration authorities have removed at least 900 immigrant children from their families—in the year since the Trump administration officially ended the family separation policy—ostensibly for reasons as relatively trivial as a parent failing to change a diaper or traffic infraction, such as driving without a license.<sup>76</sup>

By using race and gender tropes to dehumanize Latina mothers and their children, Trump laid the groundwork for the separation and detention of immigrant families who cross the Southern Border. While the family separation policy has formally ended (if not completely ended in practice), as this Article goes to press, the Trump administration has proposed a new rule to allow the indefinite detention of both parents and children—a move that would presumably require approval by the federal court in the *Flores* litigation, and that would reverse the *Flores* protections for children.<sup>77</sup> Today, it is hard to imagine similar treatment of immigrants from Europe.<sup>78</sup>

### III. THE “CRIMINAL” AND THE “TERRORIST” NARRATIVE: USING THE MASCULINITY AND “RACE” OF LATINO AND MUSLIM MEN TO SHIFT BORDERS OUTWARD

This Part of the Article examines ways that Trump deploys stereotypes at the intersection of race and gender to enlist the tropes of the “criminal” and the “terrorist” as a way of gaining support to shift borders outwards by stopping asylum-seekers and immigrants before they arrive at a U.S. territorial border. By painting Latino men as “criminals” and Muslim men as “terrorists,” Trump constructs images of masculinity that are both raced and gendered.

In Subpart III.A, I summarize accounts of ways Trump uses the trope of the “criminal” in referring to Latinos. Subpart III.B examines accounts of how Trump uses the trope of the “terrorist” in referring to

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c4501e9653&regi\_id=17436275ing-news [https://perma.cc/T4HN-C5ZE].

76. *Id.* See also *Looking at Lasting Effects of Trump’s Family Separation Policy at the Southern Border*, NPR, All Things Considered (Jan. 1, 2020), <https://www.npr.org/2020/01/01/792916538/looking-at-lasting-effects-of-trumps-family-separation-policy-at-the-southern-bo> [https://perma.cc/GKP4-EB6Q] (reporting “Although the Trump administration ended its policy of separating families at the border a year and a half ago—June of 2018—those separations continue. More than 1,100 migrant families have been separated since then [] according to the American Civil Liberties Union.”).

77. See Shear & Kanno-Youngs, *supra* note 49.

78. Note, however, that in an earlier period, white immigrants from particular countries were discriminated against. See generally NELL IRVIN PAINTER, *THE HISTORY OF WHITE PEOPLE* (2010) (discussing exclusion, stereotyping, and discrimination against Irish, Italians, Polish, and other white ethnic immigrant groups in ways that are reminiscent of today’s exclusion, stereotyping, and discrimination against Latinos and Muslims).

Muslims. In summarizing prevailing accounts in these two Subparts—that focus on race—I add an analysis of how gender intersects with these racial tropes. The role of gender in stereotyping *men* as “dangerous” is largely missing from existing accounts. Subpart III.C examines how these race and gender tropes have helped Trump gain support to shift borders even further southward—in other words, outward—as a legal construct.

#### A. The Trope of Latino Men as “Criminals”

In this Subpart, I add a gender analysis into accounts of racial tropes Trump has used in characterizing Latino men. This builds off of the insights provided by such scholars as Chris Lasch, who discusses how Trump has used racial tropes to associate Latino immigrants with crime, including through the use of “dogwhistle politics,” the practice of embedding coded racial appeals in a political message in order to promote policies of continued racial subordination.<sup>79</sup> In particular, Lasch examines how dogwhistle politics framed the political and cultural narrative surrounding the death of Kathryn Steinle, a woman killed in San Francisco by an undocumented immigrant, Juan Francisco Lopez-Sanchez. Because Mr. Lopez-Sanchez had an extensive criminal record and was an undocumented immigrant who had been previously deported five times, his arrest ignited a fierce national debate over whether so-called “sanctuary cities” protected criminals. Lasch illustrates how the Trump administration and Fox News sought to use the Steinle murder to link sanctuary cities, such as San Francisco, with crime.<sup>80</sup>

Calling Mr. Lopez-Sanchez a “Latino Willie Horton,” Lasch draws the comparison between Mr. Lopez-Sanchez and Willie Horton, an African American man infamously referred to in a George H.W. Bush 1988 presidential campaign ad attacking his opponent, then-Massachusetts Governor, Michael Dukakis, and stoking racial fears.<sup>81</sup> Having previ-

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79. Lasch, *supra* note 18, at 162 (quoting Ian Haney López, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014)). As Leti Volpp explains, “A ‘dog whistle’ refers to coded signals that only certain constituencies understand (dogs can hear whistles at frequencies that humans cannot).” Volpp, *Protecting the Nation*, *supra* note 1, at 104, n. 18 (citing Ian Haney López, *DOG WHISTLE POLITICS: HOW CODED RACIAL APPEALS HAVE REINVENTED RACISM AND WRECKED THE MIDDLE CLASS* (2014)).

80. Lasch, *supra* note 18, at 165–72.

81. *Id.* at 180 (citing Paul Waldman, *The New Willie Horton?*, *WASH. POST* (July 8, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/07/08/the-new-willie-horton/> [perma.cc/P32D-Z9T3]). See also Peter Baker, *Bush Made Willie Horton an Issue in 1988, and the Racial Scars are Still Fresh*, *N.Y. TIMES* (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/us/politics/bush-willie-horton.html> [https://perma.cc/YH3G-887G].



ously been convicted of murder, Mr. Horton stabbed a man and raped his fiancée in a home invasion during a furlough from prison—a furlough policy that the Bush campaign ad implied represented Governor Dukakis’s approach to being “soft” on crime. Taking a page from this playbook, when he ran for president, Trump pointed to Lopez-Sanchez’s role in the Steinle murder as a basis for his claim that “we must secure our border immediately” and that “[n]obody else has the guts to even talk about it.”<sup>82</sup> Lopez-Sanchez claimed the killing was an accident (that his gun misfired) and was ultimately found “not guilty” for murder.<sup>83</sup> Similar to black men, Latino men are also often unfairly associated with violent crime—and are feared—not only on the basis of stereotypes that link race and crime, but also based on stereotypes and societal expectations concerning masculinity, power, and violence. Masculinity can intersect with racialized assumptions in particularly toxic ways for men of color.<sup>84</sup>

Throughout his run for the presidency, Trump stereotyped Mexican men in particular as criminals and gang members, using these racist tropes to appeal to his white working-class base and to gain support for his anti-immigration platform. Trump notoriously described Mexican immigrants as rapists and drug dealers, saying, “They’re bringing drugs. They’re bringing crime. They’re rapists.”<sup>85</sup>

Trump’s reference to rape is hardly accidental. There is a long history of associating men of color with crimes of sexual violence against white women. This trope is both raced and gendered, as it constructs both white women as victim-survivors and men of color as, “predators.” The power of this trope dates at least as far back as Emmett Till and stereotypes of African American men and boys as sexually aggressive predators.<sup>86</sup> Against this backdrop, Trump implicitly stokes fears

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82. Theodore Schleifer, *Trump: San Francisco Killing Shows Perils of Illegal Immigration*, CNN (July 8, 2015), <https://www.cnn.com/2015/07/03/politics/trump-san-francisco-killing> [https://perma.cc/2LXA-MNX2].

83. *Undocumented Immigrant Found not Guilty of Murdering Woman in San Francisco*, Fox 8 (Nov. 30, 2017), <https://fox8.com/news/undocumented-immigrant-found-not-guilty-of-murdering-woman-in-san-francisco> [https://perma.cc/6VPR-86XL].

84. Cf. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 20–57 (rev. ed. 2012) (discussing mass incarceration—largely of African American men).

85. *Donald Trump Transcript: ‘Our Country Needs a Truly Great Leader,’* WALL STREET J.: WASH. WIRE (June 16, 2015, 11:29 AM), <https://blogs.wsj.com/washwire/2015/06/16/donald-trump-transcript-our-country-needs-a-truly-great-leader> [https://perma.cc/96U9-TX2M]; *Transcript: Donald Trump Presidential Campaign Announcement*, C-SPAN, (June 16, 2015), <https://www.c-span.org/video/?326473-1/donald-trump-presidential-campaign-announcement> [https://perma.cc/WA32-2P59].

86. The fourteen-year-old Emmett Till was notoriously lynched, after being accused

of violence against women. During a speech condemning the possible entry across the Southern Border of a “caravan” of asylum-seekers from Central America, Trump claimed that “women want security,” riffing on a nexus of concerns American women ostensibly have regarding physical security, economic security, and national security.<sup>87</sup>

Further, with his focus on MS-13—a gang in the United States largely comprised of men from Central America—Trump has linked male violence and criminality to immigration.<sup>88</sup> In its efforts to eliminate both domestic violence and gang violence as grounds of asylum,<sup>89</sup> the Trump administration is loosely *conflating* immigrants who are *fleeing* gang and domestic violence in Central America with the MS-13 gang members who are *perpetrating* violence in the United States. In so doing, Trump conflated *survivors* and *perpetrators* of violence. This rhetorical sleight of hand is aimed at equating all immigrants from Latin America with criminals.

Similarly, Trump has repeatedly applied this trope of male violence to Central American men, whom he describes as “animals” and gang members who come to the United States to terrorize wholesome American neighborhoods.<sup>90</sup> These stereotypes of men of color as dangerous sexual

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of flirting with a white woman. DeNeen L. Brown, *Emmett Till's Mother Opened his Casket and Sparked the Civil Rights Movement*, WASH. POST (July 12, 2018, 12:44 PM), [https://www.washingtonpost.com/news/retropolis/wp/2018/07/12/emmett-tills-mother-opened-his-casket-and-sparked-the-civil-rights-movement/?utm\\_term=.705e1e7a7f7a](https://www.washingtonpost.com/news/retropolis/wp/2018/07/12/emmett-tills-mother-opened-his-casket-and-sparked-the-civil-rights-movement/?utm_term=.705e1e7a7f7a) [https://perma.cc/9MVP-KJYU].

87. Tim Harris, *Trump on Border Wall: Barbed Wire Used Properly Can Be a Beautiful Sight*, REALCLEAR POLITICS (Nov. 5, 2018), [https://www.realclearpolitics.com/video/2018/11/05/trump\\_on\\_border\\_wall\\_barbed\\_wire\\_used\\_properly\\_can\\_be\\_a\\_beautiful\\_sight.html](https://www.realclearpolitics.com/video/2018/11/05/trump_on_border_wall_barbed_wire_used_properly_can_be_a_beautiful_sight.html) [perma.cc/8YGW-RMP9].

88. Donald J. Trump (@realDonaldTrump), TWITTER (June 19, 2018, 6:52 AM), <https://twitter.com/realDonaldTrump/status/1009071403918864385> [https://perma.cc/YAF6-Q8V4].

89. Catherine Powell & Maiya Moncino, *States are Challenging New Policy That Denies Asylum to Survivors of Domestic Violence*, JUST SECURITY (Oct. 16, 2018), <https://www.justsecurity.org/61082/states-challenging-policy-denies-asylum-victims-domestic-violence> [https://perma.cc/YH7R-RAAT]; Caroline Bettinger-López & Rachel Vogelstein, *Sessions' Draconian Asylum Decision*, FOREIGN AFFAIRS (June 15, 2018), <https://www.foreignaffairs.com/articles/united-states/2018-06-15/sessions-draconian-asylum-decision?cid=soc-tw> [https://perma.cc/XKK8-MW4Q]; Azam Ahmed, *Women are Fleeing Death at Home. The U.S. Wants to Keep Them Out*, N.Y. TIMES (Aug. 18, 2019), [https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html?nl=todaysheadlines&emc=edit\\_th\\_190819?campaign\\_id=2&instance\\_id=11592&segment\\_id=16279&user\\_id=758db07a98a5a67a90badbc4501e9653&regi\\_id=174362750819](https://www.nytimes.com/2019/08/18/world/americas/guatemala-violence-women-asylum.html?nl=todaysheadlines&emc=edit_th_190819?campaign_id=2&instance_id=11592&segment_id=16279&user_id=758db07a98a5a67a90badbc4501e9653&regi_id=174362750819) [https://perma.cc/GWL5-SLGH].

90. Julie Hirschfeld Davis & Niraj Chokshi, *Trump Defends 'Animals' Remark, Saying It Referred to MS-13 Gang Members*, N.Y. TIMES (May 17, 2018), <https://www.nytimes.com/2018/05/17/us/trump-animals-ms-13-gangs.html> [https://perma.cc/FRP3-7P8V].

Note also Trump's disregard for the rights of the Latinx community, in that he

predators or as “animals” turn on both race *and* gender, as they characterize these men as aggressive, hypermasculine, and even subhuman.

The trope of immigrant men as criminal was at the heart of Trump’s presidential campaign and has carried over to his presidential promise to build a wall on the Southern Border.<sup>91</sup> In his second State of the Union address—following a government shutdown over funds for border wall construction—Trump pitched the wall as necessary to keep dangerous criminals and drugs from spilling over the Southern Border.<sup>92</sup> Trump prominently introduced guests in the audience whose family member had been killed by immigrants.<sup>93</sup> While immigrants, like nonimmigrants, occasionally do commit crimes, immigrants are statistically *less* likely to commit crimes than their nonimmigrant counterparts.<sup>94</sup> It was thus particularly disingenuous for Trump to make it

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granted a presidential pardon to Sheriff Joe Arpaio. Arpaio had been convicted for contempt of court, for repeatedly and knowingly disobeying a federal judge’s orders to cease policing tactics against Latinos that the judge ruled amount to systemic racial profiling. Arpaio claimed he was not targeting Latinos, but merely cracking-down on undocumented immigration. Merrit Kennedy, *In Racial Profiling Lawsuit, Ariz. Judge Rules Sheriff Arpaio In Contempt of Court*, NPR (May 14, 2016, 11:22 AM), <https://www.npr.org/sections/thetwo-way/2016/05/14/478050934/in-racial-profiling-lawsuit-ariz-judge-rules-sheriff-arpaio-in-contempt-of-court> [<https://perma.cc/MUU5-BWFQ>]; Colin Dwyer, *Ex- Sheriff Joe Arpaio Convicted of Criminal Contempt*, NPR (July 31, 2017, 4:08 PM), <https://www.npr.org/sections/thetwo-way/2017/07/31/540629884/ex-sheriff-joe-arpaio-convicted-of-criminal-contempt> [<https://perma.cc/RCX3-34E3>].

91. As discussed above, while running for president, Trump stereotyped Mexican men as criminals and gang members, notoriously describing Mexican immigrants as rapists and drug dealers. See note 81 and accompanying text. Since becoming president, Trump has grounded calls for the southern border wall on similar stereotypes—associating Mexican immigrants with criminals and gang members. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (April 23, 2017, 11:42 AM), [https://twitter.com/realDonaldTrump/status/856171332521820165?ref\\_src=twsrc%5Etfw%7Ctwcamp%5Etweet%7Ctwtterm%5E856171332521820165&ref\\_url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fthe-fix%2Fwp%2F2017%2F04%2F24%2F4-reasons-trumps-border-wall-is-already-going-south-on-him%2F](https://twitter.com/realDonaldTrump/status/856171332521820165?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweet%7Ctwtterm%5E856171332521820165&ref_url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Fthe-fix%2Fwp%2F2017%2F04%2F24%2F4-reasons-trumps-border-wall-is-already-going-south-on-him%2F) [<https://perma.cc/D69Y-K57Z>] (claiming, “The Democrats don’t want money from budget going to border wall despite the fact that it will stop drugs and very bad MS 13 gang members.”).

92. President Donald J. Trump, State of the Union Address (Feb. 6, 2019) (stating that “[t]ens of thousands of innocent Americans are killed by lethal drugs that cross our [southern] border and flood into our cities” and referring to immigrants who commit crimes in the United States).

93. *Id.* (introducing Debra Bissell, a woman whose parents were burglarized and shot to death “by an illegal alien”).

94. See, e.g., Michelangelo Landgrave & Alex Nowrasteh, *Incarcerated Immigrants in 2016: Their Numbers, Demographics, and Countries of Origin*, CATO INSTITUTE (June 4, 2018) <https://www.cato.org/publications/immigration-research-policy-brief/their-numbers-demographics-countries-origin> [<https://perma.cc/8A92-Z9XL>] (“The data show that all immigrants—legal and illegal—are less likely to be incarcerated than native-born Americans relative to their shares of the population.”); Tanvi Misra, *For the Last Time, Here’s the Real Link Between Immigration and Crime*, CITYLAB (Feb. 6, 2019) <https://www.citylab>.

appear as though immigration caused heightened crime rates. There is no evidence to support this, as the Cato Institute's research demonstrates.<sup>95</sup> However, Trump's repeated association between immigrants and crime (and gangs) is an unmistakable dogwhistle.<sup>96</sup>

#### B. THE TROPE OF "THE MUSLIM" AND "THE TERRORIST"<sup>97</sup>

In this Subpart, I add a gender analysis into accounts of racial tropes Trump has used in characterizing Muslim men, who have been unfairly associated with terrorism because of the ways their Muslim identity intersects with a perception of male violence. I focus on two instantiations of Trump's use of gendered and raced constructs of Muslim men as dangerous in support of immigration restrictions: (1) the travel ban, and (2) the unsubstantiated claim that "unknown Middle Easterners" were mixing in with the "Migrant Caravan" marching north toward the U.S.–Mexico border in 2018.<sup>98</sup> I then conclude with

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com/equity/2019/02/crime-immigration-city-migrants-refugees-state-of-the-union/582001 [https://perma.cc/NKK9-5KB6] (reviewing available data and concluding immigrants—both documented and undocumented—are less likely to engage in criminal behavior than native-born Americans).

95. See Christopher Ingraham, *Two Charts Demolish the Notion that Immigrants Here Illegally Commit More Crime*, WASH. POST (June 19, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/06/19/two-charts-demolish-the-notion-that-immigrants-here-illegally-commit-more-crime> [https://perma.cc/6G8B-YUUA] (providing data from the Cato Institute indicating that both legal immigrants and undocumented immigrants are much less likely to commit a crime than native-born residents and criticizing President Trump's policies). See also Laura McGann & Stavros Agorakis, *The Desperate Demagogue*, Vox (Nov. 2, 2018, 2:10 PM), <https://www.vox.com/policy-and-politics/2018/11/2/18051420/trump-closing-argument-ugly-immigration-speech> [https://perma.cc/2877-FRGC] (noting the dangers of President Trump's rhetoric with regards to immigration).

96. Another regulatory response—based on Trump's association of immigration and crime—is the President's support for merging the two through the crim-immigration regulatory framework. See, e.g., Annie Lai & Christopher N. Lasch, *Crimmigration Resistance and the Case of Sanctuary City Defunding*, 57 SANTA CLARA L. REV. 539, 546 (2018) (discussing the emergence of the crim-immigration framework within the evolution of sanctuary policies that have arisen, in some instances, to counter this framework). Because crim-immigration seeks to enlist the criminal law enforcement regime to support deportations, we might view it as another instantiation of how borders are shifted inward. While I have explored the crim-immigration regime elsewhere, it is beyond the scope of the current Article, as I would need to think more carefully of the role of race and gender in that regime. For my work on crim-immigration within the context of the sanctuary cities debate, see Powell, *supra* note 28. For a superb historical perspective on the rise of crim-immigration, see Christopher N. Lasch et al., *Understanding Sanctuary Cities*, 59 B. C. L. REV. 1703 (2018) (discussing the need to counter the ways the current era of mass incarceration is being used to facilitate a new era of mass deportation).

97. I am grateful to Muneer Ahmad, for the work he has done on how Muslims are unfairly associated with terrorism. For discussion of Ahmad's work, see *infra* note 103.

98. See Wolfson, *supra*, note 10. See also Powell & Van Buren, *supra* note 2 (noting Ahmad's discussion of Trump's unsubstantiated claims of "unknown Middle Easterners"

a discussion of unfair racial profiling of Muslim men as being raced and gendered.

First, on the travel ban, Trump insinuated during his presidential campaign that visitors from predominantly Muslim countries are dangerous, pledging “a total and complete shutdown of Muslims entering the United States until our country’s representatives can figure out what the hell is going on.”<sup>99</sup> As discussed further in Subpart III.C, within days of taking office, Trump issued the first in a series of executive orders imposing a travel suspension for visitors exclusively from a handful of predominantly Muslim countries (which has now become a de facto indefinite ban)—in ways that were both over- and underinclusive of actual security threats.<sup>100</sup>

A second way Trump has constructed Muslim men as raced and gendered is by baselessly claiming that “unknown Middle Easterners” were marching toward the U.S.–Mexico border in 2018 as part of the “Migrant Caravan” from Central and South America.<sup>101</sup> In fact, after

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mixing in with the “Migrant Caravan”).

99. Jenna Johnson, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering the United States’*, WASH. POST (Dec. 7, 2015, 7:43 PM), <https://www.washingtonpost.com/news/post-politics/wp/2015/12/07/donald-trump-calls-for-total-and-complete-shutdown-of-muslims-entering-the-united-states> [https://perma.cc/2JDV-LLHV]; Jessica Taylor, *Trump Calls for ‘Total and Complete Shutdown of Muslims Entering’ U.S.*, NPR (Dec. 7, 2015, 5:49 PM), <https://www.npr.org/2015/12/07/458836388/trump-calls-for-total-and-complete-shutdown-of-muslims-entering-u-s> [https://perma.cc/ZVS9-295B]. Once Trump took office and imposed the travel ban on several predominantly Muslim countries, Trump’s lawyer-advisor, Rudolph Giuliani, conceded that the intent behind the ban was to implement the “Muslim ban” upon which Trump had campaigned. See Rebecca Savransky, *Giuliani: Trump Asked Me How to do a Muslim Ban ‘Legally’*, THE HILL (Jan. 29, 2017, 8:48 AM), <https://thehill.com/homenews/administration/316726-giuliani-trump-asked-me-how-to-do-a-muslim-ban-legally> [perma.cc/7JBD-Z67Z].

100. See, e.g., Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 GEO. IMMIGR. L.J. 159, 180 (2019) (arguing that “[w]ith respect to the persons that the order covers, EO-3 is both over- and under-inclusive”); Pratheepan Gulasekaram, *An Annotated Guide to Donald Trump’s Revised Travel Ban*, THE GUARDIAN (Mar. 7, 2017), <https://www.theguardian.com/us-news/ng-interactive/2017/mar/07/trump-travel-ban-new-annotated-guide> [https://perma.cc/EAG4-LHSD] (discussing the “charge that the ban is both over-inclusive (it certainly bans many who are not national security concerns) and under-inclusive (it excludes entire countries which may be producing more people than the listed countries who are interested in harming US”).

101. Wolfson, *supra* note 10 (noting Trump’s efforts to make the caravan an issue in the lead-up to the 2018 midterm elections).

Of course, not all terrorists are men—and vice versa. However, masculinity plays a role in terrorist recruitment. See Catherine Powell & Rebecca Turkington, *Gender, Masculinities, and Counterterrorism*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (Jan. 23, 2019), <https://www.cfr.org/blog/gender-masculinities-and-counterterrorism> [https://perma.cc/9ZQV-XCXA] (summarizing highlights from a Council on Foreign Relations roundtable conversation, led by Catherine Powell and Fionnuala Ní Aoláin). As the UN Special Rapporteur on the Promotion and Protection of Human Rights While

making the claim, “Trump himself acknowledged that he had no evidence for the claim.”<sup>102</sup> Muneer Ahmad explores ways in which “the Muslim” is conflated with “the terrorist”—in this and other contexts—and by which Muslim identity is racialized.<sup>103</sup> Patterns of profiling of Muslims reveal that Muslims are racialized, in that those identified as terrorists are perceived as such based on perceptions of physical markers of “Muslim-looking” identity (as opposed to actual religious affiliation).<sup>104</sup> Trump’s efforts to equate “the Muslim” with “the terrorist,” including in his vague reference to “unknown Middle Easterners,” is a form of fear-mongering that builds on stereotypes of Muslim men as dangerous.

Both of these examples—Trump’s travel ban and groundless claims about “unknown Middle Easterners” crossing the Southern Border—draw on a legacy of unfair racial profiling of Muslim men, which is raced and gendered. The unfair and discriminatory profiling of Middle Eastern men at airports in the aftermath of the September 11 terror attacks is well-documented, and mirrors the manner in which African Americans (especially black men) have been discriminatorily profiled.<sup>105</sup> As experts have noted, such racial profiling is a flawed law enforcement methodology, posing serious constitutional over- and underinclusivity challenges both inside and outside the context of immigration<sup>106</sup> (similar to the problems posed by the travel ban). Not only were Muslim men unfairly detained, actual terrorists who did not fit that description were not adequately monitored.<sup>107</sup> By focusing on Muslims

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Countering Terrorism, Fionnuala Ní Aoláin, has observed, hegemonic masculinities play a role in producing and sustaining violence by terrorists and—I might add—by the state (given the underrepresentation of women in most national governments as well as in many national militaries, among other factors). *Id.*

102. Wolfson, *supra* note 10.

103. See, e.g., Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. L. REV. 1683 (2009); Muneer I. Ahmad, *A Rage Shared by Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CALIF. L. REV. 1259 (2004); Ahmad, *supra* note 22. For Ahmad’s analysis of the role of Trump in eliding “the Muslim” and “the terrorist,” see Powell & Van Buren, *supra* note 2.

104. Ahmad, *supra* note 22.

105. See, e.g., David A. Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997).

106. *Id.*; Stefano Bonino, *How Discrimination Against Muslims at Airports Actually Hurts the Fight Against Terrorism*, WASH. POST (Aug. 26, 2016, 5:41 AM), [https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/26/how-discrimination-against-muslims-at-airports-actually-hurts-the-fight-against-terrorism/?utm\\_term=.9a7f8f5f6018](https://www.washingtonpost.com/news/monkey-cage/wp/2016/08/26/how-discrimination-against-muslims-at-airports-actually-hurts-the-fight-against-terrorism/?utm_term=.9a7f8f5f6018) [perma.cc/SJ4K-YUCZ].

107. Once terrorists realized that law enforcement was focused on Muslim men, in certain circumstances, western women—who are often presumed innocent—were recruited to be terrorists. See Katrin Bennhold, *Jihad and Girl Power: How ISIS Lured 3 London Girls*, N.Y. TIMES (Aug. 17, 2015), <https://www.nytimes.com/2015/08/18/world/europe/jihad-and-girl-power-how-isis-lured-3-london-teenagers.html?module=inline> [perma.cc/

through the travel ban and the “unknown Middle Easterners” rhetoric, Trump replicates this misplaced focus on race and gender.

Between the travel ban and comments on “unknown Middle Easterners,” the President inappropriately characterizes Muslim men as terroristic and dangerous. He need not even specifically focus on the gender of these mysterious “unknown Middle Easterners,” as it is understood that he is dogwhistling both the race and maleness of these “unknown” (and in reality, nonexistent) individuals.

Just as Trump’s focus on Latino men as criminals is analogous to the ways in which black men are stereotyped as criminals, aggressors, and sexual predators, so too did his references to the need for a “Muslim ban” and to “unknown Middle Easterners” invoke images of young, male, dangerous, Muslim terrorists. This trope appeals to cultural, racial, and gendered anxieties, based on memories of the September 11 attackers, who were all Muslim, Middle Eastern men, triggering years of profiling and detention of men who fit a similar profile.<sup>108</sup>

### C. Shifting the Border Outward (and Southward) for Asylum Seekers

By using unfair stereotypes—based on gender and race—concerning Latino and Muslim men, Trump has sought to shift borders outwards (and southward). As Shachar points out in her work on shifting borders, destination countries have occasionally developed methods to stop immigrants and refugees from arriving before they reach a territory.<sup>109</sup> The Trump administration has done so through two sets of policies I discuss in this Subpart: (1) rolling back protections for refugees (largely targeting those fleeing violence and poverty in Central America), and (2) the travel ban (targeting Muslim countries), as touched on briefly above.

With regard to rolling back protections for refugees, Trump has manufactured a crisis at the U.S.–Mexico border as a basis for shifting borders outwards. These strategies have included relocating initial asylum screening to Mexico, thereby forcing asylum-seekers to remain in Mexico while their legal claims for refuge in the United States proceed.<sup>110</sup> Specifically pointing to the “danger” posed by “criminals” as

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FT5R-P7B5] (noting that while “women are a strategic asset for the Islamic State, they are hardly ever considered in most aspects of Western counterterrorism”). Terrorist recruiters have recognized the gendered and raced assumptions of law enforcement, and recruited women precisely because of the relative invisibility of women terrorists to antiterrorism officials. *Id.*

108. See Ahmad, *supra* note 22.

109. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 108–15.

110. U.S. DEP’T OF HOMELAND SEC., MEMORANDUM: POLICY GUIDANCE FOR

well as “misguided court decisions and outdated laws that have made it easier for illegal aliens to enter and remain in the United States,” former DHS Secretary Kirstjen Nielsen announced a pilot project to block asylum-seekers from entering the United States from Mexico.<sup>111</sup> More recently, the Trump administration has announced a requirement that refugees initially seek asylum in the first “safe third country” they cross on their journey to the United States.<sup>112</sup> Based largely on a raced and gendered narrative of ostensible Latino criminality, Trump’s “Remain in Mexico” and “safe third country” policies effectively shift borders outward (and southward).

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IMPLEMENTATION OF THE MIGRANT PROTECTION PROTOCOLS (2019); see Elliot Spagat and Cedar Attanasio, *Tariff Deal Gives Momentum to ‘Remain in Mexico’ Policy*, ASSOCIATED PRESS (June 11, 2019), <https://apnews.com/e836471bc7f14eaba90fd09aa83b6cb8> [perma.cc/9KXZ-6MU8] (explaining the Remain-in-Mexico policy); Michael D. Shear and Maggie Haberman, *Mexico Agreed to Take Border Actions Months Before Trump Announced Tariff Deal*, N.Y. TIMES (June 8, 2019), <https://www.nytimes.com/2019/06/08/us/politics/trump-mexico-deal-tariffs.html> [perma.cc/PER7-JKYT], noting that:

Mr. Trump’s decision to use trade as a bludgeon against Mexico [to accelerate expansion of the Remain-in-Mexico policy] was driven in part by his obsession with stopping what he falsely calls an invasion of the country and in part by a desire to satisfy his core supporters, many of who have grown angry at his inability to build his promised border wall.

*Id.*

111. Glenn Thrush, *U.S. to Begin Blocking Asylum Seekers From Entering Over Mexican Border*, N.Y. TIMES (Jan. 24, 2019), <https://www.nytimes.com/2019/01/24/us/politics/migrants-blocked-asylum-trump.html?module=inline> [perma.cc/X769-FY2Y] (noting that while “using the San Ysidro border crossing near San Diego as the first location to turn back immigrants applying for refugee status[.]” the Administration had indicated that the policy would gradually be expanded to border crossings with heavy foot-traffic in Texas, New Mexico and Arizona). The “Remain in Mexico” policy “is likely to intensify pressure on the Mexican authorities” and “will force the Mexican government to create a system for processing, housing and protecting the asylum-seekers who would now congregate on their side of the border.” *Id.* Additionally, the policy was “intended to dissuade immigrants, mostly from Central America, from making the long and dangerous journey through Mexico to the southwestern United States border.” *Id.*

112. 8 C.F.R. § 208 (2019). The new rule regarding “safe” third countries has been controversial, as many of the countries that the Trump administrations deems safe (such as Guatemala) are not considered safe by many refugee experts, and has been challenged in federal court. Caitlin Dickerson, *Federal Appeals Court Blocks Trumps’ ‘Remain in Mexico’ Policy*, (Feb. 28, 2020), [https://www.nytimes.com/2020/02/28/us/migrants-court-remain-in-mexico-mpp-injunction.html?emc=edit\\_na\\_20200228&ref=cta&nl=breaking-news&campaign\\_id=60&instance\\_id=0&segment\\_id=21729&user\\_id=758db07a98a5a67a90badbc4501e9653&regi\\_id=17436275](https://www.nytimes.com/2020/02/28/us/migrants-court-remain-in-mexico-mpp-injunction.html?emc=edit_na_20200228&ref=cta&nl=breaking-news&campaign_id=60&instance_id=0&segment_id=21729&user_id=758db07a98a5a67a90badbc4501e9653&regi_id=17436275) [https://perma.cc/KM9Y-6AVW]; Miriam Jordan and Zolan Kanno-Youngs, *Trump’s Latest Attempt to Bar Asylum Seekers is Blocked After a Day of Dueling Rulings*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/asylum-ruling-tro.html> [perma.cc/8ECH-9T5J]; see also Michael D. Shear et al., *After Tariff Threat, Trump Says Guatemala Has Agreed to New Asylum Rules*, N.Y. TIMES (July 26, 2019), <https://www.nytimes.com/2019/07/26/world/americas/trump-guatemala-asylum.html> [perma.cc/WGF7-BCH6].



With respect to the Muslim travel ban, as discussed above<sup>113</sup> and revisited here, the ban serves both to advance the trope of Muslim men as terrorists and to shift the border outward. Trump issued three presidential “travel ban” orders—each of which was aimed at banning Muslim travelers before they even arrived at U.S. borders—thereby pushing the border outward, in effect, to the port of embarkation of any of the banned countries. The initial iteration of the travel ban was hastily issued, with minimal interagency consultation and no credible rationale beyond the blatantly discriminatory rationale upon which Trump had campaigned to ban Muslims from the United States before their arrival.<sup>114</sup> A second version of the travel ban, issued several weeks later, also singled out predominantly Muslim countries, aimed at stopping travelers before their arrival at U.S. borders; however, this second iteration of the travel ban incorporated an extensive analysis of presumed national security bases for excluding visitors from each country.<sup>115</sup> The third version of the travel ban—which added in a couple of *non*-Muslim countries (and withdrew three predominantly Muslim nations)—was issued in September 2017<sup>116</sup> and was ultimately upheld by the Supreme Court, on the grounds that banning travelers from this group of countries was ostensibly based on national security,<sup>117</sup> in con-

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113. See *supra* notes 100–01.

114. See Exec. Order No. 13,769, 82 Fed. Reg. 8,977 (2017). As discussed *supra* notes 100–01, once Trump took office and imposed the travel ban on several predominantly Muslim countries, Trump’s lawyer-advisor, Rudolph Giuliani, conceded that the intent behind the ban was to implement the “Muslim ban” that Trump had campaigned on. See discussion *supra* note 100. Upon realizing the illegality of banning Muslims *per se*, Trump sanitized the Muslim ban, referring to it as—and replacing it with subsequent iterations of—an ostensibly race-neutral “travel suspension.” See discussion *infra* notes 116–20 and accompanying text. This “travel suspension” *de facto* became an indefinite ban. Muzaffar Chishti & Jessica Bolter, *The Travel Ban at Two: Rocky Implementation Settles into Deeper Impacts*, MIGRATION POL’Y INST. (Jan. 31, 2019), <https://www.migrationpolicy.org/article/travel-ban-two-rocky-implementation-settles-deeper-impacts> [https://perma.cc/JDL4-LCRY] (discussing ‘Travel Ban Policies Currently in Effect’ and ‘Possible Future Developments’).

115. See Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (2017). While the second travel ban continued a ninety-day ban on travelers, it removed Iraq; exempted permanent residents and current visa holders; and dropped preferential status to persecuted religious minorities (a provision that had been largely perceived as favoring Christian minorities in predominant Muslim countries). See Glenn Thrush, *Trump’s New Travel Ban Blocks Migrants from Six Countries, Sparing Iraq*, N.Y. TIMES (Mar. 6, 2017), <https://www.nytimes.com/2017/03/06/us/politics/travel-ban-muslim-trump.html?module=inline> [perma.cc/WSA5-J99R]. Additionally, travel ban 2.0 reversed an indefinite ban on refugees from Syria, substituting it with a 120-day freeze, requiring review and renewal. *Id.*

116. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017) (amending Executive Order 13780 and adding North Korea and Venezuela to the list of banned countries).

117. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018) (holding the Trump administration had “set forth a sufficient national security justification to survive rational basis review”).

trast to the anti-Muslim animus that seemed to underlie the initial travel ban (which lower courts had enjoined).<sup>118</sup>

Once the Supreme Court addressed the merits of the third iteration of the travel ban, Chief Justice Roberts' opinion distinguished *President Trump's* more subtly-coded rhetoric from the more overtly anti-Muslim rhetoric of *Candidate Trump* during the 2016 presidential campaign.<sup>119</sup> In so doing, Roberts rebuffed Justice Sonia Sotomayor's dissent, in which she had argued for an Establishment Clause analysis that would have required the Court's more rigorous heightened scrutiny in reviewing the travel ban.

One implication of the shifting border is that the Court is more likely to analyze the president's immigration policies—even ones initially motivated by discriminatory animus—within the framework of national security concerns regarding borders. Using this national security frame, Roberts triggered the lower, more deferential standard of rational basis review, in contrast to the higher standard of review that would have been triggered had the Court given credence to the First Amendment (Establishment Clause) argument. This analysis would have led to a more rights-protecting constitutional jurisprudence. All three iterations of the travel ban effectively shifted the border outwards, based on Trump's original policy goal to ban Muslims before they even arrive at U.S. borders.

### CONCLUSION:

#### POSSIBILITIES FOR SOLIDARITY ACROSS RACE AND GENDER BOUNDARIES

This Article spotlights the role of gender in the current immigration and refugee debate to illuminate that Trump's restrictive policies are not only raced, but also gendered. I have explored how even as

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118. *But see* Wahid Niayesh, *Trump's Travel Ban Really was a Muslim Ban*, WASH. POST (Sept. 26, 2019), <https://www.washingtonpost.com/politics/2019/09/26/trumps-muslim-ban-really-was-muslim-ban-thats-what-data-suggest> [https://perma.cc/4BYD-NZ39] (summarizing data demonstrating “the number of immigrant visas issued to citizens of the[] Muslim-majority countries [included in the travel ban] dropped sharply”—from 1,419 in October 2017 to 69 in January 2018—while the non-Muslim majority countries covered by the ban (North Korea and Venezuela) “did not experience a drop in visas issued—contradicting any notion that the travel ban wasn't a ‘Muslim ban’ because it included two non-Muslim countries”). *See also* Joseph Landau, *Process Scrutiny: Motivational Inquiry and Constitutional Rights*, 119 COLUM. L. REV. 2147 (2019) (commenting that while most commentators have framed “the travel ban litigation through the President's repeated expressions of hostility against the Muslim faith,” the courts have focused on whether or not the administration followed constitutionally mandated process for issuing executive orders). For an overview of the three iterations of the travel ban—and legal challenges—see, e.g., Adam Liptak, *Supreme Court to Consider Challenge to Trump's Latest Travel Ban*, N.Y. TIMES (Jan. 19, 2018), [https://www.nytimes.com/2018/01/19/us/politics/supreme-court-trump-travel-ban.html?emc=edit\\_na\\_20180119&nl=breaking-news&nliid=17436275&ref=cta](https://www.nytimes.com/2018/01/19/us/politics/supreme-court-trump-travel-ban.html?emc=edit_na_20180119&nl=breaking-news&nliid=17436275&ref=cta) [perma.cc/4GBD-C7LR].

119. *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

traditional notions of the nationstate are being eroded, other forms of power and regulation are on the rise. Trump has learned to manipulate the fluidity of borders, shifting them alternatively inward and outward to opportunistically suit his needs, based on stereotypes of motherhood and masculinity that are raced and gendered. As Shachar notes, “The sheer reach and magnitude of the shifting border [calls for] revisiting the age-old question of how to tame menacing governmental authority.”<sup>120</sup>

By examining how Trump has used the narratives of, on the one hand, the “welfare cheat” to shift borders inward and, on the other hand, “the criminal” (and, relatedly, “the terrorist”) to shift borders outward, this Article sheds new light on how the intersection of race and gender is being used to recreate borders not only in the physical sense, but legal constructs. Even as Trump cynically uses race and gender to shift legal scripts, resistance to these policies—by lawyers, activists, immigrants, and the media—has sparked solidarity across race and gender boundaries. For instance, African American groups have strongly criticized the anti-Latinx orientation of the family separation policy.<sup>121</sup> Similarly, women’s rights activists have linked arms with immigrants’ rights lawyers to challenge family separation and Trump’s efforts to eliminate domestic violence as a grounds of asylum.<sup>122</sup> If there is a silver lining in these restrictive policies, it is the crosscutting ways in which Trump’s reliance on both race and gender stereotypes has laid a foundation for feminist, crossracial solidarity that can counter the demonizing of immigrants and refugees, as well as the accompanying legal restrictions that have grave consequences for so many.<sup>123</sup>

120. Shachar, *Bordering Migration, Migrating Borders*, *supra* note 3, at 133.

121. The tweeter feed of Sherrilyn Ifill, President of the NAACP Legal Defense and Educational Fund, reflects this strong crossracial solidarity. *See, e.g.*, Sherrilyn Ifill (@Sifill\_LDF), TWITTER (July 27, 2019, 7:23 AM), [https://twitter.com/Sifill\\_LDF/status/1155121552364572673](https://twitter.com/Sifill_LDF/status/1155121552364572673) [perma.cc/FYA4-YNUJ] (regarding Mary Papenfuss, *Immigration Officials Snatch 9-Year-Old U.S. Citizen Heading to School, Hold Her for 2 Days*, HUFFINGTON POST (Mar. 24, 2019), [https://www.huffpost.com/entry/julia-isabel-amparo-medina-immigration-border\\_n\\_5c96aa60e4b0a6329e177fbb?fbclid=IwAR3VN5DUGf-CiOlXALxFvrscS7Dg6z-h\\_bd\\_aPNyWa4hjRrknBea8DTd-yc](https://www.huffpost.com/entry/julia-isabel-amparo-medina-immigration-border_n_5c96aa60e4b0a6329e177fbb?fbclid=IwAR3VN5DUGf-CiOlXALxFvrscS7Dg6z-h_bd_aPNyWa4hjRrknBea8DTd-yc) [https://perma.cc/ECK3-HGRY]) (lamenting, “When is it enough?” in retweeting a story in Huffington Post concerning a child separated from her family, despite being a U.S. citizen, because she was overheard speaking Spanish and therefore assumed to be an unauthorized immigrant).

122. *See* Catherine Powell, *Bringing a Gender Lens to the Immigration Debate*, COUNCIL ON FOREIGN RELATIONS, WOMEN AROUND THE WORLD (June 24, 2019), <https://www.cfr.org/blog/bringing-gender-lens-immigration-debate> [perma.cc/7JA4-7EFN] (discussing collaborative work between the ACLU’s Immigrants’ Rights Project and Women’s Rights Project).

123. In this way, my conclusions echo the work of my colleagues, Jennifer Gordon & Robin Lenhardt, *Rethinking Work and Citizenship*, 55 UCLA L. REV. 1161, 1236 (2008) (highlighting important similarities and convergences in the paths to the workplace taken by African American and Latino immigrant workers and pointing to unique opportunities for increased solidarity between these groups).

# THE AMBIGUITY OF THE MIGRATION AND DEVELOPMENT NEXUS POLICY DISCOURSE: PERPETUATING THE COLONIAL LEGACY?

Janine Silga\*

## ABSTRACT

This Article seeks to identify the influence of the colonial legacy on migration policies, paying particular attention to the European context. Its goal is to assess the extent to which the current policy discourse on the “migration and development nexus (MDN)” stems from a conception of development that is still tightly connected with colonialism. Through the lens of the “North-South” divide—between countries labelled respectively as being ‘developed’ and ‘developing’—this Article considers how the MDN is often envisioned, mainly in policy circles, as a way of encouraging people from the “global South” to stay put and thus deterring their migration to the “global North.”

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\* Postdoctoral researcher (University of Luxembourg). This Article is the final version of a piece presented at UCLA as part of a symposium ‘Critical Perspectives on Race and Human Rights—Transnational Re-Imaginings’ held on 8 March. I would like to express my deep gratitude for the detailed and enthusiastic comments received from Professor Cecilia Menjivar who chaired the panel in which this Article was presented. I am also very grateful for the comments and questions formulated during this panel, both by my copanelists and by the members of the audience. I would also like to give my heartfelt thanks to Edoardo Stoppioni for his support throughout this project. Last but not least, I would like to thank all the anonymous reviewers of *JILFA* for their very attentive reading and detailed comments on the former versions of this Article. An earlier version of this Article was presented at the Law and Association Society as part of a panel chaired by Professor Iyiola Solanke entitled ‘Iterations of the Other in Domestic and International Law’. I am greatly indebted to Professor Solanke for her early comments on this piece. This Article would not have existed without her invitation to participate in her panel and I would like to extend my warmest thanks to her.

This analysis examines the “European Union (EU)” and its Member States as case studies, especially in their relations with African countries, and argues that freedom of movement is still conceived as a privilege—originating in colonial times—that is enjoyed by few. From this perspective, migration policy—often considered the last bastion of State sovereignty—is nothing but a means to preserve the North-South divide as it stands. This Article also shows the complexity of interpreting the MDN discourse as it reflects the many—often conflicting—meanings of “development” within the context of international regulation of migration.

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“D’une certaine manière ‘l’exception coloniale’ se continue dans l’immigration et par l’immigration qui comporte elle aussi ses ‘exceptions’ . . . . [L]’immigration, même quand elle n’a apparemment rien à voir avec tout antécédent colonial réalise, à sa manière . . . une situation qui ne manque pas d’analogie avec la situation coloniale.”

“Somehow, the ‘colonial exception’ perpetuates itself in immigration and by immigration, which also entails ‘exceptions’ . . . . [I]mmigration, even when it is not related to colonisation echoes in its own way . . . a situation similar to the colonial situation.”<sup>1</sup>

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1. Abdelmalek Sayad, *Naturels et naturalisés* [*Natural and Naturalized*], 99 ACTES DE LA RECHERCHE EN SCIENCES SOCIALES 26, 28 (1993).

## INTRODUCTION

The “migration and development nexus<sup>2</sup> (MDN)” emerged as an important dimension of international migration management in the early nineties. From the perspective of migration management, MDN’s main objective of connecting migration and development policies consists of the promotion of the “positive” impact of migration on development and vice versa. Although the specific nature of the interaction between migration and development has been analysed by different social sciences, the emergence of the MDN as a policy concept appears to follow an evolution that is rather independent from these scientific examinations of the way in which these social phenomena interact concretely. A superficial analysis might conclude at this point that this concept has been revolutionary when it comes to migration management, which tends to be traditionally one-sided, if not state-centered. Indeed, through its dual focus on both migration and development, the MDN appears to suggest a clear departure from States’ traditionally unilateral management of migration.

In questioning the premises of the MDN policy objective, this Article sheds a critical light on the concept and seeks to trace the persisting influence of the colonial legacy in the design of a migration regulatory framework. Focusing on the European Union (EU), this Article assesses the extent to which the current policy discourse on the MDN stems from a conception of “development” that remains closely connected with colonialism and its resulting racial prejudices. Indeed, through the lens of the “North-South” divide, this Article questions the fact that the MDN is often envisioned as a way to encourage people from the “global South” to stay put, while deterring them from moving to and settling in the “global North.” In the EU in particular, the MDN has followed a rather tortuous evolution as a policy concept, and it appears that this evolution is still ongoing. As a result, the MDN as a blurred concept has assumed several policy functions at various points in the evolution of the EU migration policy. As part of the EU migration policy, the MDN has especially shown the capacity of the EU migration strategy to include non-EU countries “of origin,” and

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2. The phrase ‘migration-development nexus’ has been created by Ninna Nyberg-Sørensen, Nicholas Van Hear and Poul Engberg-Pedersen in a seminal article on the links between migration and development focusing on policy issues. Ninna Nyberg-Sørensen et al., *The Migration-Development Nexus Evidence and Policy Options State-of-the-Art Overview*, 40(5) INT’L MIGRATION 3 (2002).

“transit” of migrants as partners, although these so-called partnerships often mirror longterm power imbalances.<sup>3</sup>

This analysis is carried out using the EU and its Member States as its main reference, especially in their relations with African countries. With regard to the Member States, this Article particularly focuses on relevant aspects of the French migration policy in connection with its former colonial empire. By doing so, this Article argues that freedom of movement is still conceived as a colonial-era “privilege” to be enjoyed only by the few and that migration policy, often considered the “last bastion of State sovereignty,” is nothing but a way to preserve the North-South divide as it exists today. Furthermore, this Article highlights the complexity of interpreting the MDN discourse as reflecting the many—often conflicting—meanings of “development” in the context of the international regulation of migratory movements.

In Part I, this Article provides a critical overview of the MDN policy discourse, presenting the two main ways in which the connection between migration and development have been interpreted at the EU level and translated into policy practices as a result. These two interpretations correspond respectively to the root causes approach and to the codevelopment approach. In Part II, this Article presents the evolution of these two approaches in the policy discourse more concretely by examining EU policy documents. Finally, Part III of this Article explains how the colonial legacy manifests itself in the EU policy discourse on the MDN.

## I. THE MDN POLICY DISCOURSE

It is necessary to distinguish between the MDN as a policy discourse and its resulting policy objectives and the MDN as an object of “scientific” analysis. Scientific analyses on the nexus, mostly carried out by economists, intend to ascertain the nature of the dialectic relationship between migration and development. In this regard, the purpose of scientific investigation is not only to establish the nature of such linkage, but also to assess its “quality”—namely, whether this relationship is “positive” or “negative.” Scientific research on migration and its impact on economic growth and social transformation<sup>4</sup> has

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3. See Steven Sterkx, *The External Dimension of EU Asylum and Migration Policy: Expanding Fortress Europe?*, in *EUROPE'S GLOBAL ROLE—EXTERNAL POLICIES OF THE EUROPEAN UNION* 117 (J. Orbie ed., 2008).

4. For a general overview on the connection between migration and social transformation, see Nicholas Van Hear, *Theories of Migration and Social Change*, 36(10) J. ETHNIC & MIGRATION STUD. 1531 (2010).

a long history of study. As early as the 19<sup>th</sup> century, geographer Ernest G. Ravenstein outlined a series of “laws on migration” in an attempt to define the determinants of migration.<sup>5</sup> It is only recently, however, that the links between migration and development have given rise to very attentive research from most other social sciences. The aim of this research has mainly been to assess the nature of such links in terms of the reciprocal impact of migration on development and of development on migration. Because they could provide measurable results, such analyses on the MDN were initially dominated by economists, particularly in the field of development economics. This explains why the original point of inquiry on the MDN was mainly focused on the extent to which migration affected the development process.<sup>6</sup>

Because the scientific analysis on the MDN does not operate within an objective and immutable theoretical framework, and the criteria of assessment are variable, MDN scholarship may rather be termed as a scientific discourse that includes several—possibly divergent—scientific analyses. Indeed, the appraisal of the quality of the MDN depends on the mutable nature of the very concept of development over time, which explains why the scientific discourse has been evolving accordingly.<sup>7</sup>

The scientific discourse on the MDN always relies on an analysis of observable facts regarding both migration and development, conceived as social phenomena. On the other hand, the policy discourse obeys a different logic, and considers migration and development—or rather the connection between them—as policy objectives. In this respect, the policy discourse formulates objectives with a view to achieving higher societal goals, which are not always straightforward. In particular, it is not always easy to decipher whether—as a policy concept—the MDN is more migration or development oriented. Although the disjunction between the scientific debate on the nature of the MDN and the actual function of MDN policy is important to note, this Article will focus on the policy discourse itself.

Substantially, the MDN policy discourse aims at fostering positive linkages between migration and development and at promoting the beneficial effects of migration on the development of the countries of origin

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5. Ernest G. Ravenstein, *The Laws of Migration*, 48(2) J. STAT. SOC'Y LONDON 167 (1885). For a modern appraisal of *The Laws of Migration*, see D. B. Grigg, *E. G. Ravenstein and the “Laws of Migration,”* 3(1) J. HIST. GEOGRAPHY 41 (1977).

6. See, e.g., Marvin P. Miracle & Sara S. Berry, *Migrant Labour and Economic Development*, 22(1) OXFORD ECON. PAPERS, NEW SERIES 86 (1970).

7. For an in-depth presentation and analysis of the evolution of the scientific discourse on the MDN, see Hein de Haas, *Migration and Development: A Theoretical Perspective*, 44(1) INT'L MIGRATION REV., 227 (2010).



(mainly through “remittances” and “circular migration”), while mitigating migration’s negative effects (braindrain as well as shortages of lower-skilled workers). In the policy discourse, the MDN is suggested as a panacea solving all alleged problems related to immigration from less to more developed countries and benefiting all stakeholders.<sup>8</sup> It is often referred to as the “win-win-win”<sup>9</sup> configuration for international migration management, in that it is supposed to be beneficial both for countries of origin and destination, as well as migrants themselves.<sup>10</sup> In this sense, it is rather paradoxical that the concept is often instrumentalised to justify a control mechanism on migration flows.

Within the EU policy framework, the discourse on the MDN originated in the early nineties and was initially developed as part of the overarching concept of the EU’s then-nascent migration policy.<sup>11</sup> Following the collapse of the Soviet Union and subsequent refugee flows—especially in connection to the crisis in the former Yugoslavia<sup>12</sup>—the MDN was first regarded in the EU as a way of curbing further migration flows by targeting the causes of migration.<sup>13</sup> In

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8. Birgitte M. Brønden, *Migration and Development: The Flavour of the 2000s*, 50(3) INT’L MIGRATION 2, 2–7 (2012).

9. The report of the UN Secretary-General on International Migration and Development of May 18, 2006, mentions that, “There is an emerging consensus that countries can cooperate to create triple wins, for migrants, for their countries of origin and for the societies that receive them.” U.N. Secretary-General, *International Migration and Development*, ¶ 6, U.N. Doc. A/60/871 (May 18, 2006), quoted in Vincent Chetail, *Paradigm and Paradox of the Migration-Development Nexus: The New Border for North-South Dialogue*, 51 GERMAN Y. B. INT’L L. 183, 184 (2008).

10. In reference to the concept of ‘circular migration,’ see Stephen Castles, *Understanding Global Migration: A Social Transformation Perspective*, 36(10) J. ETHNIC & MIGRATION STUD. 1565, 1567 (2010). In reference to ‘brain gain’ as a way to reverse ‘brain drain,’ see Catherine Wihtol de Wenden, *Migration and Development*, 40(3) ETHNIC & RACIAL STUD. 431 (2018).

11. Janine Silga, *Assessing the Consistency of EU Development Co-operation with Readmission in the EU-Philippines Agreement Case—A Balancing Exercise*, 40(3) EUR. L. REV., 439, 449 (2015).

12. In the Declaration on Principles Governing the External Aspects of Migration Policy adopted as part of its Presidency Conclusions, the European Council meeting at Edinburgh on December 12, 1992 declared that it was “conscious of the particular pressures caused by the large movements of people fleeing from the conflict in the former Yugoslavia . . .” Presidency Conclusions, Edinburgh European Council 42 (Dec. 12, 1992).

13. In its 1994 Communication, the Commission argued that action on the causes of migration pressures “require[d] ensuring that immigration and asylum policies are fully integrated into the Union’s external policies, and that the various external policy instruments available to the Union are used to address the root causes of those pressures. That could involve action at a number of different levels such as in the areas of trade, development and co-operation policies, humanitarian assistance and human rights policies.” *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies, Foreword*, COM (1994) 23 final (Feb. 23, 1994).

the EU context, such “uncontrolled” movements of people were perceived as a risk,<sup>14</sup> potentially undermining the world order as it then stood. This meant that migration was increasingly considered a security issue to be maintained under control.<sup>15</sup> In this context, the opposition between “economic migrants” and “genuine refugees”<sup>16</sup> was increasingly used to justify the “fight” against “illegal” immigration.<sup>17</sup> While this fight was essentially aimed at implementing forced return of people staying irregularly in Europe, another objective was to prevent further movements of populations at the source. From this perspective, development promotion, in its holistic sense (including both economic and political dimensions), would contribute to the containment of migration flows.<sup>18</sup> This explains the original prevalence of migration policy goals in examining the MDN as a policy objective. Some scholars, and in particular Christina Boswell, a renowned expert in EU migration policy, have contrasted punitive instruments (readmission) that are more control-oriented, with preventive instruments to deal with unauthorized immigration to Europe.<sup>19</sup> While this interpretation is right to some extent, this Article argues that punitive and preventive instruments are both control-oriented, albeit in different ways. Indeed, they both intend to reduce the so-called “migration pressure”<sup>20</sup> to Europe, whether

14. *Id.* The Declaration on Principles Governing the External Aspects of Migration Policy explicitly mentioned “the danger that uncontrolled immigration could be destabilizing . . .” Presidency Conclusions, *supra* note 12.

15. On the construction of migration as a security issue in the EU context, see Jef HUYSMANS, *The European Union and the Securitization of Migration*, 38(5) J. COMMON MAR. STUD. 751 (2000).

16. On the distinction between ‘economic migrants’ and refugees, see Khalid Koser & Richard Black, *Limits to Harmonization: The “Temporary Protection” of Refugees in the European Union*, 37(3) INT’L MIGRATION 521 (1999). For a more recent work, see Roger Zetter, *More Labels, Fewer Refugees: Remaking the Refugee Label in the Era of Globalization*, 20(2) J. REFUGEE STUD. 172 (2007).

17. In his article, Huysmans describes the evolution towards more restrictive immigration policies in Europe. He explains, “The development of security discourses and policies in the area of migration is often presented as an inevitable policy response to the challenges for public order and domestic stability of the increases in the number of (illegal) immigrants and asylum-seekers.” Huysmans, *supra* note 15, at 757.

18. Stephen Castles & Nicholas Van Hear, *Root Causes*, in GLOBAL MIGRATION GOVERNANCE 287–306 (Alexander Betts ed., 2011).

19. See Christina Boswell, *The ‘External Dimension’ of EU Immigration and Asylum Policy*, 79(3) INT’L AFFAIRS, 619 (2003).

20. According to the European Commission, “migration pressure relates to all actual and potential migratory movements directed towards Europe.” *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, *supra* note 13, at 13. On the notion of ‘migration pressure,’ see W. R. Böhring et al., *Migration Pressure: What Is It? What Can One Do About It?*, (World Employment Programme Research, Working Paper No. MIG WP. 55, 1991). The concept of ‘migration pressure’ implies that several factors, among them demography, if not controlled appropriately,

by using repressive means or incentives (especially financial) to reduce migratory movements.

#### A. The 'Root Causes' Approach and Codevelopment

Traditionally, there are two trends (alternatively referred to as "rhetorics," "paradigms," or "approaches") to the MDN in the EU policy discourse.<sup>21</sup> The first paradigm, referred to as the root causes approach, studies the causes that lead to emigration from developing countries to developed countries.<sup>22</sup> Such migration flows are commonly understood as constituting a "pressure"<sup>23</sup> on receiving countries from sending countries. This approach sees development policy (and especially its financial tools) as instrumental to the migration management objectives of receiving States, predominantly.<sup>24</sup> Typically, the root causes approach understands emigration as the result of economic deprivation, or more generally, "underdevelopment," thus referring to development as a structural process, the lack of which may lead to undesirable migration movements of people coming mostly through irregular channels.<sup>25</sup> The enthusiasm for the root causes approach is grounded in the intuition that migration is a phenomenon (mostly nonvoluntary) that should be deterred and prevented.<sup>26</sup>

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may lead to undesired migratory flows from different regions of the world. Although this concept undeniably builds on the reality, it also reflects irrational considerations, based on fear and myths of invasion of the European territory. See Hein de Haas, *The Myth of Invasion: the Inconvenient Realities of African Migration to Europe*, 29(7) THIRD WORLD Q. 1305 (2008). This also echoes earlier fears of the empowerment of colonial 'subjects' expressed by some French authors in the aftermath of the First World War. See OLIVIER LE COUR GRANDMAISON, *LA RÉPUBLIQUE IMPÉRIALE—POLITIQUE ET RACISME D'ÉTAT*, 258–78 (2009).

21. For deeper insights into the two approaches to the MDN in the EU policy discourse, see Silga, *supra* note 11, at 449–51. For an earlier appraisal of the MDN in the EU, see Chetail, *supra* note 9.

22. *Id.* Vincent Chetail describes this approach as the perspective whereby "[m]igration is perceived as a failure of development and it is believed that migration can be prevented or at least mitigated through aid and development." Chetail, *supra* note 9, at 187.

23. See *supra* note 20 on the definition of "migration pressures" in the EU context.

24. In his analysis of the External Dimension of the EU Asylum and Migration Policy, Sterkx shows how "[e]xternal assistance in the area of migration illustrate[s] that] these budgets primarily support capacity-building in the area of border management, the fight against illegal immigration, and the management of migration flows, and are used as a leverage to ensure third countries' willingness to cooperate." Sterkx, *supra* note 3, at 133.

25. This is clearly stated in the *European Agenda on Migration* in which the Commission states that the "EU external cooperation assistance, and in particular development cooperation, plays an important role in tackling global issues like poverty, insecurity, inequality and unemployment which are among the main root causes of irregular and forced migration." *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, at 8, COM (2015) 240 final (May 13, 2015).

26. *Id.* Vincent Chetail also mentions that "it has been frequently asserted that the

The root causes approach actually reveals a rather controversial aspect, if not a concern, of development policy that it shares with traditional migration policy. Indeed, one archaic objective of the EU development policy is the control of movement of population (internal migration),<sup>27</sup> on the basis of the assumption that an unbalanced rural-urban migration is adverse to development, thus adopting a ‘sedentary bias’.<sup>28</sup> On the connection between the sedentary bias approach and the root causes approach, Steve Castles points out that:

[A] dominant political discourse sees migration as a *problem* that needs to be “fixed” by appropriate policies. The repressive variant is tight border control, the more liberal one is addressing the “root causes” of migration—especially poverty and violence in origin countries—so that people do not have to migrate. Either way, migration is seen as harmful and dysfunctional.<sup>29</sup>

Institutionally, including the root causes approach into development strategy also underlines the potential instrumentalization of development (financial) means and tools for migration management purposes.

The second approach to the MDN, the codevelopment approach, broadly refers to migrants’ support for the development of their countries of origin.<sup>30</sup> Codevelopment does not necessarily attempt to define

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goal of western countries is far more to curb immigration than to contribute to the development of sending countries.” He further adds that “this is not surprising given the origin and rationale of the root causes approach, which is indeed basically intended to prevent immigration.” Chetail *supra* note 9, at 192.

27. For more insights on the question see Oliver Bakewell, ‘*Keeping Them in Their Place*’: *The Ambivalent Relationship Between Development and Migration in Africa*, 29(7) THIRD WORLD Q. 1341, 1342 (2008). See also Jacques Gaude & Peter Peek, *The Economic Effects of Rural-Urban Migration*, 114(3) INT’L LAB. REV. 329 (1976) (discussing rural-urban migration as adverse to development); Henry Rempel & Richard A. Lobdell, *The Role of Urban-to-Rural Remittances in Rural Development*, 14(3) J. DEV. STUD. 324 (1978) (for contrary opinion, see Qded Stark, *On the Role of Urban-to-Rural Remittances in Rural Development*, 16(3) J. DEV. STUD. 369 (1980)); Richard Rhoda, *Rural Development and Urban Migration: Can We Keep Them Down on the Farm?*, 17(1) INT’L MIGRATION REV. 34 (1983); Andrei Rogers & Jeffrey G. Williamson, *Migration, Urbanization and Third World Development: An Overview*, 30(3) ECON. DEV. & CULTURAL CHANGE 463 (1982).

28. Bakewell, *supra* note 27. See Stephen Castles, *supra* note 10.

29. Castles, *supra* note 10, at 1567. It is also important to bear in mind that demographic considerations may also enter the conceptual realm of control of population movement, especially within the context of development policy. On this issue, see Luc Legoux, *Les Craintes démographiques contre les droits humains [Demographic Fears Against Human Rights]*, in 1 MONDIALISATION, MIGRATION ET DROITS DE L’HOMME: UN NOUVEAU PARADIGME POUR LA RECHERCHE ET LA CITOYENNETÉ 551 (Marie-Claire Caloz-Tschopp & Pierre Dasen eds., 2007).

30. This notion is adopted by the author to refer to the second way in which the migration-development nexus has been interpreted as a policy concept in the EU framework, in addition to the root causes approach. See Silga, *supra* note 11, at 451.

development, but its understanding of development necessarily involves more individual agency and fewer structural issues than the root causes paradigm.<sup>31</sup> In this sense, “codevelopment” emphasizes the positive role of migrants in the development of their countries of origin, thanks to a more migrant-friendly approach. Particular attention is given to remittances and the perception of migration as a transnational phenomenon,<sup>32</sup> with migrants viewed as agents of the development of their countries of origin.

Initially, the EU policy discourse favored the root causes approach because it emerged at a time when the main objective was to tamp down migration flows and eventually to exhaust the irregular movement of people.<sup>33</sup> However, codevelopment was increasingly favored from the early 2000s onward.<sup>34</sup> Indeed, insofar as “codevelopment” relates to existent practices, its associated policy objectives are perceived as more tangible and easier to implement. Currently, both approaches coexist.

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31. The concept of codevelopment as adopted in this Article is more than partially covered by the French concept of *codéveloppement* in its most recent sense. In the French context, this notion broadly refers to any action of cooperation regarding migrants and the development of their countries of origin. As formulated by Christoph Daum, “*le terme de codéveloppement recouvre . . . dans le discours public toute action de coopération en rapport avec les populations immigrées et le développement des pays d’origine*” [“the word *codéveloppement* covers—in the public discourse—any action of cooperation in relation to migrant populations with the development of their countries of origin.”] Christophe Daum, *Le codéveloppement, grandeur et décadence d’une aspiration généreuse* [*The Co-Development Grandeur and Decadence of Generous Aspiration*], 68(4) REVUE INTERNATIONALE ET STRATÉGIQUE, 49, 49 (2007). This definition has also found a European echo at the Committee of Ministers of the Council of Europe, which defines codevelopment as “any social, economic, cultural or political development activity in countries of origin based on co-operation between migrants, their organisations and their partners—public and private—in both countries of origin and receiving countries . . .” COUNCIL OF EUROPE, RECOMMENDATION CM/Rec(2007)10 OF THE COMMITTEE OF MINISTERS TO MEMBER STATES ON CO-DEVELOPMENT AND MIGRANTS WORKING FOR DEVELOPMENT IN THEIR COUNTRIES OF ORIGIN (July 12 2007), [https://www.coe.int/t/dg3/migration/archives/Source/Recommendations/Recommendation%20CM%20Rec\\_2007\\_10\\_en.pdf](https://www.coe.int/t/dg3/migration/archives/Source/Recommendations/Recommendation%20CM%20Rec_2007_10_en.pdf) [<https://perma.cc/43RC-JZ6P>].

32. Rainer Bauböck defines the term ‘transnational’ as applying to “[h]uman activities and social institutions that extend across national borders.” In this respect, “[t]he very definition of transnationalism refers . . . to states as bounded political entities whose borders are crossed by flows or people, money or information and are spanned by social networks, organisations or fields.” Rainer Bauböck, *Towards a Political Theory of Migrant Transnationalism*, 37(3) INT’L MIGRATION REV. 700, 701 (2003).

33. In its 1994 Communication, the Commission stated that the EU “requires an active policy to prevent and combat illegal migratory movements.” *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, *supra* note 13, at 27.

34. See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations*, COM (2005) 390 final, (Sept. 1, 2005). For more details on this phase, see *infra* 2.2.

However, while codevelopment is still widely accepted as the dominating paradigm, the root causes discourse has been recently reappraised in the aftermath of the “refugee crisis”.<sup>35</sup>

Part II evaluates more concretely how these two approaches to MDN have evolved in the EU policy framework by examining the policy discourse as embodied in EU policy documents. From the outset, it is useful to note that policy documents refer mostly to documents issued by EU institutions, and in particular for the purpose of our analysis, the European Commission, the European Parliament, and the European Council.

## II. THE EVOLUTION OF THE MDN ‘RHETORIC’ IN THE EU POLICY DISCOURSE

### A. The ‘Root Causes’ Approach

Although migration is definitely not a new phenomenon,<sup>36</sup> since the early nineties, a relatively new concern has emerged in policy circles to find novel approaches to managing the movements of people.<sup>37</sup> This concern has become even more acute as the current phase of globalization has considerably facilitated the movement of people by removing (or sharply reducing) most of the traditional obstacles to movement, such as distances and costs.<sup>38</sup> Thus, the MDN—its complexity notwithstanding<sup>39</sup>—has become an essential toolkit for stemming the flow of

35. See *infra* 2.3.

36. “It might be wise, however, to remind ourselves that migration is *not* a new phenomenon in the annals of human history. Indeed, for much of recorded history and for many civilizations, the movement of populations was not unusual. Only with the advent of the nation-state in the sixteenth and seventeenth-century Europe did the notion of legally tying populations to territorial units and to specific forms of government become commonplace.” James F. Hollifield, *The Politics of International Migration—How Can We “Bring the State Back In”?*, in *MIGRATION THEORY—TALKING ACROSS DISCIPLINES* 137, 139 (Caroline B. Brettell & James F. Hollifield (eds., 2000).

37. Martin Geiger & Antoine Pécoud, *The Politics of International Migration Management*, in *THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT* 1, 2–3 (Martin Geiger & Antoine Pécoud eds., 2010). In this contribution, these authors especially describe the “genesis of migration management” from its first elaboration by Bimal Ghosh in 1993 “following requests from the UN Commission on Global Governance and the government of Sweden.” *Id.* For a critical perspective on migration management especially in the European context, see Liz Fekete, *The Emergence of Xeno-Racism*, 43(2) *RACE & CLASS*, 23 (2001). This author describes migration management as the “new socio-economic Darwinism.” *Id.* at 24.

38. Mathias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?*, 48 *INT’L MIGRATION REV.* 283, 284 (2015). In their article, however, the authors question the assumption that the current phase of globalisation has led to more migration.

39. The literature on the links between migration and development attests to its

irregular migration at the policy level. Indeed, it is perceived as an indirect means to combat irregular immigration by tackling the longterm causes of immigration from developing countries.<sup>40</sup>

In this respect, the MDN has drawn increased attention in the international and national fora, from international institutions to national governments.<sup>41</sup> As Christina Boswell explains: “Since the early 1990s there had been a huge expansion of multilateral activities in the areas of prevention and peace-building, ranging from early warning, human rights monitoring, institutional capacity-building and post-conflict reconstruction, through various forms of political mediation, to more robust peacekeeping and military interventions.”<sup>42</sup> This policy focus on prevention also extended to migration management and especially the flow of refugees.<sup>43</sup>

Since the mid-1990s, the MDN has received broad-based political appraisal. In the United Nations, the connection between migration and development was presented as an important aspect of population management as early as in the 1970s,<sup>44</sup> but even more explicitly so

complexity. See, e.g. Reginald T. Appleyard, *International Migration and Development—An Unresolved Relationship*, 30(3/4) INT'L MIGRATION 251 (1992). See also Bimal Ghosh, *Migration-Development Linkages: Some Specific Issues and Practical Policy Measures*, 30(3/4) INT'L MIGRATION 423 (1992).

40. The 2004 IOM Glossary on migration defines the management of migration as encompassing: “[n]umerous governmental functions and a national system of orderly and humane management for cross-border migration, particularly managing the entry and presence of foreigners within the borders of the State and the protection of refugees and others in need of protection.” INTERNATIONAL ORGANIZATION FOR MIGRATION (IOM), GLOSSARY ON MIGRATION 41 (2004), [https://publications.iom.int/system/files/pdf/iml\\_1\\_en.pdf](https://publications.iom.int/system/files/pdf/iml_1_en.pdf) [<https://perma.cc/WB5L-F43G>]. More generally on migration management, see THE POLITICS OF INTERNATIONAL MIGRATION MANAGEMENT (Martin Geiger & Antione Pécoud eds., 2010). According to Martin Geiger and Antoine Pécoud, migration management originates in the early 1990s and it includes three different layers as this “notion . . . is [first] mobilized by [institutional] actors to conceptualize and justify their increasing interventions in the migration field . . . . Second, migration management refers to a range of *practices* that are now part of migration policies, and that are often performed by the institutions that promote the notion . . . . And third, migration management relies on a set of *discourses* and on new narratives regarding what migration is and how it should be addressed.” Geiger & Pécoud, *supra* note 37, at 1–2.

41. See generally Henrik Olesen, *Migration, Return and Development: An Institutional Perspective*, 40(5) INT'L MIGRATION 125 (2002). In the first part of his article, the author especially focuses on international institutions concerned with development issues, such as the International Organization for Migration, the World Bank, the Organisation for Economic Co-operation and Development or the United Nations. See *id.* at 128–34.

42. Boswell, *supra* note 19, at 625.

43. *Id.* at 625–26.

44. See U.N. Department of Economic and Social Affairs, Population Division, Compendium of Recommendations on International Migration and Development: The United Nations Development Agenda and the Global Commission on International Migration Compared, at 15–18, U.N. Doc. ESA/P/WP.197 (2006). For another example in the United

during the 1994 Cairo Conference.<sup>45</sup> More recently, the UN launched a worldwide political dialogue on the MDN called the High Level Political Dialogue on Migration and Development. Its first meeting took place in 2006,<sup>46</sup> following the recommendations of the Global Commission on International Migration.<sup>47</sup> This process has also led to the state-sponsored yearly Global Forum on Migration and Development.<sup>48</sup> Conceived during the 2006 High-Level Dialogue of the United Nations on international migration and development,<sup>49</sup> participation in this annual meeting is open to all the States Members and Observers of the United Nations.

At the EU level, references to the root causes approach can be traced back to the late 1980s. In its resolution of March 12, 1987 on the right to asylum,<sup>50</sup> the European Parliament began by highlighting the “ . . . moral and historical responsibility of the Member States of the European Community toward asylum-seekers and refugees . . . ”<sup>51</sup> that stems from Europe’s colonial past.<sup>52</sup> As for the MDN, the European Parliament indirectly referred to the root causes approach by stating that: “ . . . [B]y means of an effective European development policy and within the framework of European Political Cooperation (EPC) an important contribution can and must be made to economic development and the restoration of peace in the main refugee countries . . . ”.<sup>53</sup> In this regard, the European Parliament identified “economic progress and political and social stability in the countries of origin” as the ultimate solutions to

States, see Abelardo Lopez Valdez et al., *The Causes and Effects of Undocumented Worker Migration in the Western Hemisphere: The Need for a Development Solution*, 73 PROCEEDINGS OF THE ANNUAL MEETING (AM. SOC. OF INT’L L.) 119 (1979).

45. Rep. of the Int’l Conference on Population and Dev., at 6–10, U.N. Doc. A/CONF.171/13/Rev.1 (1994). On the MDN, see *id.* at 67–69.

46. G.A. Res. 61/208, at 2 (Dec. 20, 2006). The next High-Level Dialogue took place on October 3–4, 2013. See G.A. Res. C.2/67/L.15/Rev.1 (Dec. 12, 2012). The UN General Assembly also regularly adopts resolutions on international migration and development. The last one was adopted on December 20, 2018. See G.A. Res. 73/241 (Dec. 20, 2018).

47. See Global Comm. on Int’l Migration, *Migration in an Interconnected World: New Directions for Action*, at 76–77 (2005).

48. Starting in Belgium in 2007, the twelfth Summit of the Global Forum on Migration and Development will take place in Ecuador in January 2020.

49. See G.A. Res. 61/208, *supra* note 46, at 2.

50. See *Resolution of the European Parliament on the Right to Asylum* of 12 March 1987, 1987 O.J. (C 99) 167.

51. *Id.* at 169 ¶ A.

52. In this respect, the European Parliament emphasizes that: “as a result of the process of decolonization carried out by some Member States, some of the emergent states have artificial frontiers, suffer from structural imbalances, have undemocratic systems of government and are the scene of armed conflicts and civil wars, which create waves of refugees . . . ” *Id.* ¶ B.

53. *Id.* ¶ D.



prevent the “creation of large groups of refugees.”<sup>54</sup> Although this resolution is focused on asylum, it gives a precise idea of the initial orientation of the EU policy discourse on the connection between development and international flows of people.

From 1991 onwards, the Commission started more explicitly formulating the MDN as a policy concept. First, in its 1991 Communication on Immigration, the Commission clearly stated the “need to achieve greater responsibility in development policies”<sup>55</sup> as a means by which to reduce emigration. However, the Commission also seemed to warn against the “instrumentalization” of development policy for migration management purposes when it stated that: “Economic aid, however, is primarily aimed at the first objective of development and therefore has only an indirect effect on the specific causes of emigration. Despite increasing such aid . . . and the implementation of new initiatives . . . these measures are not designed to prevent all emigration.”<sup>56</sup>

It is only in its 1994 Communication that the Commission concretely devised a way to address the root causes of migration by adopting a comprehensive approach to it, including external cooperation with non-EU countries of origin and transit.<sup>57</sup> To this end, the Commission identified a number of important principles for the reduction of migration pressure, which included:

[T]he preservation of peace and the termination of armed conflicts; full respect for human rights; the creation of democratic societies and adequate social conditions; a liberal trade policy, which should improve economic conditions in the countries of emigration; the effective use of the appropriate volume of development aid to encourage sustainable social and economic development, in particular to contribute to job creation and the alleviation of poverty in the countries of origin . . .<sup>58</sup>

The approach adopted by the Commission found an international echo in the UN Programme of Action of the International Conference

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54. *Id.* ¶ E.

55. *Commission Communication to the Council and the European Parliament on Immigration*, at 8 ¶ 11, SEC (91)1855 final, (Oct. 23, 1991).

56. *Id.* The change of tone to a more security-oriented vision of the ‘root causes’ approach to the MDN—revealing an increasingly instrumental use of development funding for migration management purposes—slowly emerges in Commission documents to become explicit in its 2002 Communication on the integration of migration issues in the European Union’s relations with third countries. See *Communication from the Commission to the Council and the European Parliament: Integrating Migration Issues in the European Union’s Relations with Third Countries*, at 13, COM (2002) 703 final (Mar. 12, 2002).

57. *Communication from the Commission to the Council and the European Parliament on Immigration and Asylum Policies*, *supra* note 13, at 13–14.

58. *Id.* at 14.

on Population and Development, adopted in Cairo in September 1994. Here, participants in the Conference identified the connection between immigration and development as a key element of international migration.<sup>59</sup> Regarding the MDN more specifically, the Programme consistently highlighted the need to address the root causes of international movement of people, including undocumented migrants and asylum-seekers.<sup>60</sup> While the root causes approach to the MDN initially appeared to be focused on alleviating migration pressure in the longterm by devising more holistic development policies, this approach slowly grew to be more control-oriented. Indeed, development aid, and especially financial assistance, was increasingly used to curb irregular immigration, rather than to enable longterm socioeconomic wellbeing as an indirect way to lower migration pressure. In this sense, the root causes approach was slowly deviated from its original objectives to become focused on short-term immigration control.<sup>61</sup>

## B. Codevelopment

Unlike the root causes approach, codevelopment only explicitly appears in policy documents at the end of the nineties. At the EU level, this concept was first mentioned in the 1999 Tampere Declaration of the European Council,<sup>62</sup> in which the EU adopted a notably positive and optimistic outlook on the interaction between migration and development. In paragraph 11 specifically, the European Council declared that:

[T]he European Union needs a *comprehensive approach to migration* addressing political, human rights and development issues in countries and regions of origin and transit. This requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children. To that end, the Union as well as Member States are invited to contribute, within their respective competence under the Treaties, to a greater coherence of internal and external policies of the Union. Partnership with third countries concerned will also be a key element for the success of such a policy, with a view to *promoting co-development*.<sup>63</sup>

Following the Tampere Declaration, the root causes approach began to fall out of favor, particularly because of its overly ambitious

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59. See Rep. of the Int'l Conference on Population and Dev., *supra* note 45, at 67–69.

60. *Id.* at 71–73.

61. For a more in-depth analysis on the evolution of the 'root causes' approach, see Silga, *supra* note 11, at 449–50.

62. For the full conclusions see Presidency Conclusions, Tampere European Council 15 and 16 (Oct. 1999).

63. *Id.* [Emphasis added].

objective to find a comprehensive solution to migration dilemmas, despite lacking the concrete financial means and the strong political will to make this goal a reality.<sup>64</sup> As a result, this approach yielded influence to codevelopment and its more concrete focus on the role of international migrants in the development process. Codevelopment was the focus of the 2005 Communication from the EU Commission on Migration and Development.<sup>65</sup> This Communication identified four priorities for concrete action to maximize the positive impact of migration on development, namely: the facilitation of flows of remittances, circular migration—including brain circulation—the role of diasporas in fostering development, and fighting brain drain.<sup>66</sup>

Consequently, codevelopment and its threefold expression (remittances, circular migration, and the fight against brain drain), is currently the main paradigm for understanding the connection between migration and development, both at the global and EU levels. Nevertheless, the root causes approach has not died out entirely, but rather, has reemerged at both levels, albeit in different ways. It remains to be seen whether the current references to the root causes approach—as explained below—reflect a truly comprehensive approach that is balanced between the fulfilment of short-term migration management goals and longterm development objectives, or whether such references simply mirror the deviated version of the root causes approach that has become the main way to understand this approach in the EU.

### C. The Current Policy Discourse on the MDN in the Aftermath of the ‘Refugee Crisis’

At the international level, codevelopment remains the favored paradigm, while the root causes approach is implicitly mentioned as a means by which to express the need to address migration in a comprehensive way. This dual approach echoes earlier approaches of EU institutions that advocated for a more systemic understanding of migration and for the adoption of a comprehensive approach. At the EU level, on the other hand, the purported refugee crisis seems to have given a stronger voice to the root causes approach, albeit in its more control-oriented fashion, by constantly mentioning the “root causes of irregular migration.”<sup>67</sup> In this sense, the current state of the evolution

64. See Sterkx, *supra* note 3, 131–35.

65. See *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations*, *supra* note 34, at 2.

66. *Id.* at 3–9.

67. See, e.g., *Regulation (EU) 2017/1601 of the European Parliament and of the*

of migration policy rhetoric in the EU directly reflects point 33 of the conclusions of the European Council meeting in Seville that insisted on the need to tackle the “root causes of illegal immigration”.<sup>68</sup>

At the international level, the 2030 Agenda for Sustainable Development, adopted in 2015,<sup>69</sup> includes migration as one of its development goals. In particular, Goal 10.7 aims to “[f]acilitate orderly, safe, regular and responsible migration and mobility of people, including through the implementation of planned and well-managed migration policies.”<sup>70</sup> In the political declaration preceding the listing of development goals, the Heads of State and Government and High Representatives “[r]ecognize the positive contribution of migrants for inclusive growth and sustainable development.”<sup>71</sup> This is a direct reference to codevelopment, envisioned as the contributions of migrants to the development of their country of origin through remittances and other types of targeted actions. The same declaration goes on to recognize that “international migration is a multidimensional reality of major relevance for the development of countries of origin, transit and destination, which requires coherent and *comprehensive* responses.”<sup>72</sup> This latter quotation unequivocally brings to mind the comprehensive approach to migration as it was initially designed in the early policy documents of the European Commission as well as the need to address the root causes of migration pressure as part of this comprehensive strategy.

A year later, the UN’s New York Declaration for Refugees and Migrants was even more explicit in adopting this dual approach. In this Declaration, the UN committed—with regard to both refugees and migrants—to favoring an approach that would address “[t]he drivers and root causes of large movements of refugees and migrants, including forced displacement and protracted crises . . . [and] which would, inter alia, reduce vulnerability, combat poverty, improve self-reliance

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*Council of 26 September 2017 Establishing the European Fund for Sustainable Development (EFSD), the EFSD Guarantee and the EFSD Guarantee Fund, Official Journal of the European Union (O.J.) 2017 O.J. (L 249) 1.* By setting up the EFSD, this regulation “aims to address specific socioeconomic root causes of migration, including irregular migration, and to contribute to the sustainable reintegration of migrants returning to their countries of origin and to the strengthening of transit and host communities.” *Id.* at ¶ 2. *See also* European Council Press Release 204/15, Special Meeting of the European Council (Apr. 23, 2015).

68. Presidency Conclusions, Seville European Council, at 10 (Oct. 24, 2002) (mentioned in 2.3 *infra*).

69. G.A. Res. 70/1, Transforming our World: The 2030 Agenda for Sustainable Development, at 21 (Sept. 25, 2015).

70. *Id.*

71. *Id.* at 8 ¶ 29.

72. *Id.* (emphasis added).

and resilience, ensure a strengthened humanitarian-development nexus, and improve coordination with peacebuilding efforts.”<sup>73</sup> This statement clearly reflects the root causes approach as it was originally expressed in the EU policy framework in the early nineties. Moreover, the same declaration also emphasised the positive contribution of migrants “[t]o economic and social development in their host societies and to global wealth creation.”<sup>74</sup> In this respect, the declaration mentioned the three main aspects of codevelopment in highlighting that migrant contribution may occur through the involvement of diasporas in economic development and ethical recruitment, as well as enhanced mobility for workers and remittances.<sup>75</sup>

Although such initiatives are praised at the EU level,<sup>76</sup> the current rhetoric on the MDN has taken a decisively more control-oriented direction. This is especially visible in EU policy documents issued in the aftermath of the so-called “refugee crisis.” Following the deadly shipwreck of around 800 migrants in the Mediterranean Sea on April 19, 2015, the European Council held a Special Meeting on April 23, 2015 and released a statement<sup>77</sup> that clearly emphasizes the importance of halting irregular flows of people as a way to prevent similar tragedies. In its statement, the European Council unambiguously stated the need to “tackle the root causes” of this human emergency. In addition, the European Council specified in this declaration the need for stronger political cooperation with African partners to “tackle the cause of illegal migration.”<sup>78</sup> As a way to prevent more irregular flows of people, the European Council, among others, invited “[t]he Commission and the High Representative to mobilise all tools, including through development cooperation and the implementation of EU and national readmission agreements with third countries, to promote readmission of unauthorised economic migrants to countries of origin and transit, working closely with the International Organisation for Migration.”<sup>79</sup>

In its *European Agenda for Migration*, the Commission accepted this invitation from the European Council by making ambitious plans

73. G.A. Res. 71/1, at 8 ¶ 37 (Sept. 19, 2016) (alteration to original).

74. *Id.* at 9 ¶ 46.

75. *See id.*

76. *See, e.g., Commission Proposal for a Council Decision Authorising the Commission to Approve, on Behalf of the Union, the Global Compact for Safe, Orderly and Regular Migration in the Field of Development Cooperation*, at 1–2, COM (2018) 167 final (Mar. 21, 2018).

77. European Council Press Release 204/15, Special Meeting of the European Council, *supra* note 67.

78. *Id.* ¶ 3(g).

79. *See id.* ¶ 3(l).

to address new migration challenges following the crisis.<sup>80</sup> One such commitment addresses the “root causes of irregular and forced displacement in third countries,” specifically through external cooperation assistance.<sup>81</sup> In this regard, the establishment of a stronger partnership with countries of origin and transit is highlighted as being of the utmost importance. This approach has been validated in numerous subsequent policy documents as constituting a stable policy axis of the current EU migration policy, especially in its external dimension.<sup>82</sup> This rejuvenated root causes approach, however, seems to rely on a much more substantial and longterm financial basis than the more meager means available for the implementation of this same approach in the late nineties. The creation of the EU Emergency Trust Fund for stability and addressing root causes of irregular migration and displaced persons in Africa is a clear indication of the financial support that now underpins the rejuvenated root causes approach.<sup>83</sup> So far, this Trust Fund has gathered over 4.5 billion euros, with over 89 percent coming from the EU and around 11 percent from EU Member States and other donors.<sup>84</sup> This Trust Fund targets 26 African countries.<sup>85</sup> Signed in La Valletta (Malta) on November 12, 2015, its Constitutive Agreement<sup>86</sup> sets out the overall

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80. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, *supra* note 25, at 6.

81. *Id.* at 7–8.

82. See *Joint Communication to the European Parliament and the Council, Addressing the Refugee Crisis in Europe: The Role of EU External Action*, at 3, JOIN (2015) 40 final, (Sept. 9, 2015); see also *Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on Establishing a New Partnership Framework with Third Countries Under the European Agenda on Migration*, at 3–4, COM (2016) 385 final (June 7, 2016); and, more recently, *Conclusions of the European Council of 28 June 2018*, at 3, EUCO 9/18 (June 28, 2018).

83. See *Commission Decision on the Establishment of a European Union Emergency Trust Fund for Stability and Addressing Root Causes of Irregular Migration and Displaced Persons in Africa*, at 2–6, C (2015) 7293 final (Oct. 20, 2015). Initially, the EU Trust Fund should last until December 31, 2020. See *id.* at 7 n. 11. However, this duration can be extended by a decision of the European Commission. *Id.* at art. 5.

84. *EU Trust Fund (“EUTF”) General Factsheet*, at 1 (Oct. 26, 2019), [https://ec.europa.eu/trustfundforafrica/sites/eueta/files/factsheet\\_eutf\\_long\\_online\\_publication\\_05-09-2019.pdf](https://ec.europa.eu/trustfundforafrica/sites/eueta/files/factsheet_eutf_long_online_publication_05-09-2019.pdf) [perma.cc/7ZTA-XS8P].

85. These countries cover the whole African continent. The following countries are concerned, in Northern Africa: Morocco, Algeria, Tunisia, Libya and Egypt; in the Sahel and Lake Chad area: Burkina Faso, Cameroon, Chad, Côte d’Ivoire, the Gambia, Ghana, Guinea, Mali, Mauritania, Niger, Nigeria and Senegal and last in the Horn of Africa: Djibouti, Eritrea, Ethiopia, Kenya, Somalia, South Sudan, Sudan, Tanzania and Uganda.

86. Agreement Establishing the European Trust Fund for Stability and Addressing the Root Causes of Irregular Migration and Displaced Persons in Africa and its Internal Rules (the ‘Constitutive Agreement’), E.U.-Spain, C (2015) 7293 final annex 1 (Oct. 20, 2015).

objective of the Trust Fund, which is to “. . . [a]ddress the crises in the regions Sahel and the Lake Chad, the Horn of Africa and the North of Africa.” In particular, this Trust Fund should “. . . [s]upport all aspects of stability and contributes to better migration management as well as addressing the root causes of destabilisation, forced displacement and irregular migration, in particular by promoting resilience, economic and equal opportunities, security and development and addressing human rights abuses.”<sup>87</sup>

These current developments do not necessarily imply that the root causes approach has superseded codevelopment as the prevailing policy approach toward migration. A careful reading of the *European Agenda on Migration* reveals that codevelopment is not entirely absent from the considerations of EU institutions. Indeed, in this Communication, the Commission devotes an entire section to examining ways to maximise the development benefits of migration, with remittances being a central focus.<sup>88</sup> Moreover, although the priority of the EU migration policy currently lies in dealing with the current refugee crisis, this should not detract from the legal instruments and initiatives that incorporate a vision of the MDN clearly based on codevelopment.<sup>89</sup>

Therefore, instead of claiming the demise of the codevelopment approach in the EU policy discourse on the MDN, it would be more accurate to state that in the current phase of the evolution of the MDN concept, both approaches—root causes and codevelopment—coexist. However, it is too early to definitively assess their respective importance.

A more careful look at the MDN shows that neither of the two approaches’ views fully expresses the complex and multifaceted relationship between migration and development. Indeed, while it seems that the root causes approach cannot precisely account for the linkage between migration and development<sup>90</sup> in both the short and the

87. *Id.* at art. 2(1).

88. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A European Agenda on Migration*, *supra* note 25, at 16–17.

89. *See, e.g.*, Council Directive 2009/50/EC of 25 May 2009, On the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Highly Qualified Employment, 2009 O.J. (L 155) 17; Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016, On the Conditions of Entry and Residence of Third-Country Nationals for the Purposes of Research, Studies, Training, Voluntary Service, Pupil Exchange Schemes or Educational Projects and Au Pairing (Recast), 2016 O.J. (L 132) 21. Both instruments mention the issue of ‘brain drain’. *Id.* at 4; Council Directive 2009/50/EC, *supra*, at 20.

90. *See* Hein De Haas, *International Migration, Remittances and Development: Myths and Facts*, 26 *THIRD WORLD Q.* 1269, 1271–72 (2005).

medium term, it seems equally unrealistic and restrictive to presume—as does the codevelopment approach—that migrants could simply act as agents of development.<sup>91</sup> In reality, development is a complex process that admittedly requires individual commitment. However, even more importantly, development also requires the achievement of a coherent structural and institutional environment to be achieved.<sup>92</sup>

Because it may be subject to several interpretations, the MDN cannot be considered a straightforward policy concept. This inherent ambiguity present within the MDN as a concept relates to the difficulty in disentangling migration from development policy objectives.

First, the intentions behind the use of the MDN as a policy objective—such as in the European context—are unclear, as it seeks to support migrants' initiatives while attempting to reduce immigration pressure on Europe.

Second, the MDN, possibly intentionally, does not define the concept of “development,” despite the fact that development is often regarded as the ultimate goal of the connection between migration and development. In the root causes approach, development refers to virtually all factors that prevent people from moving, spanning concepts ranging from economic welfare to political freedoms. Codevelopment, on the other hand, sees development as a dynamic process, involving migrants as agents of development. While both understandings of “development” in the MDN context do not necessarily diverge, they seem to adopt a different stance on mobility with regard to development. Indeed, the codevelopment approach mostly envisions international mobility as an essential dimension of development, which should thus be promoted, while the underlying motive of the root causes approach is to reduce the incentives to migrate at the source.<sup>93</sup>

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91. Cf. Ronald Skeldon, *International Migration as a Tool in Development Policy: A Passing Phase?*, 34 *POPULATION AND DEV. REV.* 1, 5 (2008). In his article, Skeldon criticises the emphasis on migrants' agency making them responsible for development rather than institutional structures. As he states: “That the agency of the migrants takes primacy in the development of home areas seems to divert attention from the importance of structural aspects of development policy.” *Id.* at 9.

92. As Hein de Haas clearly puts it: “Structural constraints such as highly unequal access to employment, markets, education and power do matter in the daily lives of many people in poor countries, and do severely limit their capability to overcome poverty and general underdevelopment [sic]. It would be unrealistic that migration alone would enable people to profoundly change structures.” De Haas, *supra* note 7, at 241.

93. See Chetail, *supra* note 9, at 192. In a similar way, Mark Duffield understands sustainable development as “a security technology that attempts to contain non-insured population flow by putting the onus on potential migrants to adjust their expectations while improving their self-reliance *in situ*.” Mark Duffield, *Racism, Migration and Development: The Foundations of Planetary Order*, 6(1) *PROGRESS DEV. STUD.* 68, 75 (2006).



Third, and more importantly for the purpose of this Article, the MDN is essentially targeted at African countries, from which there is relatively little immigration to Europe.<sup>94</sup> Admittedly those countries are commonly perceived as less—if not least—developed, but African migration flows to Europe are rather low in comparison with other regions (and in particular within Europe itself). So, why should African emigration (especially that from below the Sahara) be more problematic than from another continent?

It is precisely the construction of African migration (to Europe) as problematic that constitutes the main ambiguity of the MDN discourse. In this respect, the MDN policy discourse largely echoes colonial perceptions of migration and the mobility of colonial subjects in general. It is only by contextualizing the MDN in its postcolonial framework that the current discourse on connecting migration to development actually makes sense. This brings us to understand the way in which the MDN is conceived at the policy level as a legacy of the colonial world order.

In this Article, the colonial legacy is understood as the persistence of coloniality<sup>95</sup> in the current postcolonial era. Coloniality's relation to the MDN is essentially twofold. The colonial legal order essentially aimed at establishing hierarchies between colonial subjects (objects of law) and citizens (actors of law).<sup>96</sup> By doing so, the colonial legal order was necessarily relying on criteria to establish these hierarchies—criteria that manifested themselves as stereotypes (including racial prejudices) in practice.<sup>97</sup> These stereotypes constitute the second

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94. In 2017, around 9 million people from Africa migrated to Europe, representing 2 percent of the total number of international migrants in Europe, while 67 percent of international migrants in Europe came from the same continent (41 million people) and 12 percent (20 million people) came from Asia and Northern America respectively. U.N. DEP'T OF ECON. & SOC. AFFAIRS, POPULATION DIV., INTERNATIONAL MIGRATION REPORT 2017—HIGHLIGHTS, at 11–12, U.N. Sales No. E.18.XIII.4 (2017). By contrast, in 2017, international migration from Africa was mostly directed to other African countries (19 million people). *Id.*

95. “Coloniality refers to the reproduction and persistence of the old colonial racial/ethnic hierarchies in a postcolonial and postimperial world.” Ramón Grosfoguel, *Introduction: “Cultural Racism” and Colonial Caribbean Migrants in Core Zones of the Capitalist World-Economy*, 22 REV. (FERNAND BRAUDEL CTR.) 409, 414 (1999).

96. On the specificity of the colonial legal order and colonial law articulated around the divide between subjects and citizens, see OLIVIER LE COUR GRANDMAISON, *DE L'INDIGÉNAT—ANATOMIE D'UN MONSTRE JURIDIQUE: LE DROIT COLONIAL EN ALGÉRIE ET DANS L'EMPIRE FRANÇAIS* [OF THE *INDIGÉNAT* CODE—ANATOMY OF A LEGAL MONSTER: COLONIAL LAW IN ALGERIA AND IN THE FRENCH EMPIRE] 37–38 (2010).

97. As Lucy Mayblin clearly expresses it: “Both the philosophical and political (eugenicist) agenda of the social Darwinism and the differential wealth accrued in Western Europe and the white settler colonies (North America and the Australasia) to the detriment of the former European colonies (now labelled the ‘Third World’ or ‘developing countries’)

aspect of the colonial legacy that has withstood the test of time. Indeed, framing prejudices and then promulgating them as truth was a way to legitimize the abovementioned legal divide existing between colonial subjects and citizens. However, such prejudices are not exhausted by the notion of hierarchies, because prejudices do not automatically lead to the establishment of legal hierarchies. To be imposed, prejudices need a preexisting power division between entities such as nations, states or regions to which subjects and citizens belong; this power division was embodied by the colonial project.

### III. THE COLONIAL LEGACY IN THE MDN

#### A. The 'Sedentary Bias'<sup>98</sup>

In his particularly enlightening article on this topic, Oliver Bakewell qualifies the lack of critical reflection on the concept of development as a "critical flaw" undermining the whole analysis of the MDN.<sup>99</sup> In his view, "there is a persistent sedentary bias in much of the theory and practice of development, which makes it impossible to incorporate migration into the development agenda without fundamentally reassessing the concept."<sup>100</sup> As he points out:

[F]rom its earlier roots, development practice in Africa has commonly seen a reduction in migration as either an (implicit or explicit) aim of intervention or an indicator of a programme's success . . . . In general, within the development literature migration has been framed as a problem: a response to crisis rather a 'normal' part of people's lives.<sup>101</sup>

Indeed, as he goes on to argue:

[I]n order to make sense of the complex interaction between migration and development, it is necessary to go further than analysing how for migration affects development as it is currently conceived. The contribution of migrants to existing development practices may be valuable . . . , but it is based on the ideal that everyone should be able to stay at 'home' or go 'home'. It is impossible simply to bring migration into development . . . without raising fundamental questions about the nature of development and how it is put into practice. These include asking about the conception of the good life in mainstream

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are outcomes of the colonial world system . . . . That is, the hierarchical ordering of people in the world according to geographical location and visible physical characteristics as part of the colonial project." LUCY MAYBLIN, *ASYLUM AFTER EMPIRE: COLONIAL LEGACIES IN THE POLITICS OF ASYLUM SEEKING* 36 (2017).

98. Bakewell, *supra* note 27, at 1342.

99. *Id.*

100. *Id.*

101. *Id.* at 1345.

development goals; the appropriateness of models of development based on the nation state; and the inherent paternalism<sup>102</sup> of mainstream development practice.<sup>103</sup>

Not only is this statement clearly taking a critical view of the current development policies of the Western world towards the developing one,<sup>104</sup> but it also raises several interesting issues, such as the very nature of development and the question as to whether development models inherently based on the nation states<sup>105</sup> can actually coincide with the increasing mobility of the world.<sup>106</sup>

The nature of development is necessarily biased since differing conceptions of a “good life”<sup>107</sup> exist. This seems to be even more obvious with regard to the links between migration and development, as Bakewell points out:

[W]hen it comes to migration there still appears to be a gulf between the development organisations conception of the good life and that of many people with whom they work. While the former look to a future where people can achieve a better quality of life at “home”, the latter may see improved quality of life related to greater opportunities to travel and establish a new “home” elsewhere. Such autonomy is an essential part of the notion of development as freedom . . . but it is not clear how it can be incorporated into the mainstream of development practice.<sup>108</sup>

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102. According to Bakewell: “The prevailing paternalism of development discourse is another major obstacle to development actors accepting the possibility that migration may be an important strategy for many people in poor countries to improve their quality of life. In general, they work with a strong sense that migration, particularly international migration, is a ‘bad’ thing and people should want to stay at ‘home.’ Development organisations are still largely operating with a paradigm that considers migration only as one of the development problems to be addressed.” Oliver Bakewell, *Keeping Them in Their Place: The Ambivalent Relationship Between Development and Migration in Africa* 32 (Int’l Migration Inst., Working Paper No. 8, 2007).

103. *Id.* at 26.

104. For a previous and renowned critical perspective on development policies, see SAMIR AMIN, *MALDEVELOPMENT* (Michael Wolfers trans., United Nations Univ. Press & Zed Books 1990).

105. As Bakewell explains: “Apart from the sedentary assumptions underlying development goals and practices, the concept of development is spatially bound by its focus on ‘developing’ or ‘underdeveloped’ states.” Bakewell, *supra* note 27, at 1352.

106. Bakewell, *supra* note 102, at 29.

107. According to Bakewell, “The work of development organisations is framed by a (usually implicit) conception of the good life to which people will (or should) aspire.” Bakewell, *supra* note 27, at 1351.

108. Bakewell goes on to explain that, “Part of the problem may be the longstanding concern of development initiatives to preserve people’s ways of life as far as possible. This echoes the colonial interests in maintaining ‘tradition’ and reflects static, essentialised notions of culture, at least with respect to place of residence.” *Id.*

This reflects the perception that nonwhites cannot be assimilated into Western societies, which also explains why their movements—and rights—should be limited for their own sake.

## B. Development Policy as Mission Civilisatrice

Development theory and practice emerged after World War II, following the waves of decolonization from which they actually result. In the EU framework, the progressive extension of external cooperation agreements with “Third Countries,” especially postcolonial African States, corresponds to different stages of decolonization concerning respectively: French, Belgian, British, Spanish and Portuguese colonies.<sup>109</sup> The early EU development policy constitutes an extension of the former colonial order. To some extent, the current EU development policy also shares many features and objectives with the colonial project.<sup>110</sup> One of the essential goals of the colonial enterprise was to export “civilization” to “backward” peoples, supposing a gap of progress and modernity between the “civilized” and the “uncivilized.” In France, this was called the “*mission civilisatrice*” (civilizing mission). This notion, echoing the British concept of the “White Man’s Burden,”<sup>111</sup> refers to the duty to bring “civilization” to “inferior races.”

In a speech before the French Parliament on July 28, 1885, Jules Ferry, one of the main advocates of the French colonial project, stood strongly for the duty of “superior races” to civilize “inferior races”<sup>112</sup>.

109. On this evolution, see Morten Broberg, *What is the Direction for the EU’s Development Cooperation after Lisbon?—A Legal Examination*, 16 EUR. FOREIGN AFF. REV. 539, 540–44 (2011).

110. This idea goes without saying for Balakrishnan Rajagopal for whom “[d]evelopment has always been a hegemonic idea in that it has always been clear about who needs to be developed, who will do the ‘developing’, how and in which direction.” Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27(5) THIRD WORLD Q. 767, 775 (2006).

111. On the ‘White Man’s Burden’ in connection with imperialism and colonial expansion, see Ben N. Azikiwe, *Ethics of Colonial Imperialism*, 16(3) J. NEGRO HIST. 287, 290–91 (1931).

112. Jules Ferry (1885): *Les Fondements de la Politique Coloniale* (28 Juillet 1885) [Jules Ferry (1885): *The Foundations of Colonial Politics* (July 28, 1885)], ASSEMBLÉE NATIONALE, <http://www2.assemblee-nationale.fr/decouvrir-l-assemblee/histoire/grands-discours-parlementaires/jules-ferry-28-juillet-1885> (last visited Jan. 16, 2020) [<https://perma.cc/4ECM-Y2WX>] (“Je répète qu’il y a pour les races supérieures un droit, parce qu’il y a un devoir pour elles. Elles ont le devoir de civiliser les races inférieures.” [“I repeat that there is a right for superior races, because there is a duty for them. Their duty is to civilize inferior races.”]). As an echo to these words, Jules Harmand—a French doctor, diplomat and colonialist—similarly claimed in 1910 that great duties stem from the ‘superiority of the superior race’ thus founding the right to domination on its moral superiority: “... [s]i cette supériorité confère des droits, elle impose en retour de grands devoirs. La légitimation foncière de la conquête indigène, c’est cette conviction de notre supériorité, non pas seulement

This mission was not the only motive underpinning the colonial project, as economic, political and patriotic reasons also drove such an undertaking, but it constituted its underlying ‘moral’ foundation.

Mirroring this conception of a civilization gap, current development policy also intends to bridge the gap between developed and developing countries. This consideration goes for both the liberal paradigm of development (modernization theory) and the “corrective” paradigm of development (historical-structuralist approach), which are the two leading approaches in development theory. Both paradigms assume that there is a gap of “development” and “progress” towards a certain ideal of “the good life” between developed and developing countries, the former embodying the ideal that the latter should reach.<sup>113</sup>

In particular, movement of population is considered an effect of “underdevelopment,” the underlying idea being: if people move, it is because they lack what they need at home. This is a clear translation of the root causes approach, according to which, if the causes pushing people to move are addressed, there will be less migration. Often, development programs express the wish to reduce ‘push’ factors leading to migratory movements.<sup>114</sup>

This is also reflected in the codevelopment approach, albeit less explicitly. Under this approach, it is always assumed that migrants abroad should or must contribute to “developing” their country of origin—often implying that they should return there—thus helping to lessen incentives others may have to leave.<sup>115</sup>

These visions of migration clearly stem from the colonial order itself. In the colonial order, stabilizing local populations and controlling

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mécanique, économique et militaire, mais surtout de notre supériorité morale ; c'est en elle que réside notre dignité et que se fonde notre droit à la direction du reste de l'humanité . . . .” [“ . . . [i]f this superiority bestows upon us some rights, it imposes in return great duties. The property-related legitimation of indigenous conquest lies in this conviction of our superiority, not only mechanical, economic and military, but above all our moral superiority. This is the foundation of our dignity and our right to direct the rest of mankind . . . .”]. JULES HARMAND, *DOMINATION ET COLONISATION*, at 156 (Ernest Flammarion 1910).

113. For more details on these two paradigms of development, see RUMU SARKAR, *INTERNATIONAL DEVELOPMENT LAW: RULE OF LAW, HUMAN RIGHTS, AND GLOBAL FINANCE* 46–64 (2009).

114. Bakewell, *supra* note 27, at 1349.

115. As the Commission has stated in its 2005 Communication, “Migrants’ return, even temporary or virtual, can play a useful role in fostering the transfer of skills to the developing world, together with other forms of brain circulation.” *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations*, *supra* note 34, at 7.

their movement was an objective in and of itself. The underlying rationale behind such an objective was to maintain the colonial public order,<sup>116</sup> whether from an economic (controlling labor forces) or social (preserving “peace” and “order”) perspective.

In the French African colonies, the *indigénat* code, the special regulatory framework applying to natives overseas, aimed—among many other things—at keeping people as close as possible to their original location. Leaving one’s village or wandering was considered a criminal offense and was met with severe punishment.<sup>117</sup> Such provisions were intended to contain emigration from rural to urban areas in an attempt to maintain order, while also preventing tax evasion. Bakewell refers to the Zambian case to argue that: “While the colonial authorities established a labour system based on the continuous (circular) migration of Africans, they were also keen to encourage them to maintain their ‘traditional’ way of life in the villages; to preserve the ‘homes’ to which labour migrants could return.”<sup>118</sup> He further adds that: “In many areas this was assumed to be a largely sedentary existence based around stable villages in fixed locations populated by particular (static) ‘tribes.’”<sup>119</sup>

This reveals that constraint is actually the underlying truth behind the sedentary bias of development policies that specifically aim at preventing aspiring migrants to leave. Such a finding is further substantiated by the practice of “protest migrations,” whereby colonized populations attempted to escape severe colonial regimes by moving to another territory. Typically, this involved populations moving from French colonial rulers to English colonial territories—which were perceived as being less harsh.<sup>120</sup> In his article on this topic, A.I. Asiwaju

116. On the notion of ‘colonial public order,’ see generally LE COUR GRANDMAISON, *supra* note 96.

117. *Id.* at 181–82 (Arrêté général sur les infractions de l’indigénat [General Order on Offences of the *Indigénat* Code]) (“Sont considérés comme infractions spéciales à l’indigénat . . . , les faits et actes ci-après déterminés, savoir: . . . Départ du territoire de la commune sans avoir, au préalable, acquitté les impôts et sans être munis d’un permis de voyage . . .”) [“The following acts and deeds shall be regarded as special offences against the *indigénat* code, namely: . . . Departure from the territory of the municipality without having first paid taxes and without a travel permit . . .”].

118. Bakewell, *supra* note 27, at 1344.

119. *Id.*

120. See A.I. Asiwaju, *Migrations as Revolt: The Example of the Ivory Coast and the Upper Volta before 1945*, 17(4) J. AFR. HIST. 577 (1976). According to Asiwaju, “[i]t is generally accepted that French rule in West Africa was far less liberal than British rule. In French West Africa, the mercantilist approach to economic policy contrasted with the relatively laissez-faire attitude of the British, and placed much greater strain on the subject peoples. African were expected to pay the cost of the administration through a hard-fisted

points out that: “[P]rotest migrations constituted an important dimension of a series of unarmed but effective expressions of resentment by Africans against the European colonial presence.”<sup>121</sup> The same author insists on civil discontent as the main factor, beyond purely socio-economic factors, that explains this phenomenon, unlike what was often implied by French colonial rulers.<sup>122</sup> As he further explains:

[T]he relevance of civil discontent has been revealed in studies by Jean Rouch, who found from his interviews among Upper Volta residents in the Northern Territory of the Gold Coast in the early 1950s that a good number of settlers there had left French territory originally to escape heavy taxation, forced labour, conscription and the exactions of French-made local chiefs.<sup>123</sup>

Identical principles were also subsequently applied to limit emigration of “natives” from the *Afrique Occidentale Française* (Western French Africa) to the *métropole* (mainland France), and in 1928 a decree was adopted by France to this end.<sup>124</sup> This decree was aimed

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fiscal policy. The policy of *mise en valeur* also required them to supply free labour for the construction and maintenance of the necessary infrastructures. . . .” *Id.* at 582–83. He also adds that: “In addition, there was the widespread use of policy repression especially in the forms of arbitrary arrest and imprisonment permitted by the operation of the *Indigénat* code . . . , which empowered French local administration in the colonies to impose summary punishment on subject peoples for a large category of offences.” *Id.* at 584. However, this author does not seem to intend that British colonial rulers were any less harsh than the French in any respect. In this sense, he mentions an article by M. Semakula Kiwanuka who strongly rebuts the myth that significant differences existed between colonial policies and administration in Africa—although it is not totally clear whether Asiwaju agrees with his analysis. See M. Semakula Kiwanuka, *Colonial Policies and Administration in Africa: The Myths of the Contrasts*, 3(2) AFR. HIST. STUD. 295 (1970). In this regard, the latter author ends his article with these compelling words: “no colonial power had a monopoly on virtue or wisdom.” *Id.* at 315.

121. Asiwaju, *supra* note 120, at 578.

122. As Asiwaju highlights, French rulers “perhaps hypocritically, [saw] the migrations not as an expression of the ‘subject peoples’ awareness of basic differences in the French and British approaches to ‘Native Administration’; but as resulting from socio-economic attractions—the search for more fertile agricultural soil, better job opportunities, the menace of natural disasters such as locust swarms, famine and epidemics, and ethnic links.” *Id.* at 581.

123. *Id.* at 580.

124. *Décret du 24 avril 1928 portant réglementation de l’émigration et de la circulation des indigènes en Afrique occidentale française* [*Decree of 24 April 1928 Regulating the Emigration and Movement of Natives in French West Africa*], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Apr. 28, 1928, at p. 4834. On the evolution of African migration in the postcolonial era, see Daouda Gary-Tounkara, *La Dispersion des Soudanais/Maliens à la fin de l’ère Coloniale* [*The Dispersion of the Sudanese/Maliens at the End of the Colonial Era*], 1279 HOMMES & MIGRATIONS 12 (2009); Nadia Marot, *L’évolution des Accords Franco-Africains* [*The Evolution of the Franco-African Agreements*], 29–30 PLEIN DROIT (1995). In her article, the latter author especially shows how legal conditions for former French colonial ‘subjects’ to immigrate to the former

at “policing native mobility,”<sup>125</sup> especially to the *Métropole*, and led to the adoption of the identity card as a way of controlling such movements.<sup>126</sup> According to Olivier Le Cour Grandmaison, legal limitations on the emigration of colonial subjects is reflected in the *Métropole* by the increase in racializing discourse on the assimilability or nonassimilability of immigrants and the necessity of limiting the flow of those immigrants who cannot assimilate into the French republic,<sup>127</sup> while promoting the immigration of people who would better blend with the local population. Such “racial hygiene” also justified the segregation between subjects and metropolitan citizens in the colonies.<sup>128</sup>

### C. The Principle of Immigrant Selection and the Hierarchical Attribution of Rights

Beyond the notion of racial hygiene and limitations on the emigration of colonized populations, a fundamental division existed between colonial subjects, supposedly belonging to “inferior races”, and metropolitan citizens, allegedly belonging to “superior races.”<sup>129</sup> The terms “inferior” and “superior” are significant insofar as they mark a clear hierarchy that was also replicated in law. Much as this division was invoked to justify the colonial project, this separation also served to prevent emigration of colonial subjects to the *Métropole*. It further justified the application of “exceptional” rules that were tailor-made for the colonies and formed the basis of what could be termed as “colonial law.”<sup>130</sup> This was especially the case in France, wherein the *indigénat*

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Metropolitan State were slowly tightened. Indeed, she reports that such conditions departed from a quasi free movement regime (from 1960 to 1974), to an increasingly restrictive regime, whereby in order to be authorised to travel to and reside in France, aspiring immigrants not only had to prove their identity, but also needed to hold a work permit and later on a visa. *Id.*

125. GARY WILDER, *THE FRENCH IMPERIAL NATION-STATE* 140 (2005).

126. On the controlling measures imposed on natives in colonies, see OLIVIER LE COUR GRANDMAISON, *L'EMPIRE DES HYGÉNISTES* [THE EMPIRE OF HYGIENISTS] 284–92 (2014).

127. LE COUR GRANDMAISON, *supra* note 20, at 152–64.

128. *Id.* at 152.

129. Quoting Jules Harmand, Olivier Le Cour Grandmaison reproduces his opinion according to which, “... [i]l faut accepter comme principe ... qu'il y a une hiérarchie des races et des civilisations, et que nous appartenons à la race et à la civilisation supérieures.” [...] [o]ne shall accept that as a principle ... , there is a hierarchy of races and civilizations, and that we belong to the superior race and civilization.”]. LE COUR GRANDMAISON, *supra* note 96, at 51.

130. Olivier Le Cour Grandmaison, *The Exception and the Rule: On French Colonial Law*, 53(4) *DIogenes* 34, 38 (2006). On colonial law and its treatment of colonial ‘subjects’, see Emmanuelle Saada, *La loi, le Droit et L'indigène*, [The Law, the Rights and the Indigenous People], 43(1) *DRoits* 165 (2006). This author especially emphasises the fact that the exceptional character of colonial law did not only stem from its particularly brutal substance from the material point of view, but also from its particular mode of adoption, which



code applied only to the French colonies, and the law of metropole—including its protection of fundamental rights—was excluded from application to those same colonies. The establishment of this exceptional legal regime also explains the application of “exceptional” measures, such as administrative internment or collective responsibility, which showcased the almost limitless powers of colonial governors and illustrated the abomination of colonial violence.<sup>131</sup>

The late eighteenth century saw the rise of scientific theories that separated the world population into different “races.”<sup>132</sup> In particular, it was asserted that mixing “superior races” with “inferior” ones would deprive the former of their “superior” essence.<sup>133</sup> This division was essentially based on the assumption that physical characteristics (among them, skin color) reflected moral and intellectual qualities. Hence, the necessity to preserve “race purity,” notably by controlling immigration flows.

Such an approach was not only implemented in France (essentially with respect to its colonies), but also in most colonial powers, including Great Britain and the United States. Indeed, both of these colonial powers shared similar visions, as manifested in the US immigration act limiting Chinese immigration and putting quotas by nationality, as well as the 1962 British immigration act curtailing “new commonwealth” immigration.<sup>134</sup>

This approach also coincided with the adoption of the principle of immigrant selection as a matter of state sovereignty and thus a principle of international law.<sup>135</sup> The criteria of selection were manifold, entailing “physical, . . . moral, or . . . economic”<sup>136</sup> characteristics. As a criterion for immigrant selection, assimilability was concerned with the “social

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depended entirely on the discretionary powers of the French administration, thus excluding the legislative branch. *Id.* at 189.

131. Le Cour Grandmaison, *supra* note 130, at 45–48.

132. Catherine Coquery-Vidrovitch, *Le Postulat de la Supériorité Blanche et de L'infériorité Noire* [*The Postulate of White Superiority and Black Inferiority*], in *LE LIVRE NOIR DU COLONIALISME* [THE BLACK BOOK OF COLONIALISM] 863, (Marc Ferro ed., Fayard/Pluriel 2010).

133. In this sense, see LE COUR GRANDMAISON, *supra* note 126. This author especially mentions “mixophobia” (“*mixophobie*”), as the fear during French colonial times that close contact and relations between the colonised and the colonisers might lead to the degeneration of the “national body” (“*dégénérescence du corps national*”). *Id.* at 78.

134. For more details on the development of migration control in these two States, see AOIFE McMAHON, *THE ROLE OF THE STATE IN MIGRATION CONTROL* 41–61 (2016).

135. For a critical perspective on States’ right to exclude on the basis of their sovereignty, see generally James A. R. Nafziger, *The General Admission of Aliens Under International Law*, 77(4) AM. J. INT’L L. 804 (1983).

136. Herbert Samuel, *Immigration*, 15(59) ECON. J. 317, 325 (1905).

effect of immigration,”<sup>137</sup> that is, the extent to which immigration does not undermine social cohesion within the metropole. In this respect, Herbert Samuel pointed out in an article published in 1905 that: “The chief factor here must be the degree to which the aliens can be assimilated; for it is plain that if they are to be indistinguishably absorbed into the rest of the population, causing no appreciable change in the life of the nation, their coming will give rise to no problems of this kind.”<sup>138</sup> In this sense, social cohesion mainly refers to racial/ethnic homogeneity, with assimilability being its essential criteria.

In order to establish the capacity to “assimilate,” a hierarchy was made among all human “races” and typically, it was assumed that the more “European-like” (including according to skin color) a person was, the higher their capacity to assimilate.<sup>139</sup> This was the position of Georges Mauco, a French geographer, known for his racist and anti-Semitic stance, especially with regard to immigration.<sup>140</sup> His position actually found an earlier echo in what has been developed in one of the so-called *Chinese Exclusion Cases* of 1889, in which the US Supreme Court stated that it was not possible to “assimilate” Chinese immigrants with the people of the United States.<sup>141</sup> Citing the 1878 Convention that

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137. *Id.* at 331.

138. *Id.*

139. As Vincent Chetail argues, “one can advance without too much exaggeration that, from the end of the 19th century until the mid-20th century, immigration controls were primarily introduced for racial reasons, then generalized as wartime legislation and further reinforced by the economic crisis to become the standard of so-called modern states.” VINCENT CHETAIL, *INTERNATIONAL MIGRATION LAW* 48 (2019). On the influence of racism in the development of contemporary State control of migration, see McMAHON, *supra* note 134, at 50–59.

140. In his book *Les Étrangers en France* written in 1932, Mauco stated unambiguously that some people could not be assimilated within the French nation and he explicitly referred to them as being “non-assimilable” (“*inassimilables*”). GEORGES MAUCO, *LES ÉTRANGERS EN FRANCE* [FOREIGNERS IN FRANCE] 523 (1932). As he explained: “En réalité, il y a dans la population étrangère toute une part qui reste absolument inassimilable . . . . Il y a . . . ceux appartenant à des races trop différentes: Asiatiques, Africains, Levantins mêmes, dont l’assimilation est impossible et au surplus, très souvent, physiquement et moralement indésirable. Ils portent en eux, dans leurs coutumes, dans leur tournure d’esprit, des goûts, des passions et le poids d’habitudes séculaires qui contredisent l’orientation profonde de notre civilisation.” [“In reality, there is a whole part of the foreign population that is absolutely non-assimilable . . . . There are . . . those who belong to races that are too different: Asians, Africans, even Levantines, whose assimilation is impossible and even very often physically and morally undesirable. They carry within them, in their customs, mentality and tastes, some passions and the weight of ancient habits which stand in contradiction with the deep orientation of our civilisation.”]. *Id.*

141. *Chae Chan Ping v. United States*, 130 U.S. 581, 595 (1889). On the Chinese Exclusion Cases and the plenary power doctrine, see Gabriel J. Chin, *Segregation’s Last Stronghold: Race Discrimination and the Constitutional Law of Immigration*, 46 UCLA L. REV. 1 (1998) and Natsu Taylor Saito, *The Enduring Effect of the Chinese Exclusion Cases:*

framed the California Constitution, this case even referred to the immigration of Chinese workers as having “a baneful effect upon the material interests of the state, and upon public morals” and as “approaching the character of an Oriental invasion,” constituting a “menace to . . . [the United States] civilization.”<sup>142</sup>

Interestingly, although the principle of immigrant selection is currently held as universal truth—based on the sovereign power of the State to control whom to admit or not into its territory—such was not always the case, as is exemplified by the 1868 Burlingame Treaty between the United States and China. According to this instrument, “[t]he United States of America and the Emperor of China cordially recognise the inherent and inalienable right of man to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects respectively from the one country to the other, for the purposes of curiosity, of trade, or as permanent residents.”<sup>143</sup> It bears mentioning, however, that this Treaty was adopted in order to secure the right of residence of Americans living in China, and not the reverse.

Notably, the debate leading to the adoption of the first comprehensive act establishing the French immigration legal regime also encompassed considerations of racial selection, even if no explicit mention to this fact was made in the final act.<sup>144</sup> In his book on the history of the French immigration administration from 1945 until 1975, Alexis Spire specifically highlights the colonial legacy in the immigration administration, not only insofar as it relates to the differing status according to the geographic origins of the colonial migrants, but also as it relates to the continuity of colonial administration in immigration administration both from a structural and human perspective.<sup>145</sup>

Despite the salience of the principle of migrants’ selection in international law,<sup>146</sup> it is difficult to trace assimilability as an underlying

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*The ‘Plenary Power’ Justification for On-Going Abuses of Human Rights*, 10 ASIAN L.J., 13 (2003).

142. *Chae Chan Ping*, at 595.

143. Samuel, *supra* note 136, at 319 (quoting Peace, Amity, and Commerce art. V, China-U.S., July 28, 1868, 16 Stat. 739).

144. Patrick Weil, *Racisme et Discrimination dans la Politique Française de L’immigration* [*Racism and Discrimination in French Immigration Policy*], 47 VINGTIÈME SIÈCLE, REVUE D’HISTOIRE 77, 78 (1995).

145. See generally ALEXIS SPIRE, ÉTRANGERS À LA CARTE [FOREIGNERS À LA CARTE] 189–222 (2005).

146. Quoting the U.S. Supreme Court, David A. Martin gives one of the clearest expression of State sovereignty over admission of aliens on the national territory: “It is an accepted maxim of international law, that every sovereign nation has the power, as inherent

criterion of immigrant selection in contemporary society. If some criteria are now clearly stated, such as economic or physical conditions,<sup>147</sup> criteria connected to social cohesion remain quite blurred.

In particular, it is almost impossible to detect ethnic/racial “filters” operating in this respect. Indeed, the shift from scientific to cultural racism makes racist categories even more porous and complex, and therefore much more difficult to identify. In this context, racialization<sup>148</sup> no longer affects its target according to physical appearance as its single or main criterion (at least officially).<sup>149</sup>

Perhaps the only area of public policy in which assimilability appears clearly is the “integration” policy. In this domain of public policy, there are numerous examples of European States that have introduced tests assessing the knowledge of future immigrants on their destination country’s language, culture or institutions, purportedly for the sake of integration.<sup>150</sup> In this respect, it seems that assimilability “capacities” were merely replaced by integration abilities, if not outright

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in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.” David A. Martin, *Effects of International Law on Migration Policy and Practice: The Uses of Hypocrisy*, 23(3) INT’L MIGRATION REV. (SPECIAL ISSUE) 547, 547–48 (1989) (quoting *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892)).

147. See *N. v. The United Kingdom*, App. No. 26565/05 (2008). The case in point deals with an HIV positive asylum seeker, who, after her asylum claim was rejected, tried to stay in the UK (on the basis of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms), where she had previously requested the refugee status. She was claiming that, had she been returned to Uganda (where she was from), she would not be able to continue her treatment, and would probably die quickly after return. *Id.* at ¶ 25. The Court rejected her claim on the grounds that the outcome of her expulsion was speculative, *id.* at ¶ 50, and thus not serious enough to justify the application of Article 3.

148. Paul A. Silverstein defines racialisation as “the processes through which any diacritic of social personhood—including class, ethnicity, generation, kinship/affinity, and positions within fields of power—comes to be essentialized, naturalized, and/or biologized.” Paul A. Silverstein, *Immigrant Racialization and the New Savage Slot: Race, Migration, and Immigration in the New Europe*, 34 ANN. REV. ANTHROPOLOGY 363, 364 (2005).

149. On the evolution from ‘biological’ to ‘sociocultural’ racism, see Mark Duffield, *Racism, Migration and Development: The Foundations of Planetary Order*, 6(1) PROGRESS DEV. STUD. 68, 70–71 (2006). This author contends that: “[s]ociocultural categories provide the means of striation necessary to classify and manage this diverse, networked and constantly changing world. It marks a shift in racial discourse from a colonial preoccupation with ‘biological-type in location’ to a contemporary concern with ‘cultural-types in circulation’. The immigrant—the embodiment of cultural difference in motion—became its first iconic figure.” *Id.* at 71.

150. For an overview of this practice by six EU Member States, see Saskia Bonjour, *The Transfer of Pre-Departure Integration Requirements for Family Migrants Among Member States of the European Union*, 2(2) COMP. MIGRATION STUD. 203 (2014). These six Member States are: Austria, Denmark, France, Germany, the Netherlands, and the United Kingdom. *Id.* at 203.

eagerness. For this reason, Paul Silverstein contends that it is the immigrant herself who has been racialized over time.<sup>151</sup>

However blurred and diverse the criteria of immigrant selection have become, the hierarchy of rights still exists, and it is precisely this hierarchy that gives rise to doubts about the selection criteria according to which it is established. As Gurminder K. Bhambra forcefully argues:

[E]urope claims rights that belong to its national citizens, but need not be shared with others. In a situation of the general advantages of Europe, such advantages no longer deserve to be called rights; *rights that are not extended to others are privileges*. In this way, imperial inclusion based on hierarchical and racialised domination is reproduced as national—joint European—exclusion, reflecting earlier forms of domination and similarly racialised. Refusing to take into account our broader connected histories has many implications including misidentifying the extent of the populations that were recognised as citizens and could be argued to continue to have rights into the present.<sup>152</sup>

With respect to freedom of movement in particular, the hierarchy in the EU legal framework is very clear. While the principle of free movement is recognized for EU citizens<sup>153</sup> (within the EU), so-called “third country nationals” benefit from such a freedom only to a limited extent, and their freedom of movement is namely premised on the closeness of their link with the EU/its Member States.

The MDN policy discourse maintains such a hierarchy in that it implies that people belonging to developing countries are attached to their country of origin, in an almost atavistic manner. In this regard, the concept of “diaspora” has been substantially extended to include

151. Silverstein, *supra* note 148, at 366.

152. Gurminder K. Bhambra, *The Current Crisis of Europe: Refugees, Colonialism, and the Limits of Cosmopolitanism*, 23 EUR. L.J. 395, 404 (2017) (emphasis added).

153. Clearly the principle of free movement of persons in the EU is not absolute as such, even for EU citizens. Some conditions need to be fulfilled, especially from the economic point of view. In this respect, see generally Directive 2004/38/EC, of the European Parliament and of the Council of April 29, 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States, 2004 O.J. (L 158) 77. Moreover, accession to the EU was never followed by immediate—or at least full—access to free movement within the EU when the acceding State had a less favourable economic background than the other Member States. For a detailed analysis, see generally Adelina Adinolfi, *Free Movement and Access to Work of Citizens of the New Member States: The Transitional Measures*, 42 COMMON MARKET L. REV. 469 (2005); Iris Goldner Lang, *Transitional Arrangements in the Enlarged European Union: How Free is the Free Movement of Workers*, 3(3) CROAT. Y.B. EU. L. AND POL'Y 241 (2007); Mario Vinković & Endre Dudaš, *Freedom of Movement of Workers in the European Union—Transitional Provisions in the Croatia Context*, in CONTEMPORARY LEGAL AND ECONOMIC ISSUES V 139 (Ivana Barković Bojanić & Mira Lulić eds., 2015).

any immigrant coming from a developing country, with special consideration given to their contributions to “development.”<sup>154</sup> While return is promoted for the most recent immigrants, encouraging migrant diasporas to maintain links with their country of origin is upheld. More recently, in the context of the so-called “refugee crisis,” the use of the MDN discourse and, in particular its root causes paradigm, has been used as a way to keep people from seeking refuge in the EU.<sup>155</sup>

However, it is worth noting that there is also a hierarchy within the all-encompassing group of “developing countries,” and it seems that with respect to access to free movement, such a hierarchy is made increasingly complex. This is clearly exemplified by the Agreements for the Concerted Management of Migration Flows (*Accords de gestion concertée des flux migratoires*). This concept was introduced in 2006 by the French Government as an innovative bilateral instrument for managing international migration, the first agreement of which was signed with Senegal on September 23, 2006.<sup>156</sup> Indeed, the most economically deprived countries (sub-Saharan Africa) are the ones towards which return is most highly promoted, especially as a means to combat brain drain.<sup>157</sup> Immigration from such countries is often discouraged allegedly for the sake of development. On the other hand, developing

154. In this respect, see *Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, Migration and Development: Some Concrete Orientations*, *supra* note 34, at 6, 23–25, annex 4.

155. For a critical perspective on the way in which the ‘refugee crisis’ has been addressed at the EU level, see Bhambra, *supra* note 152.

156. *Décret no. 2009–1073 du 26 août 2009 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Sénégal relatif à la gestion concertée des flux migratoires (ensemble trois annexes et une déclaration), signé à Dakar le 23 septembre 2006, et avenant à cet accord (ensemble deux annexes), signé à Dakar le 25 février 2008* [Agreement between France and Senegal on joint migration management signed in Dakar on 23 September 2006], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 1, 2009, at p. 14405.

157. See, e.g., the agreement signed with Congo (Brazzaville), which focuses on the prevention of brain drain, by strongly encouraging return migration: *Décret no. 2009–949 du 29 juillet 2009 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République du Congo relatif à la gestion concertée des flux migratoires et au codéveloppement (ensemble quatre annexes), signé à Brazzaville le 25 octobre 2007*, [Agreement between France and Congo (Brazzaville) on joint migration management signed in Brazzaville on 25 October 2007], *JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE* [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 1, 2009, at p. 12867. Recital 4 to this agreement states that States Parties are : “determined to encourage temporary migration based on mobility and incentive for acquired skills to benefit the country of origin, especially regarding students, highly skilled professionals and executives” [“résolus à tout mettre en oeuvre pour encourager une migration temporaire fondée sur la mobilité et l'incitation à un retour des compétences dans le pays d'origine, en particulier pour les étudiants, les professionnels à haut niveau de qualification et les cadres . . .”]. *Id.*

countries with higher living standards usually benefit from more favorable treatment in terms of international mobility.<sup>158</sup> This is all the more puzzling as the nature of the link between migration and development is equivocal and migration is widely acknowledged as an integral part of the development process itself.

What is striking, moreover, is the crucial and apparent lack of interest in migrants themselves. For all purposes, they cannot be seen as winners in the “win-win-win” MDN formula. In this respect, even if the colonial subject has acquired full legal personhood—at least formally—the immigrant is still a legal subject to worldwide colonial powers. The international immigrant is becoming the current target of colonial “subjectization” and subjugation and her racialization operates according to many criteria, among which economic varieties are essential.<sup>159</sup>

158. For instance, see the agreement signed with Mauritius, which prioritises circularity and the promotion of professional immigration: *Décret no. 2010-1114 du 22 septembre 2010 portant publication de l'accord entre le Gouvernement de la République française et le Gouvernement de la République de Maurice relatif au séjour et à la migration circulaire de professionnels (ensemble deux annexes), signé à Paris le 23 septembre 2008*, [Agreement between France and Mauritius on the residence and circular migration of workers signed in Paris on 23 September 2008] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], Sept. 24, 2010, at p. 17330. The report from the French Parliament on this agreement explicitly mentions the fact that Mauritius does not exert a strong immigration pressure on France as one important fact explaining the more lenient attitude towards the latter country towards the former. In fact Mauritius is rather considered an emerging country, not being included in the Priority Solidarity Area (*Zone de Solidarité Prioritaire*) which targets developing countries—mostly in Africa—that are considered a priority for French development cooperation. See Michel Boutant, *Rapport fait au nom de la commission des affaires étrangères, de la défense et des forces armées sur le projet de loi autorisant l'approbation de l'accord entre la République française et le Gouvernement de la République de Maurice relatif au séjour et à la migration circulaire de professionnels*, [Report drafted on behalf of the Commission for Foreign Affairs, Defense and Armed Forces on the bill authorising the conclusion of the Agreement between France and Mauritius on the residence and circular migration of workers] 77 Sénat Session Ordinaire (2009–2010), <https://www.senat.fr/rap/109-077/109-0771.pdf> [<https://perma.cc/CHP5-Z7Q8>]. The report points out that: “... [T]he Minister wishes from now on to conclude [agreement for the concerted management of migration flows...] with emerging countries such as China, India or Russia. In this respect, an agreement has been negotiated with Mauritius as there is no significant emigration flows from this country to France.” “[...] [L]e ministère souhaiterait dorénavant conclure de[s] accords de gestion concertée des flux migratoires... ] avec des pays émergents comme la Chine, l'Inde ou la Russie. C'est dans ce contexte qu'a été négocié cet accord avec Maurice, qui ne présente pas le profil d'un pays de forte émigration vers la France.”]. *Id.* at 11.

159. Read especially Paul Silverstein on the way in which the migrant has been racialised over time through different ‘figures’ articulated around a variety of socioeconomic criteria (on economic determinants, see in particular the figure of the ‘laborer’). Silverstein, *supra* note 148, at 370–72. Liz Fekete also expresses a similar view when she wonders: “Given the EU’s eager support for a policy of managed migration, are we now to see a situation develop in which the displaced people of the world are screened and selected, sectioned off into categories of skilled and unskilled, through a sort of economic natural selection process

In many respects, the current economic division of the world still echoes the colonial divide between the “civilized” and the “uncivilized.”

### CONCLUSION

Why is it always assumed that people should go back to their “country of origin”, or stay put, when they come from developing countries, especially sub-Saharan Africa? Behind the duty of migrants to take part in “developing” their country of origin, or the duty of Western societies to develop “less developed” countries, a patronizing discourse lurks. This discourse commonly gives little autonomy to migrants to express what they perceive as “development” and interprets the possibility to remain or to return to the country of origin as the wish of any immigrant or candidate to emigration. This explains why a selection is often made between “desirable” and “undesirable” migrants. While the former are usually described as sharing common features with the western receiving state, the latter is seen as not fitting in with such stereotypical features.<sup>160</sup>

If we consider that the entire discourse on the MDN is actually heavily influenced by outdated representations originating in colonial times, the need to address its original conceptual flaws is made clearly urgent. In particular, it is surprising that the concept of development is hardly ever regarded as entailing mobility (as an extension of freedom of movement). One of the best examples of a rather successful MDN policy is the EU itself, which has strongly affirmed free movement of its citizens as being beneficial to the overall development of the European continent. In this respect, it is somewhat puzzling that the EU advocates for development as a means to limit the movement of people. One explanation to this apparent contradiction may be that, while the EU is conceived as a community based on common development and solidarity, not all countries are deemed entitled to share the fruits of European solidarity.

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ensuring the survival of the economically fittest?” Fekete, *supra* note 37, at 29.

160. “[A]ll immigration policies use classificatory methods that distinguish between unproblematic and problematic bodies, imposing more stringent conditions on the latter’s entry into national territory and rendering all regimes racialized in some form or another . . . . Problematic immigrants are not viewed as such because they happen to be brown-skinned or have particular phenotypical distinctiveness not shared by the majority of white Europeans, but because the cultures to which they are assumed to subscribe are seen as incapable of assimilation into European liberal, democratic, individualistic, Judeo-Christian norms.” Steve Garner, *The European Union and the Racialization of Immigration, 1985–2006*, 1(1) RACE/ETHNICITY: MULTIDISCIPLINARY GLOBAL CONTEXTS 61, 63 (2007).



To conclude, at the EU level, the MDN is threatened as a robust policy concept for two main reasons. First, because of its lack of a human-oriented perspective on development (embracing freedom and especially freedom to move), which would enable this concept to depart from a hierarchical attribution of rights based on racism. Second, because as a policy concept, the MDN does not rely on a common understanding of development—based on genuine and shared international solidarity between countries (individuals being the key element of the latter)—that would depart from colonial imperialism. Relying on the “relational character of colonialism”—especially in its cultural dimension—and Edward Said’s notion of the “intertwined histories” of the colonizers and the colonized, Sara Amighetti and Alasia Nusi even argue for a right to enter the former metropolitan territory for postcolonial migrants.<sup>161</sup> Such a right results from the “duties to redress the historical injustice of colonialism.”<sup>162</sup>

While this is a very interesting and original approach to immigration from former colonies, this proposition does not seem to address the colonial legacy in all of its complexity. Indeed, in as much as postcolonial migration should be reassessed in light of the longterm harmful impact of colonialism on people from former colonies, migration should not be considered an end in of itself. Indeed, being given the opportunity to immigrate to the former colonial power does not automatically lead to the grant of all the rights—both political and socioeconomic—that enable one to live a fulfilling life. In this respect, the development dimension of the MDN should not be underestimated as it currently is in the EU policy discourse. On the contrary, the MDN should be reappraised with a view to genuinely addressing the ills of the colonial past throughout the world, with free migration as only one of several potential avenues. If the abovementioned conceptual flaws are not addressed, the colonial pattern is bound to perpetuate itself: attaching the enjoyment of privileges according to perceived belonging to different human “species.”

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161. Sara Amighetti & Alasia Nuti, *A Nation's Right to Exclude and the Colonies*, 44(4) POL. THEORY 541, 551–54 (2016).

162. *Id.* at 551.

# THE CURRENT STATE AND FUTURE OF COMPARATIVE CRIMINAL LAW—A GERMAN PERSPECTIVE

Kai Ambos\*

## ABSTRACT

Comparative criminal law faces new challenges posed by the globalization and internationalization of law on the one hand, and novel threats such as terrorism and cybercrime on the other. Thus, the question arises: is it actually possible for comparative criminal law to make a meaningful contribution to improving citizens' security? Some fundamental issues need to be clarified before this question can be answered: the concept and history of comparative criminal law (Part I), its significance and function (Part II), its aims and methods as well as its normative foundation (Part III), and the current state of research and teaching in the field (Part IV). All of these points merit further attention in their own right, and to this end multiple references on each topic are provided in the footnotes. The outlook for and future practical significance of comparative criminal law (Part V) will depend on how the field responds to these challenges. While this Article is written by a German scholar and thus from a German perspective, this Article strives to present a broader view.

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## I. FOUNDATIONS: CONCEPT AND HISTORY

### A. Concept

If the study of “comparative criminal law” is to be taken seriously, at a minimum it needs to involve the comparative analysis of foreign criminal law.<sup>1</sup> In a broader sense, this also includes criminal procedural law and criminal justice—in the sense of a comprehensive study of “comparative criminal justice”.<sup>2</sup> Only on that basis is a structural approach, as discussed in greater detail below<sup>3</sup>, feasible. The comparison itself can start from one’s own legal system, which is then measured against the foreign criminal law; alternatively, the legal systems analyzed can be compared with one another directly.<sup>4</sup> It is hardly possible to fix the concept of comparative criminal law beyond this rather descriptive definition, which focuses on the (macro- and system-level) objects of the comparison. This is because comparative criminal law is a flexible concept, adapting to the aims and purposes of the comparison,<sup>5</sup> and thus focusing on a “moving target.”<sup>6</sup>

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1. For a rudimentary concept of comparative law see, e.g., Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, in RECHTSVERGLEICHUNG 86 (Konrad Zweigert & Hans-Jürgen Kötz eds., 1978) (“Comparative law means that the laws of one state . . . are critically compared with the laws of another system, or with as many others, past and present, as possible. We investigate which questions are raised here and there and what answers are provided, then look at how the answers can be compared;” orig. “Rechtsvergleichung bedeutet, daß die Rechtssätze eines Staates . . . mit den Rechtssätzen einer anderen Ordnung auseinandergesetzt werden oder auch mit möglichst vielen anderen aus Vergangenheit und Gegenwart. Wir untersuchen, welche Fragen da und dort gestellt und wie sie beantwortet werden, sodann, wie sich die Antworten zueinander verhalten.”); cf. Abbo Junker, *Rechtsvergleichung als Grundlagenfach*, 49 JURISTENZEITUNG 921, 922 (1994) (comparison as a “process”; orig. “Vorgang”).

2. For a fundamental account, see generally DAVID NELKEN, *COMPARATIVE CRIMINAL JUSTICE: MAKING SENSE OF DIFFERENCE* (2010). Often, the term is used to (normatively) cover the comparison of the whole of criminal and criminal procedural law, for example in Elisabetta Grande, *Comparative Criminal Justice: A Long Neglected Discipline on the Rise*, in THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 189, 191–204 (Mauro Bussani & Ugo Mattei eds., 2012); see also Paul Roberts, *On Method: The Ascent of Comparative Criminal Justice*, 22 OXFORD J. LEGAL STUD. 539 (2002) (reviewing DAVID NELKEN, *CONTRASTING CRIMINAL JUSTICE: GETTING FROM HERE TO THERE* (2006)).

3. See *infra* Subpart III.B.3.

4. See Albin Eser, *Funktionen, Methoden und Grenzen der Strafrechtsvergleichung*, in INTERNATIONALE PERSPEKTIVEN IN KRIMINOLOGIE UND STRAFRECHT—FESTSCHRIFT FÜR GÜNTHER KAISER ZUM 70. GEBURTSTAG 1499, 1501 (Hans-Jörg Albrecht ed., 1998).

5. See Albin Eser, *Strafrechtsvergleichung: Entwicklung—Ziele—Methoden*, in STRUKTURVERGLEICH STRAFRECHTLICHER VERANTWORTLICHKEIT UND SANKTIONIERUNG IN EUROPA 929, 941 (Albin Eser & Walter Perron eds., 2015). For an english version (to be quoted in the following) see ALBIN ESER, *COMPARATIVE CRIMINAL LAW* 5 (2017) (according to which the understanding of the concept “appears to depend crucially on the specific objective that is being pursued”).

6. Eser, *supra* note 4, at 1500 (“more or less futile” to seek to capture comparative

Furthermore, the object of comparison can vary considerably:<sup>7</sup> we can either compare only positive law—as in early positivistic (doctrinal or even terminological) comparative law—as well as include comparisons of the values underpinning these laws. We can also adapt the functional method that is still dominant at present, go beyond the law in the books, focus on factual problems and analyze the legal responses to these problems. In doing so, we can restrict ourselves to the concrete social problem itself (“problem-solving approach”) or include the legal institutions used to reach a solution in a given context (“functional-institutional approach”). Finally, we can focus upon the sociocultural conditions of given legal systems (“cultural comparison”). We will return to these approaches below (III.B). Accordingly, comparative law, to use Max Rheinstein’s classical definition, is the “empirical science of law as a general cultural phenomenon, a science that investigates the rules of social life”;<sup>8</sup> or, according to a more recent definition by Albin Eser, “a scientific, systematic comparison of various laws that is focused upon a specific aim and adapts its methodology accordingly.”<sup>9</sup>

By contrast, comparative criminal justice, as mentioned above and which is particularly widespread in the Anglo-American world, is even more general and markedly more empirical than is comparative law, enquiring how “people and institutions in different places” deal with “crime problems.”<sup>10</sup> Its focus usually centers on sentencing and the prison system, as well as the actors involved.<sup>11</sup> Its more holistic approach has proven itself superior to traditional approaches, especially in regard to the modern challenges of globalization and internationalization, terrorism, and cybercrime.

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criminal law “using a term that is all-encompassing and specific in equal measure, and universally valid to boot;” orig. “fast aussichtslos . . . in einem sowohl allumfassenden wie gleichermaßen spezifischen und dabei auch noch allgemeingültigen Begriff zu erfassen”).

7. See Eser, *supra* note 4; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 94–98 (including further references).

8. MAX RHEINSTEIN, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG* 21 (Reimer von Borries & Hans-Eckart Niethammer eds., 1987) (“empirische, Gesetzmäßigkeiten des Soziallebens erforschende Wissenschaft vom Recht als allgemeiner Kulturerscheinung”).

9. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 21; Eser, *Strafrechtsvergleichung*, *supra* note 5, at 962 (“ein wissenschaftlich-systematisch auf ein bestimmtes Ziel ausgerichtet und dementsprechend methodisch angepasstes Vergleichen verschiedener Rechte”). A simpler account is given by JEAN PRADEL, *DROIT PENAL COMPARE* 3 (2016) (“[L]’étude des différences et des ressemblances entre deux (ou plusieurs) ensembles juridiques pénaux.”).

10. NELKEN, *supra* note 2, at 1.

11. *Id.* (“ . . . links between crime, social order and punishment, and explores the roles played by police, prosecutors, courts, prisons and other actors and institutions in the wider context of various forms of social control”).

## B. History

Comparative criminal law's significance as a general discipline emerged in the early 19th century,<sup>12</sup> in line with general comparative law,<sup>13</sup> although there may have been earlier relevant writings.<sup>14</sup> German criminal law scholar Anselm von Feuerbach (1775–1833) used comparative law's empirical methodology in his theory with the aim of creating a “universal jurisprudence”<sup>15</sup> (with a historical focus<sup>16</sup>), and also employed comparative criminal procedural law as a tool in his campaign for criminal procedural reform, focusing on developments

12. See Hans-Heinrich Jescheck, ENTWICKLUNG, AUFGABEN UND METHODE DER STRAFRECHTSVERGLEICHUNG 10–24 (1955); Pradel, *supra* note 9, at 18 *et seq.*; Eser, *supra* note 4, at 1503–04; Eser, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 7–8, 11.

13. See Jürgen Basedow, *Comparative Law and its Clients*, 62 AM. J. COMP. L. 821, 827 *et seq.* (2014) (“not before the end of the nineteenth century”); *id.* at 829 (distinguishing six levels of development); MATHIAS SIEMS, COMPARATIVE LAW 15 (2d ed. 2018) (“traditional comparative law” at the beginning of the 20th century); Werner Heun, *Die Entdeckung der Rechtsvergleichung, in WENDEPUNKTE DER RECHTSWISSENSCHAFT: ASPEKTE DES RECHTS IN DER MODERNE* 9 *et seq.* (Werner Heun & Frank Schorkopf eds., 2014) (who dates it to “around 1800”; but sees a “boost” in the first half of the 19th century following Feuerbach; orig. “um 1800 . . . Aufschwung”); see also Heike Jung, *Zu Theorie und Methoden der Strafrechtsvergleichung, in IL DIRITO E LA DIFFERENZA: SCRITI IN ONORE DI ALESSANDRO BARATTA* 361 (Raffaele De Giorgi ed., 2002); Grande, *supra* note 2, at 193. On the significance of comparative studies in other scientific fields (ethnology, linguistics, theology etc.), where they became established much earlier, see Nils Jansen, *Comparative Law and Comparative Knowledge, in THE OXFORD HANDBOOK OF COMPARATIVE LAW* 305, 318–35 (Mathias Reimann & Reinhard Zimmermann eds., 1st ed. 2006).

14. See, e.g., Máximo Langer's argument that fifteenth century English writer Sir John Fortescue “made at least five crucial contributions to comparative criminal procedure that have survived to this day.” Máximo Langer, *In the Beginning was Fortescue: On the Intellectual Origins of the Adversarial and Inquisitorial System and Common and Civil Law in Comparative Criminal Procedure, in VISIONS OF JUSTICE* 273, 276 (Bruce Ackerman, et al. eds., 2016).

15. PAUL J. A. R. VON FEUERBACH, *Blick auf die deutsche Rechtswissenschaft, in ANSELMS VON FEUERBACH KLEINE SCHRIFTEN VERMISCHTEN INHALTS* 152, 163 (1833) (“die Universal-Jurisprudenz”).

16. From a German perspective on the resulting link between comparative law and history of law, which was only severed in the Weimar Republic, see Stefan Vogenauer, *Rechtsgeschichte und Rechtsvergleichung um 1900*, 76(4) RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1122 (2012); Hein Kötz, *Was Erwartet die Rechtsvergleichung von der Rechtsgeschichte?*, 47 JURISTENZEITUNG 20, 20 (1992) (“Rechtsgeschichte und Rechtsvergleichung sind . . . Holz vom gleichen Stamm” [“comparative law and history of law are . . . wood from the same tree”]); Junker, *supra* note 1, at 923 (“the same roots”; orig. “dieselbe Wurzel”); Heun, *supra* note 13, at 15–16, 19. A decidedly historical approach is taken in ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 6 (1974) (“Comparative Law is Legal History concerned with the relationship between systems.”). By contrast, the differences are rightly highlighted in UWE KISCHEL, *RECHTSVERGLEICHUNG* § 1 mns. 27–33 (2015) (observing in particular that in legal history, there is no possibility of ensuring that foreign law has been interpreted correctly by interviewing living practitioners, which is why—it should be added—no structural comparison in the sense discussed *infra* Subpart III.B.3 is possible).

in France in particular.<sup>17</sup> Feuerbach's students Karl Joseph Anton Mittermaier (1787–1867) and Heinrich Albert Zachariä (1806–1875) followed in his footsteps; their efforts to reform German criminal procedure were inspired by comparative law.<sup>18</sup> The so-called “reformierte Strafverfahren” (the liberally reformed German criminal procedure law) would have been inconceivable without the French and Anglo-American models.<sup>19</sup>

In the early twentieth century, a new generation of German-speaking criminal law scholars became very influential with regard to the development of criminal law doctrine. Among them, Franz von Liszt (1851–1919) also strongly promoted comparative criminal law,<sup>20</sup> advocating an empirically focused theory of development. Accordingly, comparative law provided information on the “direction” in which social life was “developing”, authorizing the legislator’s “purposeful intervention” or “conscious determination of purpose” within the framework of this developmental trend,<sup>21</sup> from which the “hallmark of ‘right law’” could be deduced.<sup>22</sup> Von Liszt was a key influence on the sixteen-volume

17. Anselm R. von Feuerbach, *Ueber die Gerichtsverfassung und das gerichtliche Verfahren Frankreichs, in besonderer Beziehung auf die Oeffentlichkeit und Mündlichkeit der Gerechtigkeitspflege* (1825). On Feuerbach, see Jescheck, *supra* note 12, at 11–12; Eser, *supra* note 4, at 1503; Eser, *Comparative Criminal Law*, *supra* note 5, at 7–8; Markus D. Dubber, *Comparative Criminal Law*, in *Oxford Handbook of Comparative Law* 1287, 1292 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (“good place to start”). On the particular significance of developments in France, see Thomas Vormbaum, *A Modern History of German Criminal Law* 82–98 (Michael Bohlander ed., Margaret Hiley trans., 2014).

18. See generally Carl J. A. Mittermaier, *Die Mündlichkeit, das Anklageprinzip, die Oeffentlichkeit und das Geschwornen-gericht in ihrer Durchführung in den verschiedenen Gesetzgebungen dargestellt und nach den Forderungen des Rechts und der Zweckmäßigkeit mit Rücksicht auf die Erfahrungen der verschiedenen Länder* (1845); C. J. A. Mittermaier, *Das englische, schottische und nordamerikanische Strafverfahren im Zusammenhang mit den politischen, sittlichen und socialen Zuständen und in den Einzelheiten der Rechtübung* (1851); H. A. Zachariä, *Die Gebrechen und die Reform des deutschen Strafverfahrens, dargestellt auf der Basis einer consequenten Entwicklung des inquisitorischen und des accusatorischen Prinzips* (1846). On these, see also Eberhard Schmidt, *Einführung in die Geschichte der deutschen Strafrechtspflege* 288, 292–93, 297 *et seq.* (1965).

19. Eser, *supra* note 4, at 1512.

20. Jescheck, *supra* note 12, at 10.

21. Franz von Liszt, *Tötung und Lebensgefährdung, in VERGLEICHENDE DARSTELLUNG DES DEUTSCHEN UND AUSLÄNDISCHEN STRAFRECHTS. VORARBEITEN ZUR DEUTSCHEN STRAFRECHTSREFORM* 1, 4–5 (Karl von Birkmeyer, et al. eds., 1905) (“Entwicklungsrichtung,” “zielbewußtes Eingreifen,” “die bewußte Zwecksetzung”).

22. Franz von Liszt, *Das “richtige Recht” in der Strafgesetzgebung II*, 27 *ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT* 91, 95 (1907) (“In der empirisch gegebenen Entwicklungsrichtung des im Staat organisierten gesellschaftlichen Lebens erblicke ich also das Kennzeichen des ‘richtigen Rechts’; nur auf dieser Grundlage lässt sich ein wissenschaftliches System der Politik aufbauen.” [“In the empirically given direction of development of the social life organized within the state I see the hallmark of the ‘right law’; only

ume “Vergleichende Darstellung des deutschen und ausländischen Strafrechts” (“Comparative account of German and foreign criminal law”) produced at the beginning of the 20th century (1905–1909).<sup>23</sup> It contained the first features of legislative comparative criminal law<sup>24</sup> and was referred to by Leon Radzinowicz as a “landmark in the history of comparative penal studies”;<sup>25</sup> arguably, it established comparative criminal law as a discipline in its own right.<sup>26</sup> The “publication of non-German criminal codes in German translation”<sup>27</sup> had already started before this (founded by von Liszt) and continues, albeit in a different form, to this day.<sup>28</sup>

In parallel, the founding of numerous associations with a focus on comparative law led to a certain degree of *institutionalisation*.<sup>29</sup> Of these, only two need be mentioned here: first, the “Internationale Kriminalistische Vereinigung” or International Criminological Association founded in 1888 by von Liszt, van Hamel and Prins,<sup>30</sup> and its successor, the Association Internationale de Droit Pénal (AIDP), founded in 1924 at French initiative,<sup>31</sup> for the common-law sphere of criminal law, the Canadian-based Society for the Reform of Criminal Law was founded, albeit much later (1989).<sup>32</sup> These associations were complemented by

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upon this basis can any scientific system of politics be established.”]; Franz von Liszt, *Das “richtige Recht” in der Strafgesetzgebung*, 26 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 553, 556 (1906). On von Liszt, see also JESCHECK, *supra* note 12, at 10–11; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 11.

23. Vergleichende Darstellung des Deutschen und Ausländischen Strafrechts, *supra* note 21.

24. On the historical focus of early legislative comparative law, see Heun, *supra* note 13, at 13 *et seq.*, who sees this as one of the roots of modern comparative law (the other being scientific, practical comparative law).

25. Leon Radzinowicz, *International Collaboration in Criminal Science*, 58 LAW Q. REV. 110, 128 (1942).

26. See ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 7 (no systematic method or specific discipline of comparative law until the late nineteenth century).

27. JESCHECK, *supra* note 12, at 13, 15 (54 vols. from 1888 to 1942, then from 1952 onwards; orig. “Edition außerdeutscher Strafgesetzbücher in deutscher Übersetzung”). The ZStW’s foreign review (“Auslandsrundschau”) was only founded in 1953 as a simple newsletter. *Id.* at 15, n. 19.

28. For a list of German translations of non-German criminal codes by the Max Planck Institute, see *Ausländische Gesetzbücher in Übersetzung*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, <https://www.mpicc.de/de/publikationen/institutspublikationen/ubersetzungen-strafgesetzbucher> [<https://perma.cc/8RBU-WHV2>] (last visited Apr. 13, 2020).

29. JESCHECK, *supra* note 12, at 16 *et seq.*; PRADEL, *supra* note 9, at 24 *et seq.*; Esler, *supra* note 4, at 1504–05; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 11–12.

30. JESCHECK, *supra* note 12, at 12–13, 17; Esler, *supra* note 4, at 1505.

31. JESCHECK, *supra* note 12, at 18–19; on the German national group, established by Adolf Schönke in 1951, see *id.* at 24.

32. Esler, *supra* note 4, at 1505. The Society’s official journal is *Criminal Law Forum*,



specialized research organizations in the academic sphere, in particular the Freiburg Institute for Foreign and International Criminal Law, which became part of the Max Planck Society in 1965.<sup>33</sup>

## II. THE SIGNIFICANCE AND FUNCTIONS OF COMPARATIVE CRIMINAL LAW

### A. Significance

Without wishing to portray comparative criminal law as “*the profession of our times*”,<sup>34</sup> its significance in our current period of law’s globalization and internationalization can hardly be overestimated.<sup>35</sup> Globalization has led to massive institutionalization in the form of supranational organizations and associations. This network of entities—both public and private, operating regionally and worldwide—has generated a huge demand for comparative law scholarship,<sup>36</sup> for which

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*Springer*, of which the present author is editor-in-chief.

33. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 9–10 (including further references) (originating in an institute at the University of Freiburg founded in 1938 by Adolf Schöнке); *see also* PRADEL, *supra* note 9, at 27–28.

34. Armin von Bogdandy, *Deutsche Rechtswissenschaft im europäischen Rechtsraum*, 66(1) JURISTENZEITUNG 1, 4 (2011) (“Rechtsvergleichung . . . wird . . . zum Beruf der Zeit” [“comparative law . . . becomes . . . the profession of our times”]) (emphasis added); *accord* Armin von Bogdandy, *Internationalisierung der deutschen Rechtswissenschaft. Betrachtungen zu einem identitätswandelnden Prozess*, in SELBSTREFLEXION DER RECHTSWISSENSCHAFT 145 (Eric Hilgendorf & Helmuth Schulze-Fielitz eds., 2015); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 11–12 (“ . . . probably the call for comparative criminal law was never louder than in our day and age”).

35. On the general increase in significance based on five factors, *see* Ulrich Sieber, *Strafrechtsvergleichung im Wandel—Aufgaben, Methoden und Theorieansätze der vergleichenden Strafrechtswissenschaft*, in STRAFRECHT UND KRIMINOLOGIE UNTER EINEM DACH 78, 80–94 (Ulrich Sieber & Hans-Jörg Albrecht eds., 2006); listing four phenomena in particular ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 12–14 (from a “supply to a demand market”); Albin Eser, *Zum Stand der Strafrechtsvergleichung: eine literarische Nachlese*, in FESTSCHRIFT FÜR FRANZ STRENG ZUM 70. GEBURTSTAG 669, 672–73 (Christoph Safferling et al. eds., 2017); *see also* Heike Jung, *Grundfragen der Strafrechtsvergleichung*, 38 JURISTISCHE SCHULUNG 1, 1, 7 (1998), (“increase in significance”; orig. “Bedeutungszuwachs”) (“new era . . .”; orig. “neue Ära . . .”); Jung, *supra* note 13, at 380 (“stimulating effect of Europeanisation and internationalisation”; orig. “stimulierende Wirkung von Europäisierung und Internationalisierung”); Heike Jung, *Wertende (Straf-)Rechtsvergleichung. Betrachtungen über einen elastischen Begriff*, GOLDAMMER’S ARCHIV FÜR STRAFRECHT 1, 3 *et seq.* (2005) (comparative criminal law as one of the “winners” of internationalisation); Thomas Weigend, *Criminal Law & Criminal Procedure*, in ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW 214, 214–18 (Jan M. Smits ed., 2006) (“increase of its relevance”); Susanne Beck, *Strafrecht im interkulturellen Dialog*, in STRAFRECHTSVERGLEICHUNG ALS PROBLEM UND LÖSUNG 65, 65–66 (Susanne Beck et al. eds., 2011) (“reinvigoration”; orig. “Wiederbelebung”); Frank Meyer, *Internationalisierung und Europäisierung des Rechts als methodische Herausforderung der Rechtsvergleichung*, in STRAFRECHTSVERGLEICHUNG 87, 87–89 (Susanne Beck et al. eds., 2011) (“massive boom”; orig. “ungeheurer Auftrieb”).

36. Basedow, *supra* note 13, 825–26, 837, 857 thus shows globalization’s influence on comparative law in general, and speaks of a demand-oriented comparative law approach

thousands of lawyers from all over the globe are producing expert reports in comparative law as a kind of “living comparison of laws.”<sup>37</sup> The significance of comparative criminal law can also be established from an overarching review of the different areas of international criminal law in a broad sense, i.e., supranational (European) criminal law, international criminal law *stricto sensu*, and the law on mutual judicial assistance in criminal matters.

### 1. Supranational (European) Criminal Law

The significance of comparative criminal law for supranational (European) criminal law arises from its primary legal bases themselves,<sup>38</sup> especially with respect to the European fundamental rights derived from the “constitutional traditions common to the Member States.”<sup>39</sup> Within the context of European Union (EU) criminal law,<sup>40</sup> where we see a constant drive towards the “approximation” of the criminal law of the Member States<sup>41</sup> and the creation of “minimum rules” in criminal and criminal procedural law,<sup>42</sup> this legislative process requires, in the first place, the comparative analysis of these different criminal laws and criminal justice systems to better understand where approximation and harmonization are actually necessary. Indeed, according to Art. 82(2) second sentence TFEU, “the differences between the legal traditions and systems of the Member States” are to be taken into account when creating minimum rules in criminal procedure, and these

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(drawing a distinction between “clients” from “academia”; “legal professions”; “legislature” and the “unification agencies”).

37. See Basedow, *supra* note 13, at 854–57 (“massive institutional foundation for comparative law”; “institutional side of globalization”). On “global comparative law” in this regard see SIEMS, *supra* note 13, at 292 *et seq.* (drawing a distinction between “hegemonic and counter-hegemonic globalization” and “globalized localism” and “localized globalism”); on “fading state borders” due to the convergence of legal norms, regionalization and transnationalization, *cf. id.* at 262 *et seq.*

38. On this vertical top-down influence, see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 53–54.

39. See Treaty of the Functioning of the European Union, art. 6(3), June 7, 2016, O.J. EU C 202/1 (hereinafter TFEU).

40. On the concept of European criminal law, see KAI AMBOS, *EUROPEAN CRIMINAL LAW*, 14–15 (2018).

41. TFEU, *supra* note 39, at art. 67(3); *see also id.* at arts. 82, 83(2); on the compensation of damages “in accordance with . . . general principles” in the case of noncontractual liability of the Union, *see id.* at art. 340(2).

42. On criminal law *see id.* at art. 83(1) (on the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension); on criminal procedural law *see id.* at art. 82(2) (on facilitating the mutual recognition of judgments and judicial decisions and police and judicial cooperation).

differences have first to be identified by comparative law (on criminal procedure).

The Lisbon Treaty, which provided for a fundamental reform of the EU's primary law,<sup>43</sup> created the possibility of triggering an "emergency brake procedure" if an approximation directive touched upon "fundamental aspects" of a Member State's criminal justice system.<sup>44</sup> This option means that the Commission, as the main initiator of Union law legislative procedures, needs to take these aspects into account when developing proposals for directives (anticipating Member States' objections)—and this again presupposes that it has familiarized itself with the foundations of Member States' criminal law systems by way of comparative criminal law analysis. On an operative level, the EU institutions in charge of cross-border investigations (Europol, the European Anti-Fraud Office (OLAF), Eurojust and the future European Public Prosecutor)<sup>45</sup> are constantly applying and interpreting Member State law. Criminal investigations, given the lack of a genuinely European criminal procedural law, in principle, take place according to the law of the State in charge of investigations (*lex loci*). Thus, cross-border criminal investigations necessarily involve several legal systems. Such investigations take place in all areas of transnational criminality, e.g., terrorism, human and drug trafficking, corruption, and normally one national prosecution agency takes the lead on coordinating with the others. Here, the shift of perspective from a national to a supranational, European level is particularly evident.<sup>46</sup>

Within the context of the *Council of Europe*, the European Court of Human Rights in particular frequently deals with issues of criminal and criminal procedural law that require in-depth knowledge of the law of the defendant State.<sup>47</sup> The European prohibition of double jeopardy<sup>48</sup> requires a final decision to have been made in the State which first investigates and adjudicates the respective matter;<sup>49</sup> without knowledge

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43. On the changes regarding criminal law as compared to the previous treaties see AMBOS, *supra* note 40, at 6 *et seq.*

44. TFEU, *supra*, note 39, at arts. 82(2), 83(3).

45. On these institutions, see generally AMBOS, *supra* note 40, at ch. V.

46. On methodological Europeanisation in this regard, see von Bogdandy, in SELBST-REFLEXION DER RECHTSWISSENSCHAFT *supra* note 34, at 144–46.

47. AMBOS, *supra* note 40, at 81 *et seq.*

48. Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, RT. 54, Sept. 22, 2000, O.J. L. 239; Charter of Fundamental Rights of the European Union, art. 50, Dec. 18, 2000, O.J. E.C. 2000/C 364/01.

49. On this and other preconditions, see AMBOS, *supra* note 40, at 146 *et seq.*

of the foreign procedural law in question, the correct legal classification of this final decision is not possible.<sup>50</sup>

## 2. International Criminal Law *stricto sensu*

In the field of international criminal law *stricto sensu* (ICL), classic general principles have always been among the general sources of law.<sup>51</sup> These principles can be derived from the law of the legal systems considered most important, taking the division into legal spheres or families<sup>52</sup> as a didactic starting point, since it makes it possible to restrict analysis to these representative systems, with the Anglo-American “common law” tradition on the one hand and the Franco-German “civil law” on the other.<sup>53</sup> Otherwise, however, this division should be rejected, as it tends to obscure existing differences between these legal families (for example, between English and US federal law and between French and German law), and overemphasizes similarities. Division can thus tend towards simplification, while overly focusing on civil law and furthermore marginalizing non-Western legal systems such as those of the former colonies and those of the Islamic or Buddhist world.<sup>54</sup>

50. On this, see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 48–49.

51. See the (albeit somewhat melodramatic) account in JESCHECK, *supra* note 12, at 31 (fighting “international criminality;” orig. “internationales Verbrechenertum” through comparative law and a particular responsibility in regard to the creation of an “international criminal law,” namely “appointed as humanity’s objective conscience to protect justice and its greatest demands against the effects of the ‘unconditional hatred’ of times of war” (orig. “völkerrechtlichen Strafrechts . . . das sachliche Gewissen der Menschheit dazu beufen, die Gerechtigkeit in ihren großen Postulaten . . . zu sichern gegen die Auswirkungen des ‘bedingungslosen Hasses’ der Kriegszeit . . .”)); more recently see Luis Chiesa, *Comparative Criminal Law*, in OXFORD HANDBOOK OF CRIMINAL LAW 1089, 1093–94 (Markus D. Dubber & Tatjana Hörnle eds., 2014); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 63.

52. See the classic works René David, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 12 (1964); René David & Camille Jauffret-Spinozi, *LES GRANDS SYSTÈMES DE DROIT CONTEMPORAINS* 15–16 (2002); Konrad Zweigert & Hein Kötz, *EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG: AUF DEM GEBIETE DES PRIVATRECHTS* 62 *et seq.* (1996); Siems, *supra* note 13, at 86 *et seq.*

53. PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* 35 (2007) (“ . . . *ab initio* way of enabling comparativists to take the first steps . . .”); Hein Kötz, *Abschied von der Rechtskreislehre*, 6 *ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT* 493, 504 (1998) (“first rough orientation”; orig. “erste grobe Orientierung”); SIEMS, *supra* note 13, at 109 (“didactic aim”); KISCHEL, *supra* note 16, § 4 mns. 19, 25–26.

54. For a summary of the critique see Kötz, *supra* note 53, at 495 *et seq.*; SIEMS, *supra* note 13, at 7–8, 94 *et seq.*; KISCHEL, *supra* note 16, § 4 mns. 11–17, 20–24; *see also* Helmut Heiss, *Hierarchische Rechtskreiseinteilung: Von der Rechtskreislehre zur Typologie der Rechtskulturen*, 100 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT (ZVGLRWISS)* 396, 399, 412, 416 *et seq.* (2001), who himself suggests a hierarchical classification that grants fundamental questions concerning the nature of the law primacy over technical details; *see generally* Jaakko Husa, *Classification of Legal Families Today/Is it Time for Memorial Hymn?*, 56 *REVUE INTERNATIONALE DE DROIT COMPARÉ* 11 *et seq.* (2004); Weigend, *supra* note 35, at 219; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 108–09. An earlier account is provided

Nonetheless, the importance of general principles with regard to ICL arises from traditional doctrine on the sources of international law<sup>55</sup> and has been confirmed by modern ICL through Article 21 of the International Criminal Court's (ICC) Rome Statute.<sup>56</sup> The existence of the ICC and many further international criminal law tribunals has given comparative criminal law huge practical significance,<sup>57</sup> although actual case law practice rarely manages to go beyond mere "cherry picking"<sup>58</sup> and a more systematic methodological approach would thus be desirable.<sup>59</sup> We will return to this below (C.II.).

### 3. Law on Mutual Judicial Assistance in Criminal Matters

In the law on mutual judicial assistance in criminal matters, contact with foreign legal systems is a constant. Depending on the kind of judicial assistance involved (extradition/transfer, ancillary mutual assistance or enforcement assistance), and the relationship concerning the mutual judicial assistance (multi- or bilateral treaty or without a treaty), knowledge of the law of the requested/requesting State is necessary, or at the very least, helpful. Even in a system increasingly based on mutual recognition<sup>60</sup> such as that of the EU, national law is not pushed aside completely by secondary law,<sup>61</sup> but often asserts itself in the form of

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by Gunter Frankenberg, see Gunter Frankenberg, *Critical Comparisons: Re-thinking Comparative Law*, 26 HARV. INT. LAW J. 411, 442–43 (1985). There are other attempts at classification, for example in legal traditions by PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD: SUSTAINABLE DIVERSITY IN LAW* 1–3, 60 *et seq.* (2014) (criticized by Kischel, *supra* note 16, § 3 mns. 131 *et seq.*); or, from the perspective of criminal policy, according to models of state and society by Mirelles Delmas-Marty, see MIRELLE DELMAS-MARTY, *LES GRANDS SYSTÈMES DE POLITIQUE CRIMINELLE* 81–84 (1992). On the "units of comparison," see NELKEN, *supra* note 2, at 28 *et seq.*

55. Statute of the International Court of Justice, art. 38 ("general principles of law recognized by civilized nations").

56. Rome Statute of the International Criminal Court, art. 21, Jul. 17, 1998, 2187 U.N.T.S. 38544 ("[G]eneral principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime . . ."). On this, see also Grande, *supra* note 2, at 191; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 46, 55 (subsidiary application of foreign law within the context of judicative comparative criminal law).

57. See Weigend, *supra* note 35, at 217.

58. Thus the criticism, particularly common in the U.S., of courts' utilization of comparative law, see SIEMS, *supra* note 13, at 183; Thomas Kadner Graziano, *Is it Legitimate and Beneficial for Judges to Compare*, in *COURTS AND COMPARATIVE LAW* 25, 30 (Mads Andenas & Duncan Fairgrieve eds., 2015).

59. Cf. Paul Roberts, *Comparative Law for International Criminal Justice*, in *COMPARATIVE LAW, A HANDBOOK* 339–40, 350 *et seq.*, 363, 365 (Esin Örcü & David Nelken eds., 2007) (who argues in favor of a "more explicit, systematic, and methodologically astute recourse to comparative legal method" and discusses six areas in this regard).

60. On this principle, see AMBOS, *supra* note 40, at 20 *et seq.*

61. On the relevant instruments of EU secondary law, see *id.* at 416–18.

grounds of refusal<sup>62</sup> or by making enforcement subject to conditions.<sup>63</sup> In classic treaty-based mutual judicial assistance, the principle of dual criminality—similarly to its counterpart in substantive law, the principle that an act needs to constitute a crime in the place of commission in order for (another State's) criminal law to apply to it<sup>64</sup>—renders an analysis of the criminal law of the requesting State necessary.<sup>65</sup> In the case of mutual judicial assistance without a treaty, one is at the mercy of the requested State anyway, so one should familiarize oneself with its national law on mutual assistance, and above all, with its practice in cases of mutual judicial assistance.

## B. Functions

These examples show that comparative criminal law often forms the basis of international law. As both international and European criminal law largely feed upon national criminal law, despite their autonomous interpretation and supranational institutionalization, comparative criminal law takes on a fundamental information function, creating general legal principles in the abovementioned traditional sense. At the same time, a horizontal comparison of supranational institutions and their law—beyond national legal systems, as it were—seems pertinent. We will return to this below (Subpart III.B *in fine*).

In some cases, it can be useful for the national legislator to consult foreign law before issuing laws on particular matters (*legislative comparative criminal law*).<sup>66</sup> Likewise, the actors of the criminal justice system—criminal prosecutors, defense lawyers and judges—are becoming increasingly reliant upon the insights of comparative law to solve questions in individual cases (*judicative comparative criminal law*),<sup>67</sup> as crime no longer only takes place within the confines of

62. See, e.g., Council Framework Decision on the European Arrest Warrant and the Surrender Procedures Between Member States, arts. 3,4, 2002 O.J. (L 190).

63. See, e.g., *id.* at art. 5.

64. See STRAFGESETZBUCH [StGB] [PENAL CODE], § 7 (“if the act is a criminal offence at the place of its commission”).

65. See, e.g., Eur. Consult. Ass., *European Convention on Extradition*, art. 2(1), ETS No. 24 (1957). Thereto in this context, see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 47–48 (penal authority dependent on foreign law).

66. See Weigend, *supra* note 35, at 215; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 57 *et seq.*; Chiesa, *supra* note 51, at 1091; Law Commissions Act 1965, § 3(1) (Eng.) (“[D]uty of each of the commissioners . . . to obtain . . . information as to the legal system of other countries . . .”). For a general comparative law point of view, see KISCHEL, *supra* note 16, § 1 mns. 22–52. On the legislator as the “client” of comparative law, see Basedow, *supra* note 13, at 842 *et seq.*

67. This function of comparative law was already established as “significance in the application of law” (orig. “Bedeutung in der Rechtsanwendung”) by the civil law specialist

national borders, particularly in the EU's common area of freedom, security and justice.<sup>68</sup> Last but not least, comparative criminal law can also be a scientific, theoretical undertaking,<sup>69</sup> whether to gain a broader perspective on one's own law or as an aid when solving fundamental legal problems (comparative law as a fifth method of interpretation as famously framed by the great comparativist Konrad Zweigert).<sup>70</sup>

These classic *functions* of comparative criminal law<sup>71</sup>—the legislative, judicative and scientific—have emerged as increasingly important since the midnineteenth century. Whether “evaluative-competitive comparative criminal law”, a concept proposed by Eser,<sup>72</sup> should be added to this triad, turning it into a tetrad,<sup>73</sup> does not really need to be decided. In any case, evaluation<sup>74</sup> plays an important role in actual

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Zitelmann in 1900. See ERNST ZITELMANN, *AUFGABEN UND BEDEUTUNG DER RECHTSVERGLEICHUNG* (1900), reprinted in *RECHTSVERGLEICHUNG* 11–12 (Konrad Zweigert & Hans-Jürgen Puttfarcken eds., 1978). The examples in German criminal case law are legion. See, e.g., Bundesgerichtshof [BGH] [FEDERAL COURT OF JUSTICE] 1 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN STRAFSACHEN [BGHSt] 297; BGH 2 BGHSt 152; BGH 2 BGHSt 257; BGH 5 BGHSt 30; BGH 5 BGHSt 337; BGH 38 BGHSt 214; *id.* at 228 *et seq.* (taking foreign procedural law into account concerning violations of the police obligation to inform detained persons of their rights and the consequences thereof). On judicative comparative law in general see also ZWIEGERT & KÖTZ, *supra* note 52, at 16 *et seq.*; KURT H. EBERT, *RECHTSVERGLEICHUNG: EINFÜHRUNG IN DIE GRUNDLAGEN* 176 *et seq.* (1978); on judicative comparative criminal law specifically, see Eser, *supra* note 4, at 1507–10; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 41 *et seq.*

68. See TFEU, *supra* note 39, at art. 67(1).

69. On different terms and concepts (“scientific-theoretical”; “theoretical”; “academic”; orig. “wissenschaftlich-theoretisch”; “theoretisch”; “akademisch”) see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 43 *et seq.*

70. See Konrad Zweigert, *Rechtsvergleichung als Universale Interpretationsmethode*, 15 *ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* 5, 8 *et seq.* (1949) (referring to art. 1 SchwZGB); on comparative law as the fifth method of interpretation in constitutional law see Peter Häberle, *Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat*, 44 *JURISTENZEITUNG* 913, 916 *et seq.* (1989). See KISCHEL, *supra* note 16, § 2 mns. 53–80 (for a detailed analysis); *id.* § 2 mns. 72–76 (emphasizing its significance in solving difficult cases in particular). From the point of view of criminal law see Jung, *supra* note 13, at 380; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 14.

71. On this triad, see Eser, *supra* note 4, at 1506 *et seq.*; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 16–17, 27 *et seq.*; JESCHECK, *supra* note 12, at 26 *et seq.* (providing an earlier, more rudimentary account that is not as differentiated and systematic).

72. Albin Eser, *Evaluativ-Kompetitive Strafrechtsvergleichung. Zu “Wertenden” Funktionen und Methoden der Strafrechtsvergleichung*, *FESTSCHRIFT FRISCH* 1441, 1453–54 *et seq.* (2013) (complementing the traditional evaluative or value-based comparison (thereto in the following main text and *infra* note 175 *et seq.* with main text) with a competitive element whereby the comparison strives to achieve the best possible criminal justice system).

73. Eser, *supra* note 72, at 1442–43; ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 16, 69 *et seq.* (including some formidable differentiation and the formation of numerous subgroups and subforms . . . ). For a list of thirty (!) further approaches and forms, see *id.* at 17–19.

74. On the difference between description and evaluation (without excluding the

comparisons of the law within the context of comparative cross-sections of laws and recommendations for legal policy.<sup>75</sup> According to a recent fundamental account by Eser, evaluation constitutes a possible but not obligatory component of comparative law, which may thus exist without any evaluative elements on the one hand. On the other hand, however, the aim of the comparison in question may render evaluation desirable or even necessary.<sup>76</sup>

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latter) see Martino Mona, *Strafrechtsvergleichung und Comparative Justice: Zum Verhältnis zwischen Rechtsvergleichung, Grundlagenforschung und Rechtsphilosophie*, STRAFRECHTSVERGLEICHUNG 103, 113 (Susanne Beck et al. eds., 2011).

75. Sieber, *supra* note 35, at 121 (“rationale Begründung der Bewertungsentcheidung” [“rational foundation of the evaluative decision”] as the precondition of comparative criminal law’s role as an instrument of good governance); Weigend, *supra* note 35, at 219–20 (importance of “quality judgments”); Mona, *supra* note 74, at 115 *et seq.* (evaluation required in regard to theories of justice); SIEMS, *supra* note 13, at 28–29 (evaluation and recommendations as part of comparative analysis); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 120–22 (“... final statement—where a certain level of evaluation is usually unavoidable”); Beck, *supra* note 35, at 78 (regulations should not only be understood, but evaluated); *id.* at 85 (evaluation is “unavoidable”; orig. “unvermeidbar”); KISCHEL, *supra* note 16, § 1 mns. 10–11.

76. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 73, 75–76, 120 *et seq.* (adopting a position in between the two extreme poles represented by Radbruch and von Liszt). Contra evaluation as a component of comparative law (instead, evaluation forms part of “the critique of legal systems enabled by comparative law”; orig. “durch sie ermöglichten Rechtskritik”). Ernst Rabel, *Aufgabe und Notwendigkeit der Rechtsvergleichung*, 13 RHEINISCHE ZEITSCHRIFT FÜR ZIVIL- UND PROZESSRECHT 279–80 (1924); but see *id.* at 286 *et seq.*, where he calls for a critique of, policies for and improvement of the law; on Rabel and the introduction of the evaluative level (“fifth stage of comparative law”) by Konrad Zweigert (as one of Rabel’s successors at the Hamburger Max Planck Institute for Foreign and International Private Law), see Basedow, *supra* note 13, at 832–33. On the differentiation between a “Vergleich von Wertungen” [“comparison of evaluations”] and “Wertung von Lösungen” [“evaluation of solutions”], which do not form part of comparative law in the narrower sense, see Ulrich Sieber, *Grenzen des Strafrechts. Strafrechtliche, Kriminologische und Kriminalpolitische Grundlagenfragen im Programm der Strafrechtlichen Forschungsgruppe am Freiburger Max-Planck-Institut für Ausländisches und Internationales Strafrecht*, PERSPEKTIVEN DER STRAFRECHTLICHEN FORSCHUNG: AMTSWECHSEL AM FREIBURGER MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT 35, 74–75 (Hans-Jörg Albrecht & Ulrich Sieber eds., 2006). Sieber later wrote that the issue of categorization played only a subordinate role. Sieber, *supra* note 35, at 120. Critically in this regard see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 74. On formulating the “key evaluative questions . . . in a way that is applicable to all systems” within the context of the approximation of criminal law (orig. “wesentlichen Wertungsfragen . . . in einer für alle Systeme gültigen Weise”), see Walter Perron, *Sind die Nationalen Grenzen des Strafrechts Überwindbar*, 109 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 281, 299 (1997).



### III. THE AIMS, METHODS AND NORMATIVE FOUNDATIONS OF COMPARATIVE CRIMINAL LAW

#### A. Aims

The abovementioned functions of comparative criminal law also describe its possible and manifold<sup>77</sup> aims: advising the legislator through legislative comparative criminal law, supporting the criminal justice system within the context of judicative comparative criminal law, and fundamentally questioning one's own national criminal law through scientific and theoretical comparative criminal law. The strengths and, above all, weaknesses of a nation's law become more obvious when that nation's law is made the focus of comparative study.<sup>78</sup> Ideally, comparative law critically reflects upon<sup>79</sup> and discovers a holistic view of one's own law possible;<sup>80</sup> it creates a "counterbalance to overestimations of one's own doctrine and its taxonomy."<sup>81</sup> What is more, comparative law shows "which aspects of law are subject to change, [and] which are eternal".<sup>82</sup> However, comparative law, like other disciplines, can only claim to be scientific if it allows us to see things that would have remained invisible to us otherwise. This means that it needs to be more than the mere study of foreign law,<sup>83</sup> to do more than place foreign legal

77. On the "plurality of aims" (orig. "Pluralität der Ziele") see Jung, *supra* note 13, at 378–79. On the flexibility of aims, see KISCHEL, *supra* note 16, § 2 mn. 5. On four functions or objectives see Gerhard Dannemann, *Comparative Law: Study of Similarities or Differences*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 383, 402–06 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (unifying law, solving particular problems, applying foreign law, understanding law).

78. See Junker, *supra* note 1, at 928 ("conditionalities of one's own law"; orig. "Bedingtheiten des eigenen Rechts"); MARKUS D. DUBBER & TATIANA HÖRNLE, CRIMINAL LAW. A COMPARATIVE APPROACH VI (2014); Chiesa, *supra* note 51, at 1091; ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 29; KISCHEL, *supra* note 16, § 1 mn. 1.

79. For a basic account, see Frankenberg, *supra* note 54, at 411–13 *et seq.*, 443–44 (comparative law as a "learning experience" through "distancing" and "differing" with the aim of self-reflection), who criticizes traditional, functional comparative law precisely for a lack of self-criticism and ability to engage in self-reflection. A critical view of the functional method in this regard is also put forward in Ralf Michaels, *The Functional Method of Comparative Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 379–80 (Mathias Reimann & Reinhard Zimmermann eds., 2006). But see KISCHEL, *supra* note 16, § 2 mns. 20–21 for the view that comparative law encourages understanding, but is only of limited importance when seeking to understand the doctrine of one's own law.

80. NELKEN, *supra* note 2, at 14 ("holistic picture").

81. JESCHECK, *supra* note 12, at 44 (orig.: "Gegengewichte gegen die Überschätzung der eigenen Dogmatik und ihrer Begriffswelt"); see also GUSTAV RADBRUCH, DER MENSCH IM RECHT: AUSGEWÄHLTE VORTRÄGE UND AUFSÄTZE ÜBER GRUNDFRAGEN DES RECHTS 108–09 (1957) ("appreciate it with all its flaws and virtues"; orig. " . . . in ihren Mängeln und Vorzügen würdigen").

82. RADBRUCH, *supra* note 81, at 108–09.

83. On this as merely a partial aspect of comparative law devoid of true scientific

norms side by side in isolation, abstracted from social reality. As Franz von Liszt advocated as early as 1894, it needs to be “something new and independent . . . that differs from the individual laws compared and is not simply contained within them.”<sup>84</sup>

The new kinds of risk associated with economic globalization in the “global risk society”<sup>85</sup>—crimes committed in or through the internet, transnational organized crime and terrorism—are confronting comparative criminal law with new challenges and leading to new tasks and aims for the field. Thus, there is a general demand that comparative criminal law provide normatively and empirically sound opinions on how these new risks should be controlled by criminal law.<sup>86</sup> However, rational, well-considered answers of the kind to be expected from scientific, theoretical comparative criminal law take the kind of time that short-termist politicians—focused more so on electoral considerations than empirical data on criminal policy—do not have. On a more basic level, it is doubtful whether comparative criminal law is actually able to provide such answers, given that its study and findings depend on many extralegal factors. A perspective that is at least interdisciplinary and takes account of police and intelligence prosecution practices under the lens of comparative criminal justice is thus required.

## B. Methods

### 1. General Considerations: Methodological Openness and Functional Method

The comparative method cannot be developed abstractly, but only with a focused view on the previously defined aims of the comparative

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merit, see KISCHEL, *supra* note 16, at § 1mns. 3 *et seq.*, 8, 13.

84. Franz von Liszt, *Zur Einführung: Rückblick und Zukunftspläne*, in 1 DIE STRAFGESETZGEBUNG DER GEGENWART IN RECHTSVERGLEICHENDER DARSTELLUNG.: DAS STRAFRECHT DER STAATEN EUROPAS XIII–XIX (Franz von Liszt ed., 1894) (Orig. “etwas Neues, Selbständiges . . . das von den einzelnen verglichenen Rechten verschieden, in ihnen nicht ohne weiteres enthalten ist.”); Hans Schultz, *Strafrechtsvergleichung als Grundlagenforschung*, in DIE VERGLEICHUNG ALS METHODE DER STRAFRECHTSWISSENSCHAFT UND DER KRIMINOLOGIE 7, 19–20 (Hans-Heinrich Jescheck & Günter Kaiser eds., 1980) (also accepting “less sophisticated” comparative law; orig. “weniger anspruchsvolle”). On “comparing” vs. “compiling criminal law” in this regard see Chiesa, *supra* note 51, at 1090–91.

85. The term goes back to Ulrich Beck, see ULRICH BECK, RISIKOGESELLSCHAFT: AUF DEM WEG IN EINE ANDERE MODERNE (1986). See also Ulrich Sieber, *Grenzen des Strafrechts, Grundlagen und Herausforderungen des neuen strafrechtlichen Forschungsprogramms am Max-Planck-Institut für ausländisches und internationales Strafrecht*, 119 ZStW 1, 3 *et seq.* (2007).

86. See Sieber, *supra* note 85, at 16, 53–54 (methodologically sound comparative criminal law as a foundation of rational criminal policy).

law project in question.<sup>87</sup> Accordingly, a certain methodological openness that provides enough space for creativity is required,<sup>88</sup> as the chosen method needs to be tailored to the aim, i.e., its purpose is to serve the aim, which is why the method best suited to achieving the aim should be selected.<sup>89</sup> While aim and method are thus distinct from one another,<sup>90</sup> they are at the same time interdependent in that the method cannot be defined without the aim; consequently there cannot be only *one* ‘proper’ method of comparative law.<sup>91</sup> Nevertheless, it is possible to mark out a methodological frame within which comparative law research should be carried out.

First of all, an openness to results is necessary. Those engaged in comparative law should not start out from their own positions on doctrine and criminal policy as working hypotheses and objects of reference (*tertium comparationis*92),<sup>93</sup> even though these certainly can and

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87. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 20, 27, 85–86; Eser, *supra* note 35, at 682; accord Otto Lagodny, *Fallstricke der Strafrechtsvergleichung am Beispiel der deutschen Rechtsgutslehre*, 10 ZEITSCHRIFT FÜR INTERNATIONALE STRAFRECHTSDOGMATIK 679–80 (2016); 2.2 NATIONAL CRIMINAL LAW IN A COMPARATIVE LEGAL CONTEXT, at 165, 167 (Sieber, Jarvers, & Silverman eds., 2017); the definition of aims is also emphasized by Beck, *supra* note 35, at 77–78; KISCHEL, *supra* note 16, § 3 mn. 2 (stating that the comparative method needs to start from “konkreten Fragen” [“concrete issues”]); see also Paul Roberts, *Interdisciplinarity in Legal Research*, in RESEARCH METHODS FOR LAW 90, 105 (Mike McConville & Wing Hong Cui eds., 2017) (“research questions” define “interdisciplinary methods”).

88. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 85; cf. Michaels, *supra* note 79, at 343 (one should not tie oneself to one method); SIEMS, *supra* note 12, at 9 (“plurality of methods”).

89. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 87; see also Jung, *supra* note 13, at 362 (the method should be in line with the aim); Basedow, *supra* note 13, at 837 (“[P]urpose and context . . . determine the research design . . .”).

90. This distinction is not (sufficiently) accounted for by various approaches and forms of comparative criminal law (see also *supra* note 73); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 85.

91. See, e.g., KISCHEL, *supra* note 16, § 3 mns. 2, 147–48 (the search for a “Kochrezept” [“cooking recipe”] is “illusorisch” [“illusory”]). A different view is still to be found in von Liszt, *supra* note 21, at 4 (comparative law “nur möglich auf Grund einer feststehenden Methode” [“only possible on the basis of a fixed method”]); accord Schultz, *supra* note 84, at 1 (comparative law as a “specific method” in itself; orig. “bestimmte Methode”).

92. “The third [part] of the comparison.”

93. This was still the position taken by JESCHECK, *supra* note 12. He recommends taking one’s own position on doctrine and criminal policy as a starting point (first stage), interpreting the foreign law (exegesis, second stage), then systematizing it (third stage) and finally evaluating it in terms of legal policy (fourth stage). *Id.* at 36–38, 40. Justly critically see, e.g., Ursula Nelles, *Rechtsvergleichung per Internet? Einige Aspekte zum Generalthema “Zukunft der Strafrechtsvergleichung”*, in MENSCHENGERECHTES STRAFRECHT: Festschrift für Albin Eser zum 70. Geburtstag 1005, 1009 (Jörg Arnold et al. eds., 2005); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 90.

indeed will serve as a first point of reference<sup>94</sup> given that any comparative law scholar will be influenced by his or her own legal background.<sup>95</sup> In principle, however, the main focus should be the concrete problem to be solved, in line with the functional method already mentioned at the beginning of this Article,<sup>96</sup> and investigating how the problem can be solved in a functionally equivalent manner in the legal system analyzed. In addition, it needs to be inquired, from a more strongly institutional perspective, which function the legal institution developed to solve this problem has in the legal system in question (“functionality question”),<sup>97</sup> beyond its terminology classification in terms of a particular legal discipline.<sup>98</sup>

Accordingly, functionalism in comparative law describes, initially without any more profound theoretical ambition,<sup>99</sup> an empirically

94. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 104.

95. Critically on the Western orientation of traditional comparative law see Frankenberg, *supra* note 54, at 422–23, 442.

96. See Konrad Zweigert & Kurt Siehr, *Jhering's Influence on the Development of Comparative Legal Method*, 19 AM. J. COMP. L. 215, 218–19 (1971) (on the functional method's origins in von Jhering's doctrine of the instrumental character of law (purpose theory)); see also Frankenberg, *supra* note 54, at 433–34 (referring, *inter alia*, to Harvard Law Professor and Dean Roscoe Pound); on its first explicit mention by Ernst Rabel in 1925, see Heun, *supra* note 13, at 20 and Basedow, *supra* note 13, at 831; more detail provided in ZWIEGERT & KÖTZ, *supra* note 52, at 33 *et seq.*; SIEMS, *supra* note 13, at 31 *et seq.*; first applied explicitly in the field of comparative criminal law in Hans-Heinrich Jescheck, *Rechtsvergleichung als Grundlage der Strafprozessreform*, 86 ZStW 761 (1974) 772, 775 (reference to a social problem; “functional equivalence”; orig. “funktionellen Gleichwertigkeit”).

97. ZWIEGERT & KÖTZ, *supra* note 52, at 33; Junker, *supra* note 1; Eser, *supra* note 4, at 1521; Jung, *supra* note 13, at 363–64; Michaels, *supra* note 79, at 342 (identifying four elements); Sieber, *supra* note 35, at 112–14; PRADEL, *supra* note 9, at 52–53; Heun, *supra* note 13, at 25–26; KISCHEL, *supra* note 16, §§ 1 mns. 14–16, 3 mns. 3–5, 181; see Christiane Wendehorst, *Rechtssystemvergleichen*, in ZUKUNFTSPERSPEKTIVEN DER RECHTSVERGLEICHUNG 1, 30 (Reinhard Zimmermann ed., 2016) (on its application in comparisons of legal systems beyond the national level); Graf-Peter Callies, *Zur Rolle der Rechtsvergleichung im Kontext des Wettbewerbs der Rechtsordnungen*, in ZUKUNFTSPERSPEKTIVEN 167, 182 *et seq.*, 188–89 (Reinhard Zimmermann ed., 2016) (on its application to “transnational legal markets” (orig. “transnationale Rechtsmärkte”)).

98. See KISCHEL, *supra* note 16, § 1 mn. 71, who accurately points out that the functional method “eine Beschränkung auf bestimmte Rechtsgebiete sinnlos erscheinen läßt” (“renders any restriction to particular fields of law pointless”), for the reason alone that other legal systems are unfamiliar with the German differentiation between civil, public and criminal law and their further subdivisions. Thus, any enquiry needs to be very general in nature, investigating how the legal system reacts to the concrete problem in question using which legal institution.

99. See Michael Kubiciel, *Funktionen und Dimensionen der Strafrechtsvergleichung*, RECHTSWISSENSCHAFT 212–14 (2012); Michaels, *supra* note 79, at 340 (“As theory it hardly exists . . .”); *id.* at 362 (emphasizing the instrumental approach); *id.* at 363 (“undertheorized approach . . .”); for general criticism see Frankenberg, *supra* note 54, at 416 *et seq.* (“marginal role of theory”); *id.* at 433 *et seq.* (“vulgar version of sociological functionalism”). Sketching a theory of comparative criminal law based on the functional method among

focused<sup>100</sup> methodological procedure. As such, functionalism in the comparative law context is to be distinguished from the sometimes ambiguous use of the term in other legal disciplines.<sup>101</sup> Instead of legally defined concepts,<sup>102</sup> functionalism takes as its starting point the concrete problem to be solved as the *tertium comparationis*<sup>103</sup> (“the problem of social order in need of regulation”)<sup>104</sup> and the function of the legal institution applied thereto, in order to enable a (conceptually and doctrinally neutral) comparison with the functionally equivalent<sup>105</sup>

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others, see Sieber, *supra* note 35, at 126–29.

100. Michaels, *supra* note 79, at 342 (“functionalist comparative law is factual”); KISCHEL, *supra* note 16, § 3 mn. 181 (“faktische Herangehensweise” [“factual approach”]); Callies, *supra* note 97, at 170, 172, 187 (“law in action”); see also SIEMS, *supra* note 13, at 42 (“the way it is enforced”); from the perspective of criminal law see Eric Hilgendorf, *Zur Einführung: Globalisierung und Recht*, in STRAFRECHTSVERGLEICHUNG 11, 24 (Susanne Beck et al. eds., 2011).

101. Critically on its often ambiguous and arbitrary use as a “shorthand for traditional comparative law” and “triple misnomer,” with seven possible meanings, see Michaels, *supra* note 79, at 341, 342 *et seq.*, 381; see also NELKEN, *supra* note 2, at 45 (“can involve a number of traps”). Arguing in favor of replacing the term with “kontextuelle Rechtsvergleichung” [“contextual comparative law”] to better capture the meaning, see KISCHEL, *supra* note 16, § 3 mns. 199–201.

102. Bijan Fateh-Moghadam, *Operativer Funktionalismus in der Strafrechtsvergleichung*, in STRAFRECHTS-VERGLEICHUNG 41, 43 *et seq.* (Susanne Beck et al. eds., 2011), is critical for this reason. He claims that the functional method is based upon untenable structural and functionalist assumptions (the same social problems and stable social conditions) and guided by extralegal considerations, thus negating the autonomy of legal argumentation. *Id.* at 44 *et seq.* He therefore wants to replace it with an operative functionalism based on systems theory that propagates the autopoiesis of legal systems and thus legal argumentation’s self-referentiality and internal connectivity. This operative functionalism would focus on self-reproducing legal institutions (that reproduce themselves due to the operative conditions for connection existing in the legal system) rather than the (extralegally determined) factual problems. *Id.* at 52. While he is right that the specific juridical and doctrinal contexts and justifications within a legal system need to be taken into account (concurring in this regard see Kubiciel, *supra* note 99, at 215), his approach is based on the highly problematic and implausible assumption that the legal system itself is completely autonomous. See Thomas Weigend, *Diskussionsbemerkungen*, in STRAFRECHTSVERGLEICHUNG 131 (Susanne Beck et al. eds., 2011) (legal systems do not have a “life of their own,” but are “determined by certain decisions influenced by social and political considerations”; orig. “kein Eigenleben . . . bestimmten sozial und politisch geprägten Entscheidungen determiniert”); See also critically in this regard Kubiciel, *supra* note 99, at 215–16, even though he recognizes that the juridical contexts and justifications mentioned are ultimately influenced by the legal culture and therefore a “partial comparison of the sociocultural regulatory context” (orig. “Partialvergleich des soziokulturellen Regelungsumfelds”) may be necessary, especially if the aim is to capture a legal institution or system as a whole through such a micro level comparison.

103. Cf. Michaels, *supra* note 79, at 367–69.

104. ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 96.

105. Functional equivalence is emphasized particularly by Michaels as the foundation—alongside an “epistemology of constructive functionalism”—of a “more robust functional method.” Michaels, *supra* note 79, at 363, 381.

legal institutions in foreign legal systems.<sup>106</sup> For example, the functional method does not enquire whether:

*incitement* (“*Anstiftung*”) constitutes a crime under foreign law, but how foreign law handles the mental influencing of the (main) perpetrator and the elicitation of his or her decision to commit a crime;

*theft* pursuant to § 242 StGB constitutes a crime, but how property is protected in criminal law or, more precisely, how it is protected against removal; or

criminal trials can be terminated with a *guilty plea*, but whether there are ways that criminal proceedings can be terminated early through agreement between the parties to the trial.

The functional method has a certain proximity to the *praesumptio similitudinis* (presumption of similarity) in that “functional equivalence is similarity in difference” to the extent that the legal institutions are similar in regard to the function under investigation, but otherwise may be different.<sup>107</sup> This does not entail the misleading assumption “that modern criminal justice systems all face the same ‘problems’.”<sup>108</sup> At any rate, the *praesumptio similitudinis* is at best a presumption and can thus be disproven, as “comparative work is both about discovering surprising differences and unexpected similarities” and “what we will usually need to explain is the unfamiliar mixture of both . . .”<sup>109</sup>

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106. Summarizing the criticism of functionalism, see KISCHEL, *supra* note 16, § 3 mns. 6–30 (differentiating between criticism of the procedure, criticism of the background, and postmodern critique); *id.* § 3 mns. 189–98 (identifying the different styles of thought of the functionalists and their critics). See also SIEMS, *supra* note 13, at 33–34, 45 *et seq.* (identifying three core points of criticism: overemphasis of similarities, untenable assumption of the same or comparable social problems and—postmodern criticism—that law actually serves particular functions).

107. Michaels, *supra* note 79, at 370–71; Frankenberg, *supra* note 52, at 436–37.

108. NELKEN, *supra* note 2, at 46. For a relativization see Dannemann, *supra* note 77, at 338, 394–96, 399, 401, 406, 418–19 (albeit only in regard to the practical results within the context of micro comparisons, which even the functionalists themselves relativize; ultimately similarities and differences are equivalent and their “proper balance” depends on the aim of the analysis); KISCHEL, *supra* note 16, §§ 1 mns. 77–78, 3 mns. 15, 194–97.

109. NELKEN, *supra* note 2, at 32, 37. See also Jansen, *supra* note 13, at 306, 336 (investigation of “similarities and dissimilarities of different cultural or social phenomena” and “the process of constructing relations of similarity and dissimilarity”); KISCHEL, *supra* note 16, § 3 mn. 184; Wendehorst, *supra* note 97, at 31 (on the *praesumptio dissimilitudinis* for comparisons of legal systems (not bound to national law)).

## 2. The Cultural Turn: Taking the Historical and Sociocultural Context Seriously

In order to avoid an overly limited, instrumental approach,<sup>110</sup> the historical and sociocultural context<sup>111</sup> in which the legal institutions operate, relevant overarching concepts (e.g. legality, proportionality, culpability, fairness),<sup>112</sup> and the role of the actors in the system (“agency”) need to be taken into account, in line with the broader comparative criminal justice approach<sup>113</sup> already alluded to at the beginning of this Article.<sup>114</sup> While the respective “*cultural turn*” is discussed particularly in French- and English-language (postmodern) literature<sup>115</sup> it is inter-

110. E.g., Roberts, *supra* note 2, at 540 (including further references).

111. Illustrative material provided in Heike Jung, *Rechtsvergleich oder Kulturvergleich*, in GRUNDLAGEN UND DOGMATIK DES GESAMTEN STRAFRECHTSSYSTEMS: FESTSCHRIFT FÜR WOLFGANG FRISCH ZUM 70. GEBURTSTAG 1467, 1475 (Georg Freund et al. eds., 2013).

112. This leads to a successful transition from the functional comparison of problems to an overarching comparison of concepts, which is already inherent in the functional approach. *But see* KISCHEL, *supra* note 16, § 3 mns. 166–69, 190–92.

113. *See* NELKEN, *supra* note 2, at 45 (criticizing how functionalism perceives “agency as substantially irrelevant”), 48 (“finding out what criminal justice actors . . . actually think . . .”); *see also* Tatjana Hörnle, *Plädoyer für eine transnationale Strafrechtswissenschaft*, in DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE 289, 303 (Klaus Tiedemann et al. eds., 2016) (arguing in favor). On the similar comparative jurisprudence, *see id.* § 3(129)–(130) (focusing on the “law in minds”). One of the fathers of functionalism (*see sources cited supra* note 96), Hein Kötz, already conceded in 1998 that the functional method ignored the procedure for generating certain results—like a “black box.” Kötz, *supra* note 52, at 505.

114. In favor of a contextual comparative law—using a different term (*see supra* note 101) but remaining similar in substance—that also includes legal culture, *see* KISCHEL, *supra* note 16, §§ 3 mns. 146 *et seq.*, 199 *et seq.*, 4 mns. 45–46; *id.* § 3 mn. 201 (for a summary); *id.* § 3 mn. 202 (emphasizing the doctrine of error). *See also* Keiichi Yamanaka, *Wandlung der Strafrechtsdogmatik nach dem 2. Weltkrieg—Zum Kontextwechsel der Theorien in der japanischen Straftatlehre*, in REZEPTION UND REFORM IM JAPANISCHEN UND DEUTSCHEN RECHT 173, 173–85 (Jörg-Martin Jehle et al. eds., 2008) (voicing a similar view on context dependency and calling for a “shift of context of theories” (orig. “Kontextwandels der Theorien”)); in greater detail including examples, *see generally* Keiichi Yamanaka, *Kontext—und Paradigmenwechsel bei Rechtsrezeption und—fortbildung mit Beispielen der japanischen Strafrechtswissenschaft*, in AKTUELLE PROBLEME DES STRAFRECHTS UND DER KRIMINOLOGIE 252 (Emil W. Plywaczewski & Ewa M. Guzik-Makaruk eds., 2007) (analyzing the shift in context of received legal concepts and received legal systems in the social system, system of norms, as well as in argumentation). On the connection between (legal) cultural and pluralistic approaches, *see* Greta Olson, *Introduction: Mapping the Pluralist Character of Cultural Approaches to Law*, 18 GER. L.J. 233, 233 *et seq.* (2017) and the corresponding special issue of the German Law Journal.

115. *See* PIERRE LEGRAND, *LE DROIT COMPARÉ* 123 (2015) (“la comparaison . . . sera CULTURELLE ou ne sera pas”) (capitals in original); Heike Jung, *Kontinuität und Wandel—Der französische Beitrag zur Theorie der Rechtsvergleichung*, in STRAFRECHT UND WIRTSCHAFTSSTRAFRECHT—DOGMATIK, RECHTSVERGLEICH, RECHTSTATSACHEN 1515, 1521–22 (Ulrich Sieber et al. eds., 2008); Vivian G. Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 51 (1998) (calling for an “immersion into the political, historical, economic and linguistic contexts” to enable the “valid

esting to note that in German-language literature, Wilhelm Arnold and Josef Kohler previously discussed the relationship between law and culture in the nineteenth-century.<sup>116</sup> A few decades later, Gustav Radbruch referred to law as a “cultural phenomenon” (“Kulturerrscheinung”) and the study of law as a “cultural science of understanding” (“verstehende Kulturwissenschaft”).<sup>117</sup> At any rate, a comparable debate in criminal law is more recent.<sup>118</sup>

In methodological terms, we need to proceed empirically<sup>119</sup> from a macro perspective and—in contrast to the frequently schematic

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examination of another legal culture”); Roger Cotterrell, *Comparative Law and Legal Culture*, in OXFORD HANDBOOK OF COMPARATIVE LAW 709, 709–11 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (“Culture appears fundamental—a kind of lens through which all aspects of law must be perceived”); David Nelken, *Defining and Using the Concept of Legal Culture*, in COMPARATIVE LAW: A HANDBOOK 109, 110 *et seq.* (Esin Örücü & David Nelken eds., 2007) (“[A] focus on legal culture directs us to examine the interconnections between law, society and culture as they are manifested also in the ‘law in action’ and the ‘living law.’”); NELKEN, *supra* note 2, at 48 *et seq.*; SIEMS, *supra* note 13, at 127 *et seq.*, 147 *et seq.* (“Cultural turn” as the consequence of postmodern criticism of traditional comparative law, consideration of “legal culture” as part of a “socio-legal comparative law”). Most recently from a German perspective, see Greta Olson, *Introduction: Mapping the Pluralist Character of Cultural Approaches to Law*, 18 GER. L.J. 233, 245 *et seq.* (2017) (calling for “transdisciplinary and culturally-oriented research on law in Germany”); see generally Franz Reimer, *Law as Culture? Culturalist Perspectives in Legal Theory and Theory of Methods*, 18 GER. L.J. 255 (2017) (on the relation between law and culture from a German point of view).

116. See Reimer, *supra* note 115, at 256 (including further references).

117. GUSTAV RADBRUCH, RECHTSPHILOSOPHIE: STUDY EDITION 34, 115 (1999) (“Only the comparison of both legal cultures teaches us to know each and its unique character, to appreciate each with its flaws and advantages”; orig. “Erst der Vergleich zwischen den beiden Rechtskulturen lernt jede von ihnen in ihrer Eigenart kennen, in ihren Mängeln und Vorzügen würdigen”); Gustav Radbruch, *Erneuerung des Rechts*, in 3 GESAMTAUSGABE: RECHTSPHILOSOPHIE 80, 81 (Arthur Kaufmann ed., 1990); following Radbruch Heinrich Scholler, *Rechtsvergleichung als Vergleich von Rechtskulturen—Ein Beitrag zu Gustav Radbruchs Rechtsvergleichung*, in STRAFGERECHTIGKEIT: FESTSCHRIFT FÜR ARTHUR KAUFMANN ZUM 70. GEBURTSTAG, 743, 743–44 (Fritjof Haft ed., 1993); see also KISCHEL, *supra* note 16, § 3 mns. 182, 185, 220–25 (about law and culture); *id.* § 4 mns. 40–44 (legal culture as a “Sammelbegriff” [“collective term”]); Reimer, *supra* note 115, at 262, 269 (to “compare law means to compare cultures”), who incidentally is also of the opinion that “almost any legal system can be viewed as a cultural archive—a repository of the history of social-political thought.”

118. See Hilgendorf, *supra* note 100, at 22–23 (consideration of the cultural context); Beck, *supra* note 35, at 65–67 *et seq.* (Culture-oriented comparative law that, “going beyond the comparison of legal cultures, includes various interdisciplinary insights on culture in its comparison”; orig.: “über den Vergleich von Rechtskulturen hinausgehend, diverse interdisziplinäre Erkenntnisse über die Kultur . . . in die Vergleichung einbezieht”); Fateh-Moghadam, *supra* note 102, at 49–50 (from his perspective of operative functionalism, however); Wendehorst, *supra* note 97, at 32–33 (critically because of implicit nationalism).

119. On empirical comparative criminal law, see, e.g., RODOLFO SACCO, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG 65 (2011); Nelles, *supra* note 93, at 1013 *et seq.*; for a general account of comparative law’s empirical orientation, see Basedow, *supra* note 13, at 837, 856; on legal-sociological and quantitative, numerical approaches, see SIEMS, *supra* note 13, at



“transplants”<sup>120</sup> of foreign legal institutions—adapt the legal culture by aligning the legal institutions adopted with the preexisting context on the one hand and analyzing and understanding the existing legal institutions in their respective sociocultural context on the other.<sup>121</sup> Only then we are able to move from a mere “transplant” to a real “translation” of legal concepts and their actual application.<sup>122</sup> Enhanced in this manner, a functional approach can account for<sup>123</sup> the cultural specificities of each legal system<sup>124</sup> without embarking upon overambitious comparisons of cultures in their totality. Indeed, a cultural comparison is overambitious in light of the openness and lack of definition of

147, 180 *et seq.*; on comparative criminal law in this regard, *see id.* at 173; on the empirical focus of comparative criminal justice, *cf.* main text preceding *supra* note 10.

120. For a fundamental (and affirmative) account of this phenomenon, *see* Watson, *supra* note 16, at 21–30. Comprehensively on *ratio*, effect, forms of appearance and traditional practice (from Roman law onwards) *see* SIEMS, *supra* note 13, at 231 *et seq.* (recognizing its actual significance for the development of law, differentiating between positive and negative effects depending on context and identifying a more recent focus on policy); on the issues associated with the adoption of law (conditions, consequences, forms), *see* KISCHEL, *supra* note 16, §§ 2 mns. 34–40, 3 mns. 127–28; Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 5, 29 *et seq.* (2004); Eser, *supra* note 72, at 1459–60.

121. *See* NELKEN, *supra* note 2, at 18 *et seq.* (understanding certain methods of social control “in the context of their own structures and expectations”); *id.* at 21, 40 *et seq.* (“cross-culturally valid explanations”); *id.* at 88 (“broader cultural ways of thinking”); *id.* at 93 (“cross-cultural collaboration”); KISCHEL, *supra* note 16, § 1 mns. 11, 14, 75 (consideration of the legal cultural as well as the extralegal, political and social context.). In regard to the social context, *see id.* § 1 mn. 36; *id.* § 3 mns. 170–71 (conditions under which law functions); Dannemann, *supra* note 77, at 413–14 (“Legal Context” in the sense of provisions’ legal and extralegal context); Basedow, *supra* note 13, at 837 (analytical approach dependent on context); SIEMS, *supra* note 13, at 235 *et seq.*

122. For a concrete attempt to “translate” instead of just “transplant” U.S. plea bargaining into foreign (civil law) jurisdictions, *see* Langer, *supra* note 120, at 5–6, 29 *et seq.* (“‘legal translation’ as an alternative heuristic device . . . when analyzing the transfer of legal ideas and institutions between legal systems . . . can be understood as translations from one system of meaning to the other,” accounting for cultural peculiarities).

123. Michaels, *supra* note 79, at 365, 381 (“assumes that legal rules are culturally embedded . . .”).

124. On the cultural conditioning of criminal law in our context *see* Schultz, *supra* note 84, at 14 (consideration of historical, political, cultural and social conditions); *accord* Jung, *supra* note 13, at 366, 371–72; most recently Hilgendorf, *supra* note 100, at 23 (law “as part of culture”; orig. “als Teil der Kultur”); Beck, *supra* note 35, at 81, 83, 86 (“interwovenness”; orig. “Verwobenheit”); Meyer, *supra* note 35, at 90; Kubiciel, *supra* note 99, at 214 (“culturally saturated”; orig. “kulturell imprägniert”). *See also* Kai Ambos, *Zur Zukunft der deutschen Strafrechtswissenschaft: Offenheit und diskursive Methodik statt selbstbewusster Provinzialität*, 10 DIE VERFASSUNG MODERNER STRAFRECHTSPFLEGE: ERINNERUNG AN JOACHIM VOGEL 177, 184–87 (2016) (including further references) (Spanish version in 41 REVISTA PENAL 5, 5–26 (2018)). On the factors shaping legal systems, whether verbalized (“formants”; orig. “Formanten,” e.g., laws, case law) or implicit (“cryptotypes”; orig. “Kryptotypen,” especially intellectual approaches), *see* Rossi & Sacco, *supra* note 119, at 59 *et seq.*, 61–62, 74; *but see* KISCHEL, *supra* note 16, § 3 mns. 39–48.

the concept of culture, which is informed by (legal) sociology. Even advocates of culturally oriented comparative law are forced to admit this.<sup>125</sup> Rather, the cultural aspects mentioned—the respective “cultures of control”<sup>126</sup>—are an additional aspect to consider,<sup>127</sup> not least in order to restrain researchers’ own subjective viewpoints that have been shaped by their own legal culture<sup>128</sup> and to keep them constantly aware

125. David Nelken, *Using the Concept of Legal Culture*, 29 AUSTL. J. LEGAL PHIL. 1, 1, 87 *et seq.* (2004) (as one of the leading authors, Nelken himself suggests a vague definition (“stable patterns of legally oriented social behaviour and attitudes”) and admits that the concept is “difficult to define and easy to abuse”); NELKEN, *supra* note 2, at 48 *et seq.*, 50 (“highly controversial”); Beck, *supra* note 35, at 71 *et seq.* (“risk of the vagueness of culture”; orig. “Risiko der Vagheit von Kultur”). For a summary, see KISCHEL, *supra* note 16, § 4 mns. 30–31, 44 (differentiating between an external, e.g. the attitudes of the population, and an internal, e.g. the attitudes of jurists, legal culture); *id.* § 4 mns. 33–36 (sketching the illustrative controversy between Friedman and Cotterrell). However, here Kischel takes a specifically legal, rather than legal-sociological, approach. See *id.* § 4 mn. 51 (“nichtjuristische Aspekte des Kontexts . . . sollten . . . nicht allein anderen Fachdisziplinen überlassen werden” [“non-legal contextual aspects should not be left solely to other disciplines”]); exaggerating the distinction between the two approaches, *id.* § 4 mns. 38–44; wanting to subsume legal culture into his concept of context, *id.* § 4 mns. 45–46. On this issue see sources cited *supra* note 115 at the end; for fundamental criticism, see THOMAS GUTMANN, RECHT ALS KULTUR: ÜBER DIE GRENZEN DES KULTURBEGRIFFS ALS NORMATIVES ARGUMENT 13, 36–37 (2015) (the concept of culture only creates “confusion”; orig. “Verwirrung” . . . “culture-focused comparative law . . . is doomed to failure . . . the idea that legal systems are like dumplings floating in the murky soup of culture, slowly absorbing it, is unable to provide any explanation”; orig. “kulturbezogene Rechtsvergleichung . . . zum Scheitern verurteilt . . . Vorstellung, dass Rechtsordnungen wie Knödel in einer trüben Kultursuppe schwimmen und sich langsam voll saugen, vermag nichts zu erklären”); but see Reimer, *supra* note 115, at 263 *et seq.* (criticising Gutmann’s perspective).

126. NELKEN, *supra* note 2, at 58 (including further references).

127. See ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 97–98 (“complementary relationship”); Hörnle, *supra* note 113, at 303–04 (understanding approach); reconciling the abovementioned positions of Beck (*supra* note 35) and Fateh-Moghadam (*supra* note 102) see generally Walter Perron, *Operative-funktionalistische oder kulturbezogene Strafrechtsvergleichung*, in STRAFRECHTSVERGLEICHUNG 121 (Susanne Beck et al. eds., 2011) (an operative, functionalist method for legislative comparative law and a culture-oriented method for the international harmonization of criminal law). However, within the context of legislative comparative law this leads to the rejected “legal transplants.” See *supra* note 120 and accompanying main text. Beck, *supra* note 35, at 67 *passim*, incidentally also sees her approach as complementary to existing methods, opening up a further perspective; a conciliatory stance is also adopted by SIEMS, *supra* note 13, at 363 *et seq.*, 401 *et seq.* (who explicitly calls for traditional comparative law to be broadened to include nonlegal disciplines, see *supra* note 115, speaking of “implicit comparative law” in this regard, but ultimately demands crossfertilization); Kubiciel, *supra* note 99, at 212, 216 (partial cultural comparison); Reimer, *supra* note 115, at 270 (“dialogue” between legal and cultural science). On cultural comparative legal interpretation, see KISCHEL, *supra* note 16, § 2 mns. 63–64.

128. This subjectivity of the individual engaged in comparing the law is particularly emphasised by LEGRAND, *supra* note 115, at 5, and the epistemological scepticism of further postmodern positions (see KISCHEL, *supra* note 16, § 3 mn. 28; see also SIEMS, *supra* note 13, at 117). See also Frankenberg, *supra* note 52, at 414 *et seq.* (who therefore calls for the abovementioned “differencing”); NELKEN, *supra* note 2, at 18 *et seq.* (risk of “ethnocentrism”);

of the relativity and value-based nature of their own legal systems.<sup>129</sup> The resulting conditioning explains the observation already voiced by Damaška that “lawyers socialized in different settings of authority can look at the same object and see different things”.<sup>130</sup>

This mixture of different levels, perspectives and approaches renders interdisciplinary cooperation necessary,<sup>131</sup> without this cooperation automatically being enough to completely capture all cultural factors in their complexity.<sup>132</sup> In this regard, comparativists ultimately remains dependent on the expertise and honesty of their cooperation partners from the foreign legal system<sup>133</sup> although they should strive to familiarize themselves with this system through longer study visits or even by living in the respective society.<sup>134</sup> Nelken’s differentiation between “virtually there”, “researching there” and “living there” (“observing participants”), representing a “continuum running from least to greatest engagement with another society” and its legal system, is very helpful in that regard and shows, at the same time, the limitations of comparative legal work.<sup>135</sup>

### 3. The Case-Based, Structural and “Processual” Method

A case-based method—a method analyzing a common (fictitious) case and its solution through all stages of the criminal justice system in

Beck, *supra* note 35, at 71 (conscious awareness of the subjectivity of one’s own viewpoint); *id.* at 77 (disclosure of one’s own cultural conditioning); KISCHEL, *supra* note 16, § 3 mns. 12–14, 186–87 (narrow understanding of neutrality as lack of prejudice); *id.* § 3 mns. 227–28 (national legal perspective as a source of error); Jansen, *supra* note 13, at 314–15 (“[A] wholly neutral perspective is neither possible nor desirable.”).

129. See Beck, *supra* note 35, at 75 (describing law as a “compromise between all individual truths and values of a concrete society” that “nevertheless is necessarily an expression and element precisely of this historically and geographically specific society’s culture and communication . . .”; orig. “Kompromiss zwischen alle individuellen Wahrheiten und Werten einer konkreten Gesellschaft, doch notwendig Ausdruck und Element gerade der Kultur und Kommunikation dieser historisch und geographisch speziellen Gesellschaft . . .”).

130. Mirjan R. Damaška, *The Faces of Justice and State Authority* 66 (1986).

131. See Beck, *supra* note 35, at 80; Meyer, *supra* note 35, at 92; on the need for interdisciplinarity in general, *cf.* Schultz, *supra* note 84, at 14; Jung, *supra* note 13, at 368–69; Roberts, *supra* note 87, at 92; on interdisciplinarity from a methodological (English) perspective see KISCHEL, *supra* note 16, § 3 mns. 162–64 (emphasizing distinctly legal-scientific methods and rejecting borrowings from other disciplines).

132. Beck, *supra* note 35, at 80 (It is “impossible” to take all cultural factors into account; culture is “categorically impossible to capture”; orig. “unmöglich . . . kategorisch nicht fassbar”).

133. On the problem of selecting interview partners, see *infra* note 144.

134. On the need for “immersion” in the foreign legal system see SIEMS, *supra* note 13, at 117, 355 *et seq.* (recognizing accurately that one can never become a “complete insider.”). On the difficulty of identifying law as it is lived, see KISCHEL, *supra* note 16, § 3 mn. 265.

135. NELKEN, *supra* note 2, at 93 *et seq.* (including further references).

its entirety<sup>136</sup>—makes it possible to identify differences between individual legal systems, in particular on the level of the application of the law. The aim of such a structural comparison is to investigate<sup>137</sup> the “specific connection between normative regulations and the practical application of the law” in different legal systems<sup>138</sup> using an inductive, empirical method by way of a “processual” case analysis, that is, an analysis ranging from the substantive subsumption of a fictional factual situation (“method of *solving fictitious cases*”)<sup>139</sup> to the way it is dealt with under criminal procedural law and the enforcement of the sentence.<sup>140</sup> Varying the factual situation<sup>141</sup> makes it possible to tease out different evaluations of the degree of wrongdoing involved in the act in question—the “gradation of the act’s wrongfulness”<sup>142</sup>—not only in regard to its definition as a crime, but also (in line with the

136. This was the core of the Max Planck research project “General Structural Comparison.” See Eser & Perron, *supra* note 5; Walter Perron, *Überlegungen zum Erkenntnisziel und Untersuchungsgegenstand des Forschungsprojekts “Allgemeiner strafrechtlicher Strukturvergleich,”* in Festschrift Eser 127, 127 *et seq.* (Jörg Arnold et al. eds., 1995); Perron, *supra* note 76, at 291 *et seq.*; see also Jung, *supra* note 35, at 2–3; Jung, *supra* note 13, at 363, 366 *et seq.* (who was probably inspired by the discussions of the MPI advisory board, of which he was a member at the time the structural comparison project was developed). On the project’s genesis, which dates back to 1988, see Albin Eser, § 1 *Zur Genese des Projekts: Ein Werkstattbericht,* in STRUKTURVERGLEICH 3, 14 (Albin Eser & Walter Perron eds., 2015). For a review, see Ambos, 164 *Goltdammer’s Archiv für Strafrecht* 570 (2017).

137. Walter Perron, § 2 *Ziel und Methode der Untersuchung,* in STRUKTURVERGLEICH 27, 29 (Albin Eser & Walter Perron eds., 2015); Walter Perron, § 11 *Einführung,* in STRUKTURVERGLEICH 767 (Albin Eser & Walter Perron eds., 2015).

138. Orig. “spezifische Verbindung von normativen Regelungen und praktischer Rechtsanwendung.” Eser & Perron covered eight countries (Germany, England/Wales, France, Italy, Austria, Portugal, Sweden and Switzerland); on the reasons for this restriction, see Perron, *supra* note 137, at 27, 37.

139. Perron, *supra* note 137, at 27, 34–35 (orig. “Methode der *Lösung fiktiver Fälle*”) (italics in the original). This method guarantees the object of the comparison will be one and the same; actual cases would always differ, if only in nuances.

140. Eser, *supra* note 136, at 3, 21; Perron, *supra* note 137, at 31, 39–40, 767–70 (In this context, also compare the list of criteria for interviews with national experts, *id.* at 39–40). For an earlier account, see Schultz, *supra* note 84, at 12 (including the “actual process of criminal law application . . . from police investigation to . . . release after a sentence has been served”; orig. “tatsächliche[n] Gangs der Strafrechtspflege . . . von der polizeilichen Ermittlung bis zur . . . Entlassung aus dem Vollzug . . .”); Weigend, *supra* note 35, at 218 (“ . . . look at the foreign system as a whole . . .”).

141. Four variants of the “domestic tyrant”/battered women case are reviewed in Perron, *supra* note 137, at 27, 32–33; on the selection of precisely this group of cases based on an analysis of the relevant national literature, see *id.* at 38.

142. *Id.* at 27, 32 (orig. “Graduierung des Tatumwerts”). This formed the main focus of the first three variants of the domestic tyrant case (planned/spontaneous killing of the husband while he is asleep), while the fourth variant (killing in response to an attack) focused on a possible justification (self-defense) or exculpation, see Perron, *supra* note 137, at 767, 768, 821–38 (on decriminalization in the fourth variant).

abovementioned processual case analysis) concerning the punishment provided for, the concrete sentence imposed by the adjudicating court and its enforcement. Authors of country reports, i.e. reports focusing on specific domestic criminal justice systems, need to avail themselves of the help of national criminal law practitioners and scholars, with whom they should conduct semistructured intensive interviews.<sup>143</sup> In this regard, the choice of interview partners<sup>144</sup> and the analysis of the necessarily heterogeneous<sup>145</sup> responses is of key importance.<sup>146</sup>

The reference to criminal procedure is outcome-focused in that the analysis enquires whether and to which extent the kind of criminal procedure in question influences the verdict and sentence. By contrast, the manner in which proceedings are conducted (as standard or abbreviated criminal proceedings) and the associated strain placed on the defendant do not form part of the object of enquiry.<sup>147</sup> The aim of this approach is to gain insight into the way the criminal regulations analyzed “actually function” in the legal systems in question while at the same time identifying consistencies and differences.<sup>148</sup> Furthermore, the aim is to identify the “various legal cultures’ structures and manners of functioning.”<sup>149</sup> The focus does not lie on the positive law itself (in the sense of merely studying foreign law), but on the “structural relationships” between the respective regulations and their practical application.<sup>150</sup>

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143. Perron, *supra* note 137, at 27, 34–35, 39–40 (60–120 minutes per interview with interview guidelines; on the questions, see the evaluation sheet in the appendix, *id.* at 1137 *et seq.*).

144. Between 9 (Portugal) and 17 (France) interview partners were chosen, including both legal practitioners and academics. Perron, *supra* note 137, at 27, 38–39. Critically on expert interviews, see NELKEN, *supra* note 2, at 91 *et seq.* (asking, among other things, how we can be sure that the national experts are really telling us what they know).

145. Perron, *supra* note 137, at 27, 36, is self-critical in this regard (answers “quite heterogeneous,” “considerable gaps” when analyzing responses; orig. “recht heterogen . . . erhebliche Lücken”); *id.* at 44 (A clear distinction is not always made between the interview partner’s view and the predicted court decision. However, not all questions are relevant to all countries, which is unavoidable due to the explorative method.). Furthermore, not all interview partners were sufficiently competent in all fields, see, e.g., Walter Perron, § 16 *Besonderheiten der Strafvollstreckung*, in STRUKTURVERGLEICH 909 (Albin Eser & Walter Perron eds., 2015) (only limited competence regarding sentence enforcement).

146. More details on the analysis provided in Perron, *supra* note 137, at 27, 40–45 (transcripts analyzed using computer technology), are on the evaluation sheet, see app. at 1137 *et seq.*

147. *Id.* at 27, 33–34 (Focus on “the conclusion of proceedings by the pronouncement of a verdict on the defendant’s guilt and a sentence;” orig. “Verfahrensbeendigung durch Urteilsspruch über Schuld und Strafe”).

148. *Id.* at 27, 29 (orig. “tatsächliche Funktionieren”).

149. Perron, *supra* note 137, at 767 (orig. “Strukturen und Funktionsweisen der unterschiedlichen Rechtskulturen”).

150. Perron, *supra* note 137, at 27, 29.

An explicitly empirical approach that accounts for the entire criminal justice system will (accurately) presume a traditional “doctrinal” or purely normative approach is limited, not only because it is “unable to completely capture the normative content” of different national laws,<sup>151</sup> but because—more importantly—it cannot comprehend and explain the actual workings of the laws in question within the given criminal justice system in their entirety.<sup>152</sup> Naturally, the breadth of such an approach depends on how many groups of crimes and types of situations are covered and how many countries are analyzed.<sup>153</sup> A further advantage of the structural comparative method is how the inductive approach makes it necessary for project researchers to engage in discourse, overcoming one of the deficits of traditional comparative law projects:<sup>154</sup> creating national reports in parallel and producing the comparative cross-section with only occasional (bilateral) queries to the national authors. A classic comparison of this kind involves three stages: (1) exegetic work on the selected legal systems (selection, pretest), possibly considering their socioeconomic and cultural foundations, and production of the national report; (2) systematizing and ordering the material and findings to produce the comparative cross-section of laws; and (3) writing up the evaluation and recommendations for legal policy.<sup>155</sup> I note in

151. *Id.* at 27, 30 (orig. “schon den normativen Bedeutungsgehalt . . . nicht vollständig erfassen”).

152. On taking account of “social and ethical ideas and . . . social conditions” as well as “social reality” (orig. “sozialethischen Vorstellungen und . . . sozialen Verhältnissen . . . soziale Wirklichkeit”) see Schultz, *supra* note 84, at 10–11; Perron, *supra* note 76, at 286–87, 301 (“platitude”; orig. “Binsenweisheit”); Jung, *supra* note 13, at 364 (“empirical validity of norms”; orig. “empirische Geltung der Normen”); *id.* at 368 (“field research”; orig. “Feldforschung”); Sieber, *supra* note 35, at 116–17 (including the “Wirklichkeitsebene” [“level of reality”] through structural comparison); Weigend, *supra* note 35, at 218–19; Hilgendorf, *supra* note 100, at 22; Mona, *supra* note 74, at 110–11 (inclusion of “social reality”; orig. “sozialen Wirklichkeit”).

153. In this regard, the abovementioned structural comparison project (*supra* note 136) provided only limited insights, given that it analyzed only one group of crimes (killing) with one type of situation (domestic tyrant/battered women) and only eight countries (*supra* note 138). However, it was primarily experimental, “serving first and foremost to develop and test a method of analysis that could also be used for other topics and other legal spheres in possible later projects” (orig. “vorrangig der Entwicklung und Erprobung einer Untersuchungsmethode dienen, mit der in etwaigen späteren Projekten auch andere Themen und andere Rechtskreise bearbeitet werden können”). Perron, *supra* note 137, at 27, 37. On the selection of countries and criteria, see ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 673 *et seq.*

154. On the concrete implementation of the study in this regard, see Perron, *supra* note 137, at 27, 34 *et seq.*

155. For a similar three-stage model for individual comparisons, see LÉONTIN-JEAN CONSTANTINESCO, RECHTSVERGLEICHUNG—BAND II, DIE RECHTSVERGLEICHENDE METHODE 137 *et seq.* (1972) (identification, comprehension and comparison); Dannemann, *supra* note 77, at 406–18 (“selection” of the objects of comparison and questions, “description” of the

passing the inductive method also shows the contrast between (deductive) civil-law and (inductive) common-law legal reasoning<sup>156</sup> is an exaggeration that is probably not able to do justice, at the primary conceptual level, to the many differences among civil and common legal systems themselves.<sup>157</sup>

#### 4. Circular Comparative Law Between International Criminal Tribunals and Domestic Systems

Furthermore, the existence of many international criminal tribunals means comparative criminal law needs to be practiced not just horizontally, between countries, but also vertically. This entails investigating to which extent the criminal tribunals' case law is influenced by national law and vice versa.<sup>158</sup> This, here so-called "*circular comparative law*"

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objects of comparison, the context and the findings, "analysis" of differences/similarities and findings); in favor of a four-stage structure see SIEMS, *supra* note 13, at 15 *et seq.* (the preliminary issue of defining the research question and selecting countries as a first discrete step, otherwise three stages as above); for eight steps even see de Cruz, *supra* note 52, at 242 *et seq.* For a summary of de Cruz's method, see KISCHEL, *supra* note 16, § 3 mns. 36–38, who makes helpful suggestions on how to structure a comparative law study and on concrete methods. *Id.* § 3 mns. 236–69.

156. Chiesa, *supra* note 51, at 1098–99.

157. For a differentiated account of common and civil law and the differences between them, see SIEMS, *supra* note 13, at 50 *et seq.*, 78 (concluding the difference is exaggerated and it would be better to distinguish between Western and non-Western law).

158. From the perspective of international law, see generally Dinah Shelton, International Law and Domestic Legal Systems: Incorporation, Transformation and Persuasion (2011); International Law in Domestic Courts: Rule of Law Reform in Post-Conflict States (Edda Kristjánsdóttir et al. eds., 2012); see also Eser, *supra* note 4, at 1508–09; Anna Dolitzke, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 Eur. J. Int'l. L. 851, 851 *et seq.* (2015) (analyzing the "vertical diffusion" of legal institutions between the nation state and international law, namely in the form of the "upward diffusion" of national concepts, leading to their internationalisation, and the "downward diffusion" of international concepts). From an ICL perspective, see Mireille Delmas-Marty, *The Contribution of Comparative Law to a Pluralist Conception of International Criminal Law*, 1 J. Int'l. Crim. Just. 13, 16 (2003) (Comparative law's contribution to the incorporation of national law into international criminal law "hybridization" on the one hand and to its integration of international criminal law into national law on the other). Specifically on international criminal law's influence on the national level, see generally William W. Burke-White, *The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina*, 46 Colum. J. Transnat'l. L. 279 (2008); Eszter Kirs, *Limits of the Impact of the International Criminal Tribunal for the Former Yugoslavia on the Domestic Legal System of Bosnia and Herzegovina*, 3 Goettingen J. Int'l. L. 397 (2011); Sigall Horowitz, *How International Courts Shape Domestic Justice: Lessons from Rwanda and Sierra Leone*, 46:3 Isr. L. Rev. 339 (2013); Naomi Roht-Arriaza, *Just a "Bubble"? Perspectives on the Enforcement of International Criminal Law by National Courts*, 11 J. Int'l. Crim. Just. 537 (2013); Yuval Shany, *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation*, 46:3 Isr. L. Rev. 431 (2013).

refers to the influence of national law (upward) on the case law of the international criminal tribunals and vice versa (downward).<sup>159</sup> This circular comparative law is better suited to developing<sup>160</sup> universally valid principles and rules on the supranational level itself rather than classic universal (and usually overambitious) comparative law, given that the latter's universalist aspiration<sup>161</sup> is unrealistic for several reasons.<sup>162</sup> These reasons include its traditional Eurocentrism,<sup>163</sup> limited resources in terms of staff and language skills<sup>164</sup> and the fact that "every universalism is always also a form of particularism."<sup>165</sup> In contrast, supranational case law itself is the source of these principles and rules.<sup>166</sup>

International criminal tribunals thus become a "laboratory for transcultural criminal law discourse" on the one hand.<sup>167</sup> On the other

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159. On the traditional understanding of circulation between national legal systems, see SACCO, *supra* note 119, at 25–26.

160. For an instructive discussion of the effects of globalization on (comparative) criminal justice, see NELKEN, *supra* note 2, at 71 *et seq.*

161. On Feuerbach's "universal jurisprudence" in this regard, see *supra* note 15 and accompanying main text. On private law, see Ernest Rabel, *supra* note 76, at 283 ("The law of every developed nation shimmers and quivers in the sun and wind. All of these vibrating bodies in their entirety form a whole that none has hitherto been able to see and comprehend."; orig. "Tausendfältig schillert und zittert unter der Sonne und Wind das Recht jedes entwickelten Volkes. Alle diese vibrierenden Körper zusammen bilden einen noch von niemandem mit Anschauung erfasstes Ganzes.").

162. ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 34–36 ("unrealistic, if not theoretically questionable from the start . . . comparative criminal research, on the one hand, can be neither equally global nor thematically total, on the other hand, it cannot be simply limited to either certain 'legal families' or regions. [It is] best understood as having a tendency against isolation, and as aiming, in principle, at the greatest possible grasp of criminal law.").

163. Insufficiently critically in this regard, see Sieber, *supra* note 35, at 111–12. Sieber accurately points out the problem of systematization, which can indeed probably only be solved using legal informatics, *id.* at 114–16; on computer-based comparative law in this regard, albeit only at a rudimentary level. *Id.* at 124–25.

164. See, e.g., Callies, *supra* note 97, at 173–74 (on limited resources).

165. See Armin von Bogdandy, Zur sozialwissenschaftlichen Runderneuerung der Verfassungsvergleichung: Eine hegelianische Reaktion auf Ran Hirschs Comparative Matters, 55 DER STAAT 103, 110 (2016) (engaging with Hirsch's work and its North American universalism; orig. "ein jeder Universalismus doch stets auch ein Partikularismus ist").

166. For an early general account of the relation between comparative law and international case law, see Rabel, *supra* note 161, at 5 *et seq.*; on comparative law as a source of international case law, see Michael Bothe, *Die Bedeutung der Rechtsvergleichung in der Praxis internationaler Gerichte*, 36 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 280, 280–99 (1976). On the necessity of comparative law via "hybridization" and "cross-fertilization" for the development of a pluralistic international criminal law, see Delmas-Marty, *supra* note 158, at 13, 16, 18–21. More specifically on the development of general principles in the case law of the international criminal tribunals, see FABIAN O. RAIMONDO, GENERAL PRINCIPLES OF LAW IN THE DECISIONS OF INTERNATIONAL CRIMINAL COURTS AND TRIBUNALS 84 *et seq.* (2008).

167. Joachim Vogel, *Transkulturelles Strafrecht*, 157 GOLDHAMMER'S ARCHIV FÜR



hand, the general legal principles derived from national law need to be developed with an eye to the aims and purpose of these international criminal courts,<sup>168</sup> proceeding in a manner that is, as already called for above, as representative, systematic and methodologically sound as possible.<sup>169</sup> Circular comparative law in this sense also takes account of the new governance structures that have emerged in the European area of freedom, security, and justice, in particular, as it makes it easier to see the supranational level as an autonomous law creator in its own right.<sup>170</sup> Supranational legal systems themselves—whether universal or regional—in turn enable horizontal comparisons of legal systems<sup>171</sup> beyond the national level, such as comparing international criminal tribunals.<sup>172</sup>

### C. Normative Foundations

Regardless of the method adopted, comparative criminal law should not be purely instrumental and outcome-focused,<sup>173</sup> like approaches guided by economic benefit and efficiency, such as that of the economic analysis of law.<sup>174</sup> Rather, it should be guided, in the sense of a value-based and value-oriented comparison<sup>175</sup> and like a

STRAFRECHT 1, 12 (2010) (orig. “Laboratorium für transkulturelle Strafrechtsdiskurse”); *accord* ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 56.

168. ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 142 (harvesting principles from national legal systems with an eye to the aims of international criminal jurisdiction).

169. Roberts, *supra* note 59.

170. *Cf.* Meyer, *supra* note 35, at 90 *et seq.* (emphasizing the need for multidisciplinary approaches).

171. *See* Wendehorst, *supra* note 97, at 8 *et seq.* (primarily from a civil law perspective). The author also includes legal systems that are not anchored in a particular institution, e.g. religious law or recognized legal principles in a given field, among legal systems that are not bound by national law. *Id.*

172. From a predominantly normative perspective, *see* Roger O’Keefe, International Criminal Law 111, 483 (2015); Kai Ambos, 1 Treatise on International Criminal Law: Foundations and General Part 40, 51–53 (2013); Kai Ambos, 2 Treatise on International Criminal Law: International Criminal Procedure 8, 44 (2016); from an empirical perspective, *see* generally Alette Smeulders et al., *Sixty-Five Years of International Criminal Justice: The Facts and Figures*, 13 Int’l. Crim. L. Rev. 7 (2013).

173. Critically in this regard *see* Joachim Vogel, *Diskussionsbemerkungen: Instrumentelle Strafrechtsvergleichen*, in STRAFRECHTSVERGLEICHUNG ALS PROBLEM UND LOSUNG 205, 207 (Susanne Beck et al. eds., 2011). *See also* Pierre Hauck, *Funktionen und Grenzen des Einflusses der Strafrechtsvergleichen auf die Strafrechtsharmonisierung in der EU*, in STRAFRECHTSVERGLEICHUNG ALS PROBLEM UND LOSUNG 255, 260 (Susanne Beck et al. eds., 2011); Kubiciel, *supra* note 99, at 218–19; Eser, *supra* note 120, at 1460; *cf.* Michaels, *supra* note 79, at 351.

174. *See* KISCHEL, *supra* note 16, § 3 mns. 65–67, 95–96 (Rightly pointing out any use of orthodox economic analysis is very limited and selective.). More recent statistical comparative law is also predominantly economically oriented. *Id.* § 3 mns. 106–25. On numerical comparative law in this regard, *see* SIEMS, *supra* note 13, at 180 *et seq.*

175. For a fundamental account, including of the history of the concept, *see* Eser, *supra* note 120, at 1443 *et seq.*, 1450 *et seq.*; ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5,

democratic legislator,<sup>176</sup> by the constitutional and human rights value judgments<sup>177</sup> of a liberal *Rechtsstaat*, that is, a State guided by the rule of law and fundamental human rights, above all human dignity, mainly as protective rights towards the State. This already follows, in fact, from the need for (e)valuation recognized above,<sup>178</sup> for this (e)valuation entails the question of the content of the underlying values. The functional method is unable to provide the answer to this question since it requires more than a mere assessment of the functionality of the legal institutions analyzed via micro comparison.<sup>179</sup> At any rate, the decision in favor of value judgments derived from human rights and the liberal constitution is itself only a basic value judgment on a metalevel, and hence needs to be rendered more concrete within the context of specific comparative law research projects.<sup>180</sup>

A functionally, structurally and culturally oriented comparative (criminal) law understands itself as theoretical and foundational, without denying its legislative and judicative function.<sup>181</sup> Theoretically ambitious comparative criminal law goes far beyond this, however, as

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at 69 *et seq.* For an earlier account, see Jung, *supra* note 35, at 1 *et seq.*; on the significance for European law see Heun, *supra* note 13, at 26–27. Drawing a distinction to “wertvergleichend” [“value-comparative”] comparative criminal law, see Sieber, *supra* note 35, at 119–25. On “values” and “evaluation” in legal doctrine, see Nils Jareborg, *Legal Dogmatics and the Concept of Science*, in GRUNDLAGEN UND DOGMATIK DES GESAMTEN STRAFRECHTS-SYSTEMS: FESTSCHRIFT FÜR WOLFGANG FRISCH ZUM 70. GEBURTSTAG 49, 57 (Georg Freund et al. eds., 2013).

176. On the democratic legislator being bound by fundamental rights, the prohibition of arbitrary action and human rights, see Ambos, *supra* note 124, at 187.

177. HEIKE JUNG, SANKTIONENSYSTEME UND MENSCHENRECHTE 43–48 (1992), argues in favour of a human rights-based value foundation. Accord Sieber, *supra* note 35, at 121–22 (“Ausrichtung auf den Menschen in einer offenen Gesellschaft und damit auf das allgemeine Freiheitsprinzip . . .”) [“focus on human beings in an open society and thus on the general principle of freedom . . .”]; see also Eser, *supra* note 120, at 1463–64; KISCHEL, *supra* note 16, § 1 mns. 79–80 (“Menschenrechtsorientierte . . . Vergleichung” [“human-rights-oriented comparison”]); KAI AMBOS, DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHTS: ANSÄTZE EINER DOGMATISIERUNG 45 (2004).

178. See *supra* note 74 and accompanying main text.

179. Cf. Michaels, *supra* note 79, at 373 *et seq.*, 381.

180. See Sieber, *supra* note 35, at 119–23 (With an appropriate demarcation of preliminary questions preceding the actual evaluation: (1) comparability of the object regulated (comparable problem), (2) comparability of evaluative standards and (3) comparison of concrete regulations); see also Sieber, *supra* note 85, at 53 *et seq.* Critically and productively from the perspective of “evaluative-competitive comparative criminal law” (orig. “evaluativ-kompetitiven Strafrechtsvergleichung”) see Eser, *supra* note 120, at 1447, 1449, 1453, 1454, by which he understands a comparative law whose “objectives can extend from neutral evaluation to interest-driven competition” (orig. “Zielsetzungen . . . von neutraler Wertung bis zu interessengeleitetem Wettbewerb reichen können . . .”); distinguishing between functions and methods, see *id.* at 1450 *et seq.*, 1460.

181. On this tripartite division, see Law Commissions Act 1965, *supra* note 66 *et seq.*

it is interested less in narrow questions of the legislator and criminal justice than in the larger whole—in criminal law as a system, in its underlying legal principles and in criminal justice institutions. Comparative criminal law in this sense is also a method of (criminal) legal doctrine,<sup>182</sup> as it systematizes legal material and is able to contribute to a consistent application of the law that is coherent in itself. Above all, however, it constitutes fundamental research in criminal law theory, as it undertakes—beyond mere comparisons of laws and legal “dogmatics”—either an in-depth analysis of individual phenomena (micro perspective) or a comparison of institutions or even systems (macro perspective),<sup>183</sup> whether focusing on the criminal legal system as a whole or on individual legal institutions covering several individual phenomena and their effect within various social and cultural contexts.<sup>184</sup> However, one should note the (micro/macro) terminology is disputed<sup>185</sup> and distinctions cannot always be drawn precisely. Instead, there is “a continuum of increasingly standardizing comparison from highly specialized individual comparisons to extremely generalized divisions into legal spheres.”<sup>186</sup> At any rate, as already stated above (C.I.), comparative law so understood leads to a critical reflection on and questioning of one’s own law.<sup>187</sup> However, even comparative law such as this is not

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182. See Massimo Donini, *Strafrechtstheorie und Strafrechtsreform: Beiträge zum Strafrecht und zur Strafrechtspolitik in Italien und Europa* 30 (2006). Similarly on the symbiotic relationship between comparative law and doctrine, see Junker, *supra* note 1, at 924.

183. On micro and macro comparisons, see, e.g., Jung, *supra* note 13, at 362–63; KISCHEL, *supra* note 16, § 1 mns. 17–18.

184. See Sieber, *supra* note 35, at 94–95, 109–10 (systematic knowledge of different criminal legal systems); ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 32–35 (listing very different orientations). As a foundational subject from the perspective of legal history, see Arnd Koch, *Strafrechtsgeschichte und Strafrechtsvergleichung*, in *GRUNDLAGEN UND DOGMATIK DES GESAMTEN STRAFRECHTSYSTEMS: FESTSCHRIFT FÜR WOLFGANG FRISCH ZUM 70. GEBURTSTAG 1483, 1485 et seq.* (Georg Freund et al. eds., 2013).

185. For example, it is used to refer to something different in SACCO, *supra* note 119, at 30 (comparison within a ‘family’ of laws or between such ‘families’); on “systematology” (systems comparisons) as a distinct contribution of comparative law to science. SACCO, *supra* note 119, at 125–127. From the perspective of legal families, see Dannemann, *supra* note 77, at 387–88. From a historical perspective, see Basedow, *supra* note 13, at 830–31; most recently see Wendehorst, *supra* note 97, at 1 *et seq.*

186. KISCHEL, *supra* note 16, § 1 mn. 18 (“ein Kontinuum zunehmend typisierender Vergleichung vom sehr spezialisierten Einzelvergleich . . . bis hin zur hochgradig generalisierenden Einteilung in Rechtskreise”).

187. See Hilgendorf, *supra* note 100, at 15; Mona, *supra* note 74, at 104, 106 *et seq.* (Who accordingly sees comparative law as a “subversive discipline”; orig. “subversive Disziplin”). This (naturally) applies all the more when one is working in a foreign legal system as a foreign lawyer; thereto, citing his own experience. Otto Lagodny, *Fallstricke der Strafrechtsvergleichung am Beispiel der deutschen Rechtslehre*, 10 ZIS 679 (2016).

“pure research” in the sense of “research without ulterior purpose,”<sup>188</sup> as it pursues the aim of insight inherent in all fundamental research<sup>189</sup> and ultimately strives for intercultural validity<sup>190</sup> on the (admittedly rocky) road towards a universal science of criminal law.<sup>191</sup>

188. See ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 21–23 (emphasizing the legitimacy of aims and correctness of methods accurately). However, the overwhelming majority is of a different opinion. See Jescheck, *supra* note 96, at 764; Günther Kaiser, *Strafrechtsvergleichung und vergleichende Kriminologie*, in *STRAFRECHT—STRAFRECHTSVERGLEICHUNG* 79, 82 (Günther Kaiser & Theo Vogler eds., 1975); Schultz, *supra* note 84, at 8 (“pure research”; orig. “reine Forschung”); see also Sieber, *supra* note 35, at 94; Callies, *supra* note 97, at 174.

189. Similarly Mona, *supra* note 74, at 109, who quotes Schultz, as in *supra* note 188, but concedes overarching aims such as justice are (or should be) pursued in all events. Schultz himself enquires into the “scientific aims” (orig. “wissenschaftlichen Zielen”) of comparative criminal law. Schultz, *supra* note 84, 19.

190. On the “Verallgemeinerungsprinzip” [“generalization principle”] in this context, which is concerned with the transnational generalizability of legal ideas or institutions, see von Bogdandy, *supra* note 34, at 4.

191. On this matter, von Liszt, *supra* note 84, at XX, XXV, already declared a “common science of criminal law derived from all individual laws but above them all” as the “law of the future” was comparative law’s “highest task” (orig. “gemeinsame, allen einzelnen Rechten entnommene, aber über ihnen allen stehende Strafrechtswissenschaft . . . Recht der Zukunft . . . höchste Aufgabe”). For a more ambitious call for a “universal” science of criminal law, see Sieber, *supra* note 35, at 129–30. However, the “International Max Planck Information System for Comparative Criminal Law” (led by Sieber, see *id.* at 124, 129) has failed to deliver in this respect although the MPI website praises it as a success, see the longer (!) German version at *Projekt zum Allgemeinen Teil des Strafrechts*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, <http://www.mpicc.de/de/forschung/forschungsarbeit/strafrecht/vi.html> [<https://perma.cc/ED7C-U9XM>] (last visited Dec. 11, 2019). Accordingly, the project (running from 2004 to 2018) carried out an analysis of 28 (foreign) legal systems (note however that in the section ‘Landes-berichterstatter/-innen’ only 24 countries are listed, while the database at *Einführung in die Rechtsordnung und Allgemeiner Teil des Strafrechts*, MAX-PLANCK-INFORMATIONSSYSTEM FÜR STRAFRECHTSVERGLEICHUNG, <http://www.infocrim.org> [<https://perma.cc/BVC8-EHR6>] (last visited Apr. 13, 2020) speaks of 25 countries and lists 28) in regard to certain issues referring to the General Part of criminal law and several volumes have been published, but the database still lacks many general part topics and is not fully available in English (not even the summary of the project, see *International Max Planck Information System for Comparative Criminal Law*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, <https://www.mpicc.de/en/research/projects/international-max-planck-information-system-for-comparative-criminal-law> [<https://perma.cc/673W-TFGV>] (last visited Mar. 7, 2020). It is also surprising no information for Germany is available. The original idea for the project was presented in 2000 by Ursula Nelles at the invitation of then-MPI director Eser, see Nelles, *supra* note 93, at 1005–1006, n. 1, 1016–17. Critically on its implementation, see ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 34–35. Arguing in favor of a “transnational criminal law science,” see Hörnle, *supra* note 113, at 303 *et seq.*, but note she, being the new director of the MPI’s department for criminal law since August 2019, decided to cease further work on the project. The Institute’s name has now also been changed to “MPI for the Study of Crime, Security and Law.”

#### IV. THE STATE OF COMPARATIVE CRIMINAL LAW IN RESEARCH AND TEACHING IN GERMAN-SPEAKING JURISDICTIONS

The internationalization mentioned above (B.I.) has undoubtedly led to an increase in the importance of comparative legal research, as is evident in the number of doctorates and publication series on comparative criminal law.<sup>192</sup> German research is visible on the international level, especially if published in English. Oddly enough, one of the leading modern works on comparative law was written in English by a German scholar teaching in England.<sup>193</sup> However, internationalization has not had a comparable impact on academic teaching, at least in German-speaking jurisdictions, even though comparative law's importance has long been recognized<sup>194</sup> and it is rightly seen as a foundational subject<sup>195</sup> as, more than any other legal discipline, it helps those engaged in it to reflect critically upon their own law. Early demands that education take account of internationalization<sup>196</sup> have (apart from a few flagship projects<sup>197</sup>) ultimately only resulted in European Law becoming established as a compulsory subject in German law faculties.<sup>198</sup> Comparative criminal law still remains something of a wallflower, so Heike Jung's 1998 statement that it is "still not easy" for comparative law "to assert

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192. Cf. *Research Series in Cooperation with Duncker & Humblot*, MAX-PLANCK-INSTITUT FÜR AUSLÄNDISCHES UND INTERNATIONALES STRAFRECHT, <https://www.mpicc.de/en/publications/institute-publications/research-series> [<https://perma.cc/75ZW-P6GM>] (last visited Mar. 7, 2020) (the series on international and foreign law published by Duncker & Humblot and Nomos, complementing the MPI's traditional publication series on foreign and international criminal law (also published by Duncker & Humblot)).

193. SIEMS, *supra* note 13.

194. See the earlier account in BERNHARD C. AUBIN & KONRAD ZWIEGERT, *RECHTSVERGLEICHUNG IM DEUTSCHEN HOCHSCHULUNTERRICHT* 28–29 (1952) ("key factor of education"; orig. "zentraler Bildungsfaktor"); ZWIEGERT & KÖTZ, *supra* note 52, at 20 (importance for academic teaching as an objective); Junker, *supra* note 1, at 921 ("established in university teaching"; orig. "in der Universitätslehre etabliert"); accord Jung, *supra* note 13, at 378. See also ESER, *COMPARATIVE CRIMINAL LAW*, *supra* note 5, at 10.

195. Junker, *supra* note 1, at 921, 927.

196. Cf. Jung, *supra* note 35, at 1.

197. See, e.g., *Global Systems and Intercultural Competence*, JULIUS-MAXIMILIANS-UNIVERSITY OF WÜRZBURG, <http://www.bildungswissenschaft.uni-wuerzburg.de/en/sonstiges/global-systems-and-intercultural-competence> [<https://perma.cc/D3LQ-GTHA>] (last visited Mar. 7, 2020) (The Würzburg project attempts to embed basic skills in dealing with foreign law and foreign cultures in legal training); Hilgendorf, *supra* note 100, at 14; *Global Systems and Intercultural Competence*, JULIUS-MAXIMILIANS-UNIVERSITY OF WÜRZBURG, <http://www.gsik.de> [<https://perma.cc/5HWJ-7E27>] (last visited Dec. 11, 2019).

198. See Jung, *supra* note 35, at 7 ("references to European law" as a compulsory subject in the German federal state of the Saarland; orig. "europarechtliche Bezüge"). On its importance, see also Junker, *supra* note 1, at 921. This is confirmed by a glance at the German federal states' current examination regulations, which all contain "references to European law" as a compulsory subject.

itself as a subject in the study of law<sup>199</sup> continues to be valid today.<sup>200</sup> Likewise, German case law only makes selected, outcome-focused use of comparative criminal law.<sup>201</sup>

Comparative criminal law's limited importance is also due to the fact it is traditionally dealt with as adjunct to the much more dominant comparative civil law.<sup>202</sup> In German-speaking countries, there are 57 faculties of law<sup>203</sup> with 169 chairs in comparative law, of which only 14 are for criminal law, 35 are for public law (in a wider sense) and 120 for civil law;<sup>204</sup> 6 of the 14 chairs in criminal law with a comparative focus use the designation "comparative criminal law,"<sup>205</sup> 6 use "comparative law,"<sup>206</sup> and 2 use "comparative criminal procedural law."<sup>207</sup> As far as the specializations at the study of law's advanced stage are concerned,<sup>208</sup> comparative criminal law is almost never its own subject, but rather at best, offered within the context of general comparative law, international law or criminal law and criminal justice.

Concerning legal academic training, Germany lags behind France and several other countries.<sup>209</sup> It is small comfort that the situation in the United States seems to be even worse, at least if Yale professor John

199. Jung, *supra* note 35, at 6 (orig. "nach wie vor nicht leicht sich im Studium des Rechts zur Geltung zu bringen").

200. On the difficulty of including comparative law in general teaching, see KISCHEL, *supra* note 16, § 2 mns. 18–19 *et seq.*

201. See Edward Schramm, Die Verwendung strafrechtsvergleichender Erkenntnisse in der Rechtsprechung des BGH und BVerfG, in STRAFRECHTSVERGLEICHUNG 155 *et seq.* (Susanne Beck *et al.* eds., 2011).

202. See Jung, *supra* note 35, at 1; Helmut Heiss, *Hierarchische Rechtskreiseinteilung — Von der Rechtskreislehre zur Typologie der Rechtskulturen*, 100 ZVGLRWISS 396, 401 (2001) ("typically . . . classed among private law"; orig. "typischerweise . . . im Privatrecht angesiedelt"); Dubber, *supra* note 17, at 1288; Hilgendorf, *supra* note 100, at 12 ("domain of civil law"; orig. "Domäne des Zivilrechts"); Mona, *supra* note 74, at 104–05; Grande, *supra* note 2, at 191; ESER, *supra* note 35 ("Stand . . ."), at 670; *but see* KISCHEL, *supra* note 16, § 1 mns. 68–71 (acknowledging a "gewisse Vorherrschaft" ["certain primacy"] of comparative civil law, but seeing comparative law as universal and existing in all fields of law).

203. Forty-five in Germany, five in Austria, six in German-speaking (!) Switzerland and one in Luxembourg.

204. Germany: 133 chairs of comparative law (93 civil law, 28 public law, 12 criminal law); Austria: 7 chairs, (6 civil law, 1 criminal law); Switzerland: 20 chairs (14 civil law, 5 public law, 1 criminal law); Luxembourg: 9 chairs (6 civil law, 2 public law, 1 criminal law).

205. Bielefeld, Frankfurt an der Oder, Greifswald, Hannover, Leipzig, Osnabrück.

206. Göttingen, Frankfurt am Main, Humboldt University of Berlin, Bielefeld, Cologne, Bale.

207. Luxembourg, Vienna.

208. The study of law encompasses a basic phase, comparable to Bachelor studies in Anglo-American jurisdictions, and a specialization phase ('Schwerpunktbereiche'), comparable to a Master's. In this later phase students may choose from a great variety of different areas of specialization.

209. See ESER, COMPARATIVE CRIMINAL LAW, *supra* note 5, at 10.

Langbein's famous criticism of the practice at U.S. faculties of law and legal practice is still considered valid: "... If the study of comparative law were to be banned from American law schools tomorrow morning, hardly anyone would notice. ... They operate on the assumption that the foreigners have nothing to teach. ... Fortified in the lucrative fool's paradise that they inhabit, American legal professionals have little incentive to open their eyes to the disturbing insights of comparative example."<sup>210</sup> Langbein's finding can probably be applied to other common-law legal systems, at least where comparisons with non-English language legal systems are concerned.<sup>211</sup> Of course, this situation can also be explained with the demand-oriented structure of American—and, for that matter, other Anglo-American—law schools. If students are not interested in comparative non-common law, why should it be taught and why should professors engage with it?

## V. OUTLOOK

Despite the trend towards renationalization as part of populist movements—whether in Europe (“Alternative für Deutschland”, “Legga Nord”, “Front National”, “Vox”) or beyond (“America first”)—the challenges of transnational (organized) crime, which are by no means limited to the so-called Islamic State, require more rather than less comparative criminal law. However, demand is focused not so much on fundamental research, but rather on comprehensive comparative criminal justice studies with an emphasis on law enforcement (police investigation, criminal prosecution) and mutual legal assistance. Law enforcement practice, especially from a police perspective, requires contributions to the harmonization of criminal justice systems, especially with regard to the cooperation of prosecuting and police authorities, in order to facilitate transnational investigations and

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210. John H. Langbein, *The Influence of Comparative Procedure in the United States*, 43 AM. J. COMP. L. 545, 549, 554 (1995). Somewhat more optimistically, see Vernon V. Palmer, *Insularity and Leadership in American Comparative Law: The Past One Hundred Years*, 75 TUL. LAW REV. 1093, 1097 (2001) (“In truth, given its isolation, it would appear to have done well under the circumstances, at least by any quantitative measure.”). Arguably, the increasing number of comparative criminal law literature, often in the form of casebooks used in teaching, demonstrates the situation is better these days. See e.g., Dubber & Hörnle, *supra* note 78 or HANDBOOK OF COMPARATIVE CRIMINAL PROCEDURE (Jaqueline Ross & Stephen Thaman, eds., 2016).

211. In this context, it appears symptomatic the only casebook on comparative criminal law (Dubber & Hörnle, *supra* note 78; see also Carl-Friedrich Stuckenberg, Markus D. Dubber & Tatjana Hörnle, *Criminal Law. A Comparative Approach*, 128 ZStW 292 (2016)) was written by two German authors (Dubber and Hörnle), of whom the former is a professor at the University of Toronto.

prosecutions. Given the importance of extraterritorial targeted killings, most prominently advocated and practiced by the United States, and its challenges under international law<sup>212</sup> comparative criminal justice studies may even contribute to more lawful approaches in the prosecution of terrorists and other international criminals.

Of course, for comparative criminal law as an academic discipline, the question arises to which extent it wants to be merely the agent of the interests of criminal justice authorities. This is not just a matter of principle or a question of academic self-understanding and ethics. It is also a practical issue that concerns the limits of academic research. After all, such research can hardly be expected to provide practically relevant answers that could not have been found by any sufficiently creative criminal justice practitioner him- or herself, or result from concrete criminal justice cooperation on the ground. At any rate, academic comparative criminal law should not lose sight of the larger picture—the rule of law framework of any criminal justice activity, especially if it interferes with citizens' rights. Comparative criminal law as an academic discipline pursuing fundamental research should develop towards an international and transnational science of criminal law, concerned less with national legal doctrines and more with openminded criminal law theory and criminal justice in a dialogue-oriented procedure.<sup>213</sup>

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212. For a discussion of the killing of Iranian General Qassem Soleimani, see Marko Milanovic, *The Soleimani Strike and Self-Defence Against an Imminent Armed Attack*, EJIL: TALK! (January 7, 2020), <https://www.ejiltalk.org/the-soleimani-strike-and-self-defence-against-an-imminent-armed-attack> [<https://perma.cc/6698-9YZC>]; Kai Ambos, *Die Tötung Soleimanis als Belastungsprobe für das Völkerrecht*, FAZ EINSRUCH (August 1, 2020), <https://www.faz.net/einspruch/die-toetung-soleimanis-als-belastungsprobe-fuer-das-voelkerrecht-16571225.html> [<https://perma.cc/Y84D-32L8>]; available in Spanish at <https://ciperchile.cl/2020/01/15/el-asesinato-de-soleimani-como-prueba-de-fuego-para-el-derecho-internacional> [<https://perma.cc/9AYJ-B6FY>].

213. For one attempt at such an “Anglo-German dialogue,” see the ‘Core Concepts in Criminal Law and Justice’ project, available at *Core Concepts in Criminal Law and Justice*, INSTITUT FÜR KRIMINALWISSENSCHAFTEN, <https://www.department-ambos.uni-goettingen.de/index.php/anglo-german-dialogue> [<https://perma.cc/4MDF-BHCR>] (last visited Apr. 13, 2020). The first volume has been published in the meantime: CORE CONCEPTS IN CRIMINAL AND CRIMINAL JUSTICE: ANGLO-GERMAN DIALOGUES (Kai Ambos et al. eds., Cambridge Univ. Press 2020).





# SETTLER COLONIALISM THROUGH THE COURT: DOMESTIC INTERPRETATIONS OF INTERNATIONAL LAW

Mia Lattanzi\*

## ABSTRACT

Since 2002, Israel has been building the Separation Wall to divide Israel and certain Israeli settlements from the rest of the occupied Palestinian West Bank. The Wall's construction prompted a series of court cases before the International Court of Justice and the Israeli High Court of Justice, debating the Wall's legality under humanitarian and human rights laws. Reaching opposing conclusions, the courts display fundamentally different perspectives on the position of the occupied Palestinian population within the protections of international law. This Comment assesses where the courts' analyses differ and how the Israeli court's ruling, while claiming compliance with international law, has reverberated through subsequent challenges of Israel's occupation policies, legal scholarship, and international institutions to subvert vital protections for populations living under military occupation. Examining the Separation Wall cases, through the history of the West Bank and the development of the law of occupation, illustrates how the practice of settler-colonial dispossession can be recreated through contemporary international law.

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INTRODUCTION

A law school casebook for teaching public international law courses, *International Law: Norms, Actors, Process* by Jeffrey L. Dunoff, Steven R. Ratner, and David Wippman, includes excerpts from two court cases concerning the Israeli Separation Wall. The chapter with these cases introduces law students to the international law governing military occupation. The case excerpts are from the International Court of Justice (ICJ) advisory opinion *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004) and the Israeli High Court of Justice (HCJ) 2056/04 *Beit Sourik Village Council v. The Government of Israel* (2004). Following the brief excerpts, the casebook offers an explanation for the opposing outcomes these courts reached in their decisions on the Separation Wall, by referencing another HCJ case, HCJ 7957/04 *Mara’abe v. The Prime Minister of Israel* (2005):

What influence should the ICJ’s decision have on decisions by national courts? . . . [T]he Israeli Supreme Court noted the common normative foundation to the *Beit Sourik* and ICJ decision, and suggested that the principal reason for the different conclusions each court reached lay

in the different factual records presented to each court.<sup>v</sup> Against this backdrop, the Israeli Supreme Court decided the effect to be given to the ICJ decision: “[T]he Supreme Court of Israel shall give the full appropriate weight to the norms of international law . . . . However, the ICJ’s conclusion, based upon a factual basis different than the one before us, . . . does not obligate the Supreme Court of Israel to rule that each and every segment of the fence violates international law. The Israeli Court shall continue to . . . ask itself, regarding each and every segment, whether it represents a proportional balance between the security-military need and the rights of the local population.”<sup>1</sup>

The appearance of the Israeli Separation Wall cases in law school classrooms presents the latest challenge for those seeking to confront normalization of the conditions in the Occupied Palestinian Territories (OPT). Properly discussed, *Beit Sourik* and *Mara’abe* demonstrate the HCJ’s attempts to legitimate Israel’s settler-colonial relationship with the Palestinian population, using international law and the language of human rights to compound, rather than counter, a discriminatory legal regime. However, in failing to consider the discursive moves and broader implications of the HCJ decisions, the *International Law* casebook overlooks the subordinating consequences of these court rulings.

Construction of the Separation Wall began in 2003 with the stated purpose of providing security by preventing Palestinians without permits from entering Israel.<sup>2</sup> Running for 440 miles, 85 percent of the Separation Wall is located inside occupied West Bank, encircling Israeli settlements miles east of the Green Line—the internationally recognized 1949 armistice border between Israel and the West Bank and East Jerusalem.<sup>3</sup> The United Nations General Assembly first asked the ICJ, through a resolution in 2003, to evaluate “the legal consequences arising from the construction of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem.”<sup>4</sup> This United Nations (UN) resolution spurred a trilogy of decisions on the legality of the Separation Wall under international law.

In short succession, the HCJ and ICJ issued a series of court decisions that formed a reactive dialogue on the legitimacy of the Separation Wall under international law: In HCJ 2056/04 *Beit Sourik Village Council v. The Government of Israel*, the HCJ found the Separation Wall was

1. JEFFERY L. DUNOFF ET AL., *INTERNATIONAL LAW: NORMS, ACTORS, PROCESS* 472 (4th ed. 2015).

2. See *The Separation Barrier*, B’TSELEM (Nov. 11, 2017), [https://www.btselem.org/separation\\_barrier](https://www.btselem.org/separation_barrier) [<https://perma.cc/RXM8-6T3K>].

3. *Id.*

4. G.A. Res. ES-10/14, ¶ 23 (Dec. 8, 2003).

legal, but needed to be rerouted because the specific segment under consideration caused disproportionate harm to nearby Palestinians.<sup>5</sup> Eight days later, the ICJ issued its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), finding the Separation Wall, (1) violated Palestinians' right to self-determination by illegally confiscating and destroying property, and (2) violated international human rights conventions.<sup>6</sup> The HCJ responded to the ICJ ruling in H CJ 7957/04 *Mara'abe v. The Prime Minister of Israel*, asserting Israel's compliance with the normative basis of the ICJ decision, but finding again the Separation Wall was legal because of the temporary nature of the occupation and the necessities of security following the Second Intifada.<sup>7</sup>

The HCJ continues to cite its decisions to legitimize construction of segments of the Separation Wall. Additionally, the legal frameworks developed through this iterative jurisprudential exercise, in particular the proportionality test and inclusion of settlers within the military commander's duty to ensure public safety, are redeployed in other contexts to further dispossess Palestinian lands and violate Palestinian human rights. Scholarship by highly regarded humanitarian law experts lend further support to the HCJ decisions. These altered legal norms are also replicated in other international court decisions concerning settlers in occupied territory. These developments reflect a reversion of international law as a tool of settler colonialism and the historic use of courts to justify dispossession of indigenous populations.

This Comment examines how the canonization of the Separation Wall cases threatens to distort international legal norms of occupation and further the subordination of the occupied Palestinian population. Part I of this Comment introduces the history of the West Bank and Israel's occupation of the territory. Part II reviews the development of the international law of occupation through a critical framework. Part III discusses the ICJ and HCJ decisions, focusing on how the HCJ's legal reasoning legitimizes discriminatory practices in the West Bank. Finally, Part IV discusses the impacts of the HCJ decisions on Israeli domestic precedent and influence on international law.

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5. See H CJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 807, ¶¶ 62, 67, 80, 81 (2004).

6. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 136, ¶ 122, 137 (July 9) [hereinafter ICJ Advisory Opinion].

7. See H CJ 7957/04 *Mara'abe v. The Prime Minister of Israel* 60(2) PD 477, ¶ 100 (2005).

## I. A BRIEF HISTORY OF THE WEST BANK

The Ottoman Empire controlled Palestine from 1516 until the end of World War I (WWI).<sup>8</sup> During WWI, Britain supported an Arab revolt to end Ottoman control, promising Palestinians an independent state under Hashemite rule.<sup>9</sup> However, despite Palestinian calls for self-determination, Britain also supported “the establishment in Palestine of a national home for the Jewish people.”<sup>10</sup> Following WWI and the defeat of the Ottoman Empire, the newly established League of Nations designated Britain and France as Mandate Powers of former Ottoman colonies in the Middle East.<sup>11</sup> Britain assumed control of the mandates in Iraq, Transjordan, and Palestine, and France controlled the mandates in Syria and Lebanon.<sup>12</sup> Under Article 22 of the Covenant of the League of Nations, Palestine became one of the Class A mandates having reached “a stage of development where their existence as independent nations can be provisionally recognized” but would be administered under British authority “until such time as they are able to stand alone.”<sup>13</sup>

Following World War II (WWII), Britain transferred control of Palestine to the UN. By 1946, approximately 1.25 million Palestinians and 600,000 Jewish people lived in Palestine.<sup>14</sup> On November 29, 1947, the UN General Assembly voted to partition Palestine into a Palestinian state and a Jewish state, with each containing the majority of each’s respective populations and with Jerusalem to become an

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8. This Part focuses on the history of Palestinians in the West Bank, but much more could be said of the detailed history of Palestinians living in Israel’s 1967 borders, the Gaza Strip, East Jerusalem, and Palestinian refugees and diaspora.

9. JOEL BEININ & LISA HAJJAR, *PALESTINE, ISRAEL AND THE ARAB-ISRAELI CONFLICT: A PRIMER*, MIDDLE EAST RES. & INFO. PROJECT 3 (2014), [https://web.stanford.edu/group/sper/images/Palestine-Israel\\_Primer\\_MERIP.pdf](https://web.stanford.edu/group/sper/images/Palestine-Israel_Primer_MERIP.pdf) [<https://perma.cc/ZP3P-T8JN>].

10. Letter from Arthur James Balfour to Lionel Walter Rothschild (Nov. 2, 1917), in *THE ROTHSCHILD ARCHIVE*, [https://www.rothschildarchive.org/contact/faqs/walter\\_rothschild\\_and\\_the\\_balfour\\_declaration](https://www.rothschildarchive.org/contact/faqs/walter_rothschild_and_the_balfour_declaration) [<https://perma.cc/6DHS-2LKD>]. Collective Jewish migration to Palestine began, however, as early as the 1880s as part of the Zionist movement to establish a Jewish state in Palestine. See JOHN REYNOLDS, *EMPIRE, EMERGENCY AND INTERNATIONAL LAW* 212 (2017).

11. Treaty of Versailles, Part I: The Covenant of the League of Nations art 22, Jan. 28, 1919, 2 Bevans 235.

12. See Exchange of Letters Between France and Great Britain Respecting the Recognition and Protection of an Arab State in Syria (Sykes-Picot Agreement), May 9–16, 1916, Gr. Brit.-Fr., available at AVALON PROJECT, [https://avalon.law.yale.edu/20th\\_century/sykes.asp](https://avalon.law.yale.edu/20th_century/sykes.asp) [<https://perma.cc/U22P-2H2A>].

13. Covenant of the League of Nations, *supra* note 11, art 22(4).

14. BEININ & HAJJAR, *supra* note 9, at 4.

international zone.<sup>15</sup> The day after the UN adopted the partition plan, fighting began.<sup>16</sup> By April 1948, Jewish forces had gained control of territory beyond the borders of the Jewish state envisioned by the UN partition plan. On May 15, 1948, the day Britain evacuated Palestine, Jewish forces pronounced an independent State of Israel. Egypt, Syria, Jordan, and Iraq invaded the new State of Israel in support of Palestine.<sup>17</sup> In 1949, the Arab states and Israel signed armistice agreements ending the armed conflict and demarcating a new territorial boundary, known as the “Green Line” which remains the contemporary internationally recognized boundary between Israeli and Palestinian territories.<sup>18</sup> Jordan and Egypt assumed control over the remaining Palestinian territories, where over 700,000 Palestinians had been removed or expelled by Jewish forces; Jordan controlled the West Bank and East Jerusalem and Egypt controlled the Gaza Strip.<sup>19</sup>

During the Six-Day War, which began on June 5, 1967, Israel gained control over the West Bank from Jordan, the Gaza Strip and Sinai Peninsula from Egypt, and the Golan Heights from Syria.<sup>20</sup> This initiated Israel’s belligerent military occupation over the Palestinian territories.<sup>21</sup> The UN Security Council responded by adopting Resolution 242, declaring the “inadmissibility of the acquisition of territory by force.”<sup>22</sup> Israel installed an administrative government to manage the West Bank and Gaza, which led to criminalizing expressions of Palestinian nationalism and denying basic political and civil rights to Palestinians.<sup>23</sup> Despite the clear view of the UN Member States that the belligerent occupation of the OPT began in 1967, Israel denied the *de jure* application of the Geneva Convention relative to the Protection

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15. G.A. Res 181(II), Future Government of Palestine, U.N. Doc. A/RES/181(II), Nov. 29, 1947.

16. BEININ & HAJJAR, *supra* note 9, at 5.

17. *See id.*

18. *See, e.g.*, G.A. Res 67/210, Israeli Settlements in the Occupied Palestinian Territory, including East Jerusalem, and the Occupied Syrian Golan (Dec. 18, 2012).

19. *See* UNRWA & UNHCR, THE UNITED NATIONS AND PALESTINIAN REFUGEES 2 (Jan. 2007), <https://www.unrwa.org/userfiles/2010011791015.pdf> [<https://perma.cc/L3X2-76NB>].

20. *See* BEININ & HAJJAR, *supra* note 9, at 6.

21. ICJ Advisory Opinion, 2004 I.C.J. 136, ¶ 78 (July 9). The situation in the occupied territories is sometimes described as *sui generis*, or unlike any other seen in the history of international law. However, doing so enables the Israeli government to establish a regime in which they “pick and choose” which provisions of international law to abide by and erasing the similarities between the occupation of West Bank and other settler-colonial societies. *See* AYEAL GROSS, THE WRITING ON THE WALL: RETHINKING THE INTERNATIONAL LAW OF OCCUPATION 8 (2017).

22. S.C. Res. 242, preamble (Nov. 22, 1967).

23. *See* BEININ & HAJJAR, *supra* note 9, at 7.

of Civilian Persons in Time of War (“Fourth Geneva Convention”). Instead Israel applies, without formally accepting, certain international law provisions to the situation in the OPT.<sup>24</sup>

From 1967 to 2017, Israel constructed over 200 settlements in the West Bank.<sup>25</sup> Jewish settlers came to the settlements motivated by ideological and economic factors. Inhabiting the Palestinian territories fulfilled Zionist goals of converting all of Palestine into a Jewish homeland.<sup>26</sup> Settlers also receive subsidies from the Israeli government, considerably reducing costs of living.<sup>27</sup> The settlements in East Jerusalem and West Bank hold 588,000 Jewish settlers. In the West Bank, settlements cover almost 10 percent of the territory. Their locations and accompanying security infrastructures prevent Palestinian landowners from accessing their property and obstruct movement within the West Bank.<sup>28</sup>

In the 1970s, Israel and the international community determined economic development could end the Palestinian-Israeli conflict.<sup>29</sup> However, the steps Israel took over the decades resulted in Palestinian dependence on the Israeli economy. Migratory labor fused the economies, with 35–40 percent of Palestinian laborers working in Israel from 1967 to 1990.<sup>30</sup> Currently, of the 2.7 million Palestinians living in West

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24. NOURA ERAKAT, JUSTICE FOR SOME: LAW AND THE QUESTION OF PALESTINE 61 (2019); see also EYAL BENVENISTI, THE INTERNATIONAL LAW OF OCCUPATION 206 (2d ed. 2012).

25. *Settlements*, B’TSELEM (Nov. 11, 2017), <https://www.btselem.org/settlements> (last updated Jan. 16, 2019) [<https://perma.cc/YJB5-WKDM>].

26. See *The Economics at the Heart of Israel’s Illegal Settlements*, MIDDLE EAST EYE (Feb. 13, 2015), <https://www.middleeasteye.net/news/economics-heart-israeli-settlements> [<https://perma.cc/8CDY-2HL8>].

27. *Id.*

28. MICHAEL SFARD, THE WALL AND THE GATE 123 (2018).

29. See Nur Arafah, *The Myth of a Palestinian Economy*, AL JAZEERA (July 6, 2017), <https://www.aljazeera.com/indepth/features/2017/07/myth-palestinian-economy-170706060337109.html> [<https://perma.cc/NY6U-PD7T>].

30. Even the United States has taken a critical view on Israel’s policies that contributed to the current state of the Palestinian economy. See *The World Factbook: West Bank: Economy*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/Publications/the-world-factbook/geos/we.html> (last updated Nov. 5, 2019) [<https://perma.cc/RC85-DDFV>] (“Longstanding Israeli restrictions on imports, exports, and movement of goods and people continue to disrupt labor and trade flows and the territory’s industrial capacity, and constrain private sector development.”).



Bank, 100,000–110,000 work in Israel.<sup>31</sup> An additional 30,000 Palestinians work in West Bank settlements.<sup>32</sup>

During the First Intifada, from 1987 to 1991, Palestinians in the West Bank and Gaza protested Israel's military occupation. Hundreds of thousands of Palestinians participated in peaceful and nonpeaceful demonstrations, general strikes, and boycotts.<sup>33</sup> Over 1000 Palestinians and 100 Israelis were killed, initiating changes in Israel's treatment of the occupied territories.<sup>34</sup> The Oslo Peace Process, a cycle of mediated negotiations led by the United States beginning in 1993, resulted in several interim agreements.<sup>35</sup> The 1993 Israel–PLO Declaration of Principles established the Palestinian Liberation Organization (PLO) as the representative of the Palestinian people, in return for formal recognition of the state of Israel.<sup>36</sup> The agreement allowed the PLO to establish a Palestinian Authority (PA) to govern areas of West Bank and the Gaza Strip.<sup>37</sup> However, key issues were left for later negotiations, including: the settlements, water rights, the right of return for Palestinian refugees, the status of Jerusalem, and the territory Israel would cede.<sup>38</sup>

The 1994 Paris Economic Protocol (Paris Protocol), part of the Oslo Accords, gave Israel authority over Palestinian labor movement and revenue, formalizing an imbalanced economic relationship.<sup>39</sup> Pri-

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31. See Adam Rasgon, *Israel Planning to Increase Work Permits for Palestinians*, THE JERUSALEM POST (Jan. 12, 2018), <https://www.jpost.com/Arab-Israeli-Conflict/Israel-planning-to-increase-work-permits-for-Palestinians-533556> [https://perma.cc/7AGS-D8PW]. Most Palestinians require a work permit to cross into Israel, but about 30,000–40,000 Palestinians enter Israel without a permit. *Id.* The Israeli government only permits employing Palestinians in the sectors of construction, agriculture, hospitality, industry, or services. See *A Guide on the Employment of Palestinian Workers in Israel* (Hebrew), POPULATION AND IMMIGR. AUTH., [https://www.gov.il/he/Departments/Guides/employment\\_of\\_palestinians\\_in\\_israel\\_2016](https://www.gov.il/he/Departments/Guides/employment_of_palestinians_in_israel_2016) [https://perma.cc/BNV6-JL75].

32. Rasgon, *supra* note 31.

33. See BEININ & HAJJAR, *supra* note 9, at 9.

34. *Id.*

35. Robert Malley & Hussein Agha, *Camp David: The Tragedy of Errors*, N. Y. REV. BOOKS (Aug. 9, 2001), <https://www.nybooks.com/articles/2001/08/09/camp-david-the-tragedy-of-errors> [https://perma.cc/NQ8R-W6Z8].

36. See *id.*

37. See *id.* Israel unilaterally disengaged from Gaza in 2005, removing all settlers and military personnel from the territory. Israel maintains control of Gaza's airspace, territorial waters, utilities, and the flow of goods and people in and out of the territory. This allows Israel to exert maximum control over Gaza's economy and the lives of Palestinians who remain largely trapped within the territory. See Andrew Sanger, *The Contemporary Law of Blockade and the Gaza Freedom Flotilla in 13* YEARBOOK INT'L HUMANITARIAN L. 397, 430 (M.N. Schmitt et al. eds., 2010).

38. See BEININ & HAJJAR, *supra* note 9, at 10; see also Malley & Agha, *supra* note 35.

39. Arafah, *supra* note 29; see also U.N. CONFERENCE ON TRADE AND DEV., THE

marily a taxation and trade regime, the Paris Protocol created a single customs zone, preserving the absence of economic borders or trade barriers between Israel and Palestine while deferring the question of a political border.<sup>40</sup> Israeli products received open access to Palestinian markets while Palestinian goods had a comparatively slight presence in Israeli markets.<sup>41</sup> The result of the Paris Protocol, while purporting to foster economic development, was to comprehensively restrict all aspects of Palestinian fiscal policy. Israel controlled the distribution of Palestinian indirect tax revenues from customs, purchase taxes, value-added tax, and excise taxes.<sup>42</sup> Delays in transferring cleared revenues as mandated, often due to political reasons, created uncertainty and instability for the Palestinian economy, and further reliance on foreign aid.<sup>43</sup>

A second Oslo *Accord*, the 1995 Interim Agreement, divided the West Bank into three territorial designations: Areas A, B, and C. The PA received full civil and security control of Area A. In Area B, the PA controlled civil affairs and had joint control with Israel over security. Israel had full civil and military control of Area C. Areas A and B were distributed in 165 disconnected locations throughout West Bank.<sup>44</sup> The remaining territory of Area C comprised 61 percent of West Bank.<sup>45</sup> Currently, all 125 Israeli settlements and 100 outposts, as well as 300,000 Palestinians, are located in Area C.<sup>46</sup> Additionally, Area C contains 90 percent of West Bank's water resources, most fertile agricultural lands, sites for resource extractive industry, and tourist sites.<sup>47</sup> The Oslo accords attempted to reduce responsibility for the wellbeing of the Palestinian population in West Bank and the political

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ECONOMIC COSTS OF THE ISRAELI OCCUPATION OF THE PALESTINIAN PEOPLE: CUMULATIVE FISCAL COSTS, 8, U.N. Doc UNCTAD/GDS/APP/2019/2, U.N. Sales No. E.20.II.D.6 (Dec. 2019).

40. See SFARD, *supra* note 28, at 128. Palestinians accepted this condition to allow continued flow of Palestinians labor to Israel. See Arafah, *supra* note 29.

41. See U.N. CONFERENCE ON TRADE AND DEV., *supra* note 39, at 1. Between 2007 and 2011, trade with Israel constituted between 70 and 90 percent of total Palestinian imports and exports, while the trade deficit for Palestine with Israel increased from \$2.3 billion to \$3.2 billion. *Id.*

42. *Id.* at 17, 24.

43. *Id.* at 6, 24.

44. See *Planning Policy in West Bank*, B'TSELEM (Nov. 11, 2017), [https://www.btselem.org/planning\\_and\\_building](https://www.btselem.org/planning_and_building) [https://perma.cc/JHG6-P27E].

45. See *id.*

46. See GROSS, *supra* note 21, at 154; Zena Tahhan, *Israel's Settlements: 50 Years of Land Theft Explained*, AL JAZEERA (Nov. 21, 2017), <https://interactive.aljazeera.com/aje/2017/50-years-illegal-settlements/index.html> [https://perma.cc/TGS9-B8HF].

47. See Tahhan, *supra* note 46.

and economic costs of the occupation, without sacrificing Israel's exercise of authority.<sup>48</sup>

The negotiation process slowed from 1996–2000.<sup>49</sup> Meanwhile, settlement construction increased dramatically.<sup>50</sup> Despite promises to halt settlement construction, Israel facilitated the transfer of 50,000 additional settlers by expanding existing settlements and constructing illegal outposts with access to electricity, water, and roads.<sup>51</sup> The Oslo Process ended at the Camp David Summit in July 2000, when each party arrived with markedly different negotiation terms,<sup>52</sup> and then-Israeli Prime Minister Ehud Barak refused to commit to any proposals in writing.<sup>53</sup>

The Second (al-Aqsa) Intifada of 2000 was partially a response to the continuing occupation, failed negotiations, Palestinians' frustrations, allegations of corruption within the PA, and a provocative visit by then-Prime Ministerial candidate Ariel Sharon to the Noble Sanctuary with 1000 armed Israeli guards.<sup>54</sup> Along with peaceful protests, some Palestinian groups carried out attacks using small arms and suicide attacks in Israel and the settlements.<sup>55</sup> Israeli forces responded by firing upon peaceful demonstrators, attacking PA locations in Ramallah and Gaza, and shelling civilian neighborhoods.<sup>56</sup>

The Israeli cabinet approved construction of the Separation Wall in 2002, and construction began in 2003. The stated purpose was to prevent attacks from Palestinians crossing the border without permits. Eighty-five percent of the Wall's route runs through the West Bank. In most areas, the Separation Wall is electric fencing, barbed-wire, and ditches. In more populated areas—like Jerusalem, Bethlehem, Qalqilyah, and Tulkarm—it is a concrete barrier, rising up to nine meters high.<sup>57</sup>

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48. GROSS, *supra* note 21, at 203–04 (citing NEVE GORDON, ISRAEL'S OCCUPATION 20–21, 169–93 (2008)).

49. See BEININ & HAJJAR, *supra* note 9, at 1, 11.

50. *Id.* at 11.

51. NICOLA PERUGINI & NEVE GORDON, THE HUMAN RIGHT TO DOMINATE 104 (2015).

52. BEININ & HAJJAR, *supra* note 9, at 11.

53. Malley & Agha, *supra* note 35.

54. See BEININ & HAJJAR, *supra* note 9, at 11.

55. See SFARD, *supra* note 28, at 258–59.

56. See BEININ & HAJJAR, *supra* note 9, at 12; see also John Dugard (Special Rapporteur of the Commission on Human Rights), *Question of the Violation of Human Rights in the Occupied Arab Territories, including Palestine*, ¶ 12, U.N. Doc. A/56/440 (Oct. 4, 2001).

57. Separation Barrier, *supra* note 2.

Within the West Bank, the Separation Wall circumvents some Israeli settlements, creating “closed areas” and “enclaves.”<sup>58</sup> “Closed areas” are territory between the Separation Wall and the Green Line where the Wall separates Israeli settlements in the West Bank from the remainder of Palestinian territory.<sup>59</sup> Palestinians included within the closed areas are subject to a new residency status, requiring permits or identification cards to travel and access their land and property.<sup>60</sup> Israeli citizens inside the closed areas can move freely to, from, and within the area, without needing permits. “Enclaves” are areas where the Separation Wall completely surrounds a Palestinian community, cutting off unrestricted access.<sup>61</sup> The challenges to daily life and survival from living in the isolation of enclaves and closed areas have caused the number of Palestinians living in these areas to decline.<sup>62</sup>

In October 2003, UN Member States introduced a resolution condemning the Separation Wall and presented the resolution to the Security Council.<sup>63</sup> However, a US veto blocked the resolution’s approval by the Security Council.<sup>64</sup> On December 12, 2003, the UN General Assembly adopted a request for an advisory opinion from the ICJ on the legality of the Separation Wall.<sup>65</sup> Meanwhile, the UN Security Council adopted Resolution 1515, endorsing the Road Map to a Permanent Two-State Solution to the Israeli-Palestinian Conflict, proposed by then-President George W. Bush, which intended to address the Israeli-Palestinian conflict in three stages of negotiation overseen by the UN, the European Union, Russia, and the United States.<sup>66</sup>

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58. See U.N. Office for the Coordination of Humanitarian Affairs, *Enclaves and Closed Areas Between West Bank Barrier and the Green Line* (Jan. 2004), <https://www.refworld.org/pdfid/4821c987d.pdf> [<https://perma.cc/64UZ-PXGR>].

59. See *id.*

60. See *Separation Barrier*, *supra* note 2.

61. See U.N. Office for the Coordination of Humanitarian Affairs, *supra* note 58.

62. See *Separation Barrier*, *supra* note 2; c.f. U.N. Office for the Coordination of Humanitarian Affairs, *West Bank Access Restrictions* (July 2018), [https://www.ochaopt.org/sites/default/files/wb\\_closure\\_2\\_0.pdf](https://www.ochaopt.org/sites/default/files/wb_closure_2_0.pdf) [<https://perma.cc/EMY4-CQF7>] (discussing the extent of Palestinians’ restricted movement in West Bank due to Israeli policies, such as the construction of the Separation Wall, checkpoints, and settlements).

63. Press Release, General Assembly, Speakers in General Assembly Emergency Session Condemn Israel’s Construction of ‘Security Barrier’, Expansionist Policies, U.N. Press Release GA/10177 (Oct. 20, 2003).

64. See *id.*

65. G.A. Res. ES-10/14, *supra* note 4.

66. Press Release, Security Council, Security Council Adopts Resolution Endorsing Road Map Leading Towards Two-State Resolution of Israeli-Palestinian Conflict, U.N. Press Release SC/7924 (Nov. 19, 2003). In 2003, during the negotiation period, Sharon refused to halt settlement construction, due to housing needed for expanding families already living in the settlements. See Paul Reynolds, *Powell Visit Highlights Problems*, BBC

Since 2003, feigned attempts at negotiation have continued. However, the United States, as Israel's strongest supporter and a nonneutral participant, has never sincerely considered the Palestinian position, and is responsible for impeding Palestinians' bid for statehood in the Security Council in 2004, 2009, 2011, and 2014.<sup>67</sup> Palestinians, alternatively, increasingly sought international recognition of their statehood, irrespective of a final negotiated peace with Israel. Palestine received Non-Member State observer status from the UN in 2012.<sup>68</sup> As of 2019, 138 of 195 UN Member States had formally recognized Palestine as a state.<sup>69</sup> Additionally, in 2015, Palestinian President Mahmoud Abbas bid to join the International Criminal Court (ICC). Israel retaliated against the ICC's approval of Palestine's bid by freezing \$127 million dollars in Palestinian tax revenue.<sup>70</sup> In late 2019, ICC chief prosecutor Fatou Bensouda opened investigations into potential violations of international criminal law under the ICC's Rome Statute by Israelis and Palestinians, in Gaza and West Bank, during the 2014 Israel-Gaza conflict, pending a determination of the ICC's jurisdiction over the OPT.<sup>71</sup>

Amidst the momentum for Palestine's recognized sovereignty, the Separation Wall creates a reality defiant of a potential political border on the Green Line, mocks good faith negotiations between Israelis and

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NEWS (May 12, 2003, 1:51 PM), [http://news.bbc.co.uk/2/hi/middle\\_east/3020335.stm](http://news.bbc.co.uk/2/hi/middle_east/3020335.stm) [<https://perma.cc/3JLY-R8KW>]. The United States supported the continued construction of settlements stating, "In light of new realities on the ground, including already existing major Israeli population centers, it is unrealistic to expect that the outcome of final status negotiations will be a full and complete return to the armistice lines of 1949 . . . ." Letter from President George W. Bush to Prime Minister Ariel Sharon, in WHITE HOUSE ARCHIVES (Apr. 14, 2004), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/04/20040414-3.html> [<https://perma.cc/PU3P-TJNQ>].

67. ERAKAT, *supra* note 24, at 224.

68. Meeting Coverage, General Assembly Votes Overwhelmingly to *Accord* Palestine 'Non-Member Observer State' Status in United Nations, U.N. Doc. GA/11317 (Nov. 29, 2012). This status does not confer the ability to vote in the General Assembly but permits other benefits like participation in international bodies. Ewan MacAskill & Chris McGreal, *UN General Assembly Makes Resounding Vote in Favor of Palestinian Statehood*, GUARDIAN (Nov. 29, 2012), <https://www.theguardian.com/world/2012/nov/29/united-nations-vote-palestine-state> [<https://perma.cc/U4EE-C8EA>].

69. Tovah Lazaroff, *Saint Kitts and Nevis Becomes 138<sup>th</sup> Nation to Recognize Palestine*, THE JERUSALEM POST, (July 31, 2019, 7:48 AM), <https://www.jpost.com/Middle-East/Saint-Kitts-and-Nevis-became-138th-nation-to-recognize-Palestine-597166> [<https://perma.cc/RZZ9-NNQK>].

70. *Israel Freezes Palestine Tax Funds over ICC Bid*, BCC NEWS (Jan. 3, 2015), <https://www.bbc.com/news/world-middle-east-30667440> [<https://perma.cc/8Y3Q-WEY6>].

71. *Statement of ICC Prosecutor, Fatou Bensouda, on the Conclusion of the Preliminary Examination of the Situation in Palestine, and Seeking a Ruling on the Scope of the Court's Territorial Jurisdiction*, INT'L CRIMINAL COURT (Dec. 20, 2019), <https://www.icc-cpi.int/Pages/item.aspx?name=20191220-otp-statement-palestine> [<https://perma.cc/4HG6-Q6TB>].

Palestinians, and impedes the exercise of Palestinian self-determination. The Wall continues to affect Palestinian daily life and movement in the region more than a decade after the Second Intifada ended. The next Part discusses the law governing Israel's occupation of the West Bank, and its accompanying obligations as the occupying power.

## II. INTERNATIONAL LAW OF OCCUPATION

This Part discusses the development of occupation law from European nations' experiences with military engagement and colonialism. Occupation law developed from the law of nations out of concern for the protection of the sovereign. Following the drafting of the Geneva Conventions, the law shifted to include protections for individuals under occupation. While remnants of occupation law's hierarchical origins remain, its evolution towards protecting the right to self-determination and the individual rights of the occupied population should inform contemporary interpretations of the restrictions and obligations placed on the occupying power.

### A. Origins of Occupation Law

International law's defining legal personality is sovereignty, a concept derived from the European colonial encounter and the need to facilitate conquest.<sup>72</sup> Signifying legal equality between states as members within the "Family of Nations," state sovereignty originated from the efforts of European nations' to distinguish themselves from non-European societies as having received the gift of civilization.<sup>73</sup> Societies recognized as sovereign became the only legitimate actors in international law, offering legal justification for conquest, colonial control, and settler-colonial acquisition of indigenous territory, often regarded as *terra nullius* (or empty land) since European powers did not view it as under the control of another sovereign state.<sup>74</sup> This system, known

72. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 83 (2005).

73. See *id.* at 101–05.

74. *Id.* at 83 (citing LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* 292 (1912)). Such confrontations between a sovereign European state and a non-European state were easily justifiable to positive jurists because the nonsovereign state lacked a legal personality on which to base a legal opposition. *Id.* at 34. Although often referred to together, there are ways in which settler colonialism is both a type of and distinct from colonialism. Colonialism and settler colonialism are direct forms of instating a system of dominance over an indigenous population. See GLEN SEAN COULTHARD, *RED SKIN WHITE MASKS* 7 n.28 (2014). Settler colonialism, however, focuses centrally on the removal of the native to be replaced with a preferred population. LORENZO VERACINI, *SETTLER COLONIALISM: A THEORETICAL OVERVIEW* 4, 35 (2010) (noting removal of the native population could include elimination, transfer, or forced assimilation); see Patrick Wolfe, *Settler Colonialism and the Elimination*

as preemption, served to avoid conflict between competing European nations, by reserving the right to appropriate lands and resources based on the first European presence in a territory.<sup>75</sup> European powers portrayed colonialism as an emancipatory project to enhance the rights of indigenous populations.<sup>76</sup>

Occupation law was developed to be separate and distinct from the laws of conquest. It governed the relationship between a military occupying power and the occupied state following armed conflict. As Professor Nehal Bhuta argues, occupation law did not progress from the humanization of war but sought to protect the political legitimacy of European nations following their collective experience with the Napoleonic wars and revolutionary calls for constitutional change emerging at the Congress of Vienna in 1815.<sup>77</sup> Belligerent occupation could arise exclusively from wars between sovereign states, meaning wars between European nations.<sup>78</sup>

The foundation for occupation law became the “inalienability of sovereignty.”<sup>79</sup> The preservationist principle of occupation law allowed temporary management by a military invader without transferring the sovereign right to control. This temporary and limited authority, exercised by an occupying power until a peaceful resolution could be reached, helped to concretize the spatial order of intra-European borders.<sup>80</sup> Occupation carried obligations to preserve public order and enforce the laws of a territory unless “absolutely prevented.” This intermediate status created tension in the administration of an occupied territory, as the occupant’s authority derived from military power not sovereign right.<sup>81</sup> These tensions led to the exploitations of ambiguities in the law as the responsibilities of an occupying power to the occupied population continued to evolve.

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*of the Native*, 8 J. GENOCIDE RES. 387, 388 (2006) (“Settler colonialism destroys to replace.”).

75. See ANGHIE, *supra* note 72, at 82; Wolfe, *supra* note 74, at 391. The recognition doctrine, used to determine when a territory is a sovereign state under international law, is a contemporary reflection of international law’s efforts at hierarchical ordering. ANGHIE, *supra* note 72, at 101.

76. PERUGINI & GORDON, *supra* note 51, at 23–24.

77. See Nehal Bhuta, *The Antinomies of Transformative Occupation*, 16 EUR. J. INT’L L. 721, 723 (2005).

78. See *id.* at 729.

79. EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 5 (2d prtng. 2004).

80. See Bhuta, *supra* note 77, at 729.

81. See BENVENISTI, *supra* note 79, at 4; Bhuta, *supra* note 77, at 726.

## B. The Mandate System

The post-WWI mandate system, predating several of the treaties defining modern occupation law, demonstrates the tensions between military occupation and sovereign privileges over territory. The history of the mandate system in Palestine has also informed the Israeli perspective that the full body of occupation law does not apply to the OPT. Economic gain motivated European states' colonial expansion, with colonies providing labor, resources, and access to new and expanding markets. Post-WWI efforts to decolonize former German and Ottoman territories coincided with European states' full realization of their colonies' great economic potential.<sup>82</sup> Following the defeat of the German and Ottoman empires in WWI, the League of Nations, a newly established international body, created the Mandate System to oversee the decolonization of the territories.<sup>83</sup> The League of Nations supported the transformation of colonies into sovereign states to demonstrate the universality of international law and the European legal order.<sup>84</sup>

The League of Nations divided the colonies and territories into mandates depending on the "stage of development of the people, the geographic situation of the territory, [and] its economic conditions"<sup>85</sup> to assist "peoples not yet able to stand by themselves under the strenuous conditions of the modern world."<sup>86</sup> The mandates were paired with "advanced nations" guided by "the principle that the well-being and development of such peoples form a sacred trust of civilization."<sup>87</sup> The former Ottoman territories in the Middle East were designated as "A" Mandates, recognized as nearly independent nations, with the Mandate powers providing only "administrative advice and assistance."<sup>88</sup>

Two central principles of the Mandates System were (1) nonannexation of native lands and (2) the promotion of wellbeing and development of the native population.<sup>89</sup> Annexing land ran counter to the democratic ideals of the League of Nations project.<sup>90</sup> Through these principles, forming the concept of trusteeship, the Mandate powers sought to demonstrate that the Mandate System was not another

82. See ANGHIE, *supra* note 72, at 141.

83. See Covenant of the League of Nations, *supra* note 11, art. 22.

84. See ANGHIE, *supra* note 72, at 136.

85. Covenant of the League of Nations, *supra* note 11, art. 22(3).

86. *Id.* art. 22(1).

87. *Id.* art. 22(1)–(2).

88. *Id.* art. 22(4).

89. See ICJ Advisory Opinion, 2004 I.C.J. 136, ¶ 70 (July 9) (citing International Status of South-West Africa, Advisory Opinion, 1950 I.C.J. 128, 131 (July 11)).

90. See ANGHIE, *supra* note 72, at 140.



form of colonialism, but a way of promoting the interests and self-government of native peoples.<sup>91</sup> However, the Mandate territories, while possessing notionally a path to sovereignty, remained subordinate to the Mandate powers in the international system. The trusteeships were temporary, but the Mandate System's goals of promoting self-government and self-determination justified bureaucratic interference to introduce a "modern social and legal order" in the Mandate territories.<sup>92</sup> In Palestine, the British administrative government, comprised almost entirely of British officials, denied positions to Palestinians who had senior positions under Ottoman rule.<sup>93</sup> The British administrative government altered the preexisting Ottoman system through a broad spectrum of laws impacting the judicial system, food prices, public health and sanitation, treatment of animals, forestry, and rent control.<sup>94</sup>

The Mandate powers interpreted their obligation to promote "well-being and development" in chiefly economic terms.<sup>95</sup> While prohibited from exploiting native lands or peoples under the concept of trusteeship, the Mandate powers—in debt from WWI—nonetheless knew the potential value of the Mandate territories<sup>96</sup> and incorporated European access to trade and commerce into the Mandate System's provisions.<sup>97</sup> The Mandate powers' control of the territories' administrations allowed them access to trade, labor, and raw materials.<sup>98</sup> Palestinians were involved in construction and resource extraction projects to modernize Palestinian society, while assuring financial benefits and dependency to Britain.<sup>99</sup> The Mandate System was a contradiction between advancing the interests and self-government of the formerly colonized while recreating colonial economic relations.<sup>100</sup>

### C. Modern Law of Occupation and the West Bank

Decolonization facilitated the extension of humanitarian law protections to formerly colonized populations, largely through treaties

91. *See id.*

92. *See* Bhuta, *supra* note 77, at 729–30.

93. Ghada Issa Sa'id Rifai, British Economic Policy in Palestine, 1919–1935: The Construction of Haifa Harbour, a Case Study 64 (Oct. 4, 2016) (unpublished Ph.D. dissertation, Queen Mary University of London), [https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/24736/Rifai\\_G\\_PhD\\_final\\_130417.pdf?sequence=1](https://qmro.qmul.ac.uk/xmlui/bitstream/handle/123456789/24736/Rifai_G_PhD_final_130417.pdf?sequence=1) [https://perma.cc/98QR-W6J6].

94. *See* BENVENISTI, *supra* note 24, at 78.

95. *See* ANGHIE, *supra* note 72, at 157.

96. *See* Rifai, *supra* note 93, at 74, 76.

97. Covenant of the League of Nations, *supra* note 11, art. 22(5).

98. *See* ANGHIE, *supra* note 72, at 141.

99. *See* Rifai, *supra* note 93, at 74, 76, 91.

100. ANGHIE, *supra* note 72, at 192; Rifai, *supra* note 93, at 316.

following WWII.<sup>101</sup> The body of occupation law is contained in provisions of the Hague Regulations of 1907, the Fourth Geneva Convention of 1949, Additional Protocols I and II to the Geneva Conventions of 1977, and customary international law. Following WWII, tensions between the powers occupying the former Axis territories who desired expansive powers and smaller nations with experience under occupation led to drafting the Geneva Conventions with a different emphasis than the Hague Regulations.<sup>102</sup> The Fourth Geneva Convention embodied a shift from occupation law's concern for the political interests of the elite to individual protections for the occupied population.<sup>103</sup> This included treaty language specifically outlining the occupying power's independent duties to a population under occupation.<sup>104</sup>

Occupation is established when a hostile armed force obtains effective control of a territory.<sup>105</sup> Modern occupation law imposes standards for the general welfare of the occupied population, or "protected persons," including restricting destruction of property and prohibiting settlement.<sup>106</sup> According to Article 43 of the Hague Regulations, an occupying power must "take all measures in his power to restore, and ensure, as far as possible, public order and safety" of the occupied population and came to include ensuring protection of their human rights.<sup>107</sup> The Fourth Geneva Convention also prohibits the occupying power from "measures aiming at creating unemployment or at restricting opportunities . . . in an occupied territory, in order to induce them to work for the Occupying Power."<sup>108</sup> The principle of nonannexation is reflected in the prohibitions against destruction of state or private property unless "absolutely necessary" for military operations.<sup>109</sup> Additionally, Article 49(6) prohibits civilian settlement within the occupied territory.<sup>110</sup> The presence of Israeli settlers in the West Bank since 1967

101. See PERUGINI & GORDON, *supra* note 51, at 98.

102. See BENVENISTI, *supra* note 24, at 72.

103. See *id.*

104. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 27, 32, 33, 34, 39, 51, 52, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

105. Laws and Customs of War on Land (Hague, IV), art. 42, Oct. 18, 1907, 36 Stat. 2277, T.S. 539 [hereinafter Hague Regulations of 1907].

106. See BENVENISTI, *supra* note 79, at xi.

107. The Hague Regulations of 1907, *supra* note 105, art. 43; see BENVENISTI, *supra* note 79, at xi; see also Noam Lubell, *Human Rights Obligations in Military Occupation*, 94 INT'L REV. RED CROSS 317, 330 (2012).

108. Fourth Geneva Convention, *supra* note 104, art 52(2).

109. *Id.* art. 53.

110. *Id.* art. 49(6) ("The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.").

directly violates this provision, which includes no exceptions for when settlement could be permissible.<sup>111</sup>

Occupation law also incorporates the preservationist principle of temporality from the Mandate system,<sup>112</sup> requiring the occupying power to respect “unless absolutely prevented, the laws in force in the country” and holding authority over the territory and population in trusteeship only until the occupation ends.<sup>113</sup> The Fourth Geneva Convention further states occupation “shall cease one year after the general close of military operations.”<sup>114</sup> Installing an administrative government is one method of governing in occupied territory to help ensure a temporary occupation.<sup>115</sup> However, the extent to which the occupied population realizes self-government is largely controlled by the occupying power. The burden of these obligations should incentivize ending the occupation, with Article 47 of the Fourth Geneva Convention providing that no agreement between “authorities of the occupied territories and the Occupying Power” can alter obligations to the occupied population.<sup>116</sup>

Despite these provisions governing belligerent occupation, Israel’s military administrative government together with the agreements from the 1990s, i.e., the Oslo Accords and the Paris Protocol, separates effective control of the territory from responsibility for the administration of services to the occupied population. The Oslo Accords place control of civil services with the PA in Areas A and B, while the Paris Protocol allows Israel to collect and distribute Palestinian taxes,<sup>117</sup> constraining

111. See BENVENISTI, *supra* note 24, at 241.

112. See BENVENISTI, *supra* note 79, at xi (“Occupation is a temporary measure for reestablishing order and civil life after the end of active hostilities”).

113. See Hague Regulations of 1907, *supra* note 105, art. 43; see Gross, *supra* note 21, at 26 (connecting the Mandate System’s notion of a “sacred trust” to the duties of an occupying power under Article 43 of the Fourth Geneva Convention); Adam Roberts, *What is Military Occupation?* 55 BRIT. Y.B. INT’L L. 249, 295 (1985) (“The Hague Regulations and the 1949 Geneva Convention IV can be interpreted as putting the occupant in a quasi-trustee role.”).

114. Fourth Geneva Convention, *supra* note 105, art. 6(3). The Fourth Geneva Convention originally reduced the articles that remained applicable after one year of occupation to Articles 1–12, 27, 29–34, 47, 49, 51, 52, 53, 59, 61–77, and 143. However Additional Protocol I, Art 3(b), which is considered customary international law, revised the reduction of provisions stating that the time limit no longer has significance. See BENVENISTI, *supra* note 24, at 80; YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION* 283 (2009).

115. See DINSTEIN, *supra* note 124, at 55. Administrative governments can help ensure temporality of an occupation, as alternative options, including no government or a puppet government, might endanger self-determination and nonannexation. See BENVENISTI, *supra* note 24, at 5–6.

116. Fourth Geneva Convention, *supra* note 104, art 47.

117. See Jodi Rudoren, *What the Oslo Accords Accomplished*, N.Y. TIMES (Sept. 30, 2015), <https://www.nytimes.com/2015/10/01/world/middleeast/palestinians-mahmoud-abbas-oslo-peace-accords.html> [https://perma.cc/5QN8-EHCX].

the PA's ability to provide services.<sup>118</sup> Meanwhile, Israel maintains full civil and military authority in the larger and more contiguous Area C, creating practical difficulties for the PA in governing and coordinating services between different locations. In Area C, differentiated legal regimes apply to Jewish and Palestinians residents. The Israeli military authority issues regulations to govern Palestinians in West Bank but applies Israeli law, through military orders instead of direct legislation, to Jewish settlers. This allows Israeli law to govern settlements without *de jure* annexation of the territory.<sup>119</sup>

The structure of the administrative government in West Bank in dividing responsibility for the wellbeing of the occupied population from control of the territory, does not exist within the framework of occupation law.<sup>120</sup> Israel invokes the Fourth Geneva Convention's requirement that an occupation be temporary to grant Palestinians limited capacity to self-govern and to justify subdividing the West Bank into Areas A, B, and C.<sup>121</sup> Israel cites this structure to argue Israel is not responsible for all the obligations of an occupying power under the Geneva Conventions, while nonetheless still maintaining effective control of the OPT and withholding recognition of Palestinian sovereignty.<sup>122</sup> The legal indeterminacy of this arrangement creates another form of control, allowing Israel to exploit alleged ambiguity in the law.<sup>123</sup> When faced with the ICJ's firm legal findings that the Fourth Geneva Convention applied in full to the OPT and Israel was responsible for Palestinians' human rights, the Israeli HCJ offered an abstracted interpretation of occupation law to detract from Israel's responsibilities to Palestinians and protect Jewish settlement in the West Bank.

### III. SEPARATION WALL CASES

The HCJ first considered the legality of the Separation Wall in *Beit Sourik Village Council v. The Government of Israel* (2003).<sup>124</sup> The HCJ ruled that the construction of the Separation Wall was legal, but

118. See DINSTEIN, *supra* note 114, at 58 (discussing the 1995 Israeli-Palestinian Interim Agreement transfer of responsibility to the PA government).

119. SEARD, *supra* note 28, at 126; *see also* GROSS, *supra* note 21, at 5 (describing examples of occupying powers attempting to denounce responsibility for the occupied population while maintaining a form of control).

120. See Fourth Geneva Convention, *supra* note 104, art. 47; *accord* Dugard, *supra* note 56, ¶¶ 6–7.

121. See GROSS, *supra* note 21, at 250.

122. See *id.* at 151.

123. See *id.* at 177, 255.

124. See HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 807 (2004).

the segment under consideration needed to be rerouted to avoid causing Palestinians disproportionate harm.<sup>125</sup> Just a week later, the ICJ issued its advisory opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (2004), as an authoritative interpretation of modern occupation law and the minimum guarantees owed to an occupied population.<sup>126</sup> The ICJ found the Separation Wall violated Palestinians' right to self-determination and other human rights.<sup>127</sup> The HCJ then issued a subsequent judgment in *Mara'abe v. The Prime Minister of Israel* (2005), adjusting its interpretation of international law in light of the ICJ decision, but not conceding the Separation Wall was illegal.<sup>128</sup> Both HCJ decisions depart meaningfully from the ICJ's advisory opinion and outline an alternative interpretation of occupation law.

Tracing the reasoning of the international and Israeli courts illustrates their contrary applications of international legal norms. These differences reveal efforts to alter an occupying power's obligations to the occupied population by exploiting the role of the Israeli national court to enforce international law. This analysis demonstrates the potential for national courts to legitimate state oppression of an occupied population by obscuring the conduct of state actors behind international law's neutral façade.

#### A. ICJ Advisory Opinion

As the principal adjudicatory body of the UN, the ICJ resolves contentious legal disputes brought by UN Member States and issues advisory opinions. In 2003, the UN General Assembly, during the Tenth Emergency Special Session, requested that the ICJ review the legality of the Israeli Separation Wall and issue an advisory opinion.<sup>129</sup> At the time of the request, no other judicial body had assessed the Separation

125. *Id.* ¶ 85.

126. See ICJ Advisory Opinion, 2004 I.C.J. 136 (July 9).

127. *Id.* ¶¶ 122, 137.

128. See HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* 60(2) PD 477, ¶ 100 (2005).

129. G.A. Res. ES-10/14, *supra* note 4, ¶¶ 22–23. Comprised of a fifteen-judge panel, advisory opinions are nonbinding but authoritative expressions of contested law. See INT'L COURT OF JUSTICE, *Advisory Jurisdiction*, <https://www.icj-cij.org/en/advisory-jurisdiction> (last visited Feb. 6, 2020) [<https://perma.cc/EW5C-D8JH>]. UN Member States have the opportunity to bring contentious, binding proceedings before the ICJ against other consenting Member States, instead of needing a resolution from the General Assembly for an advisory opinion. INT'L COURT OF JUSTICE, *Contentious Jurisdiction*, <https://www.icj-cij.org/en/contentious-jurisdiction> (last visited Feb. 15, 2020) [<https://perma.cc/2VNY-H5R2>] (“Only States may apply to and appear before the International Court of Justice. International organizations, other authorities and private individuals are not entitled to institute proceedings before the Court.”).

Wall's legality. It was also the first ICJ decision on occupation law.<sup>130</sup> The precise legal question before the Court was to determine "the legal consequences arising from the construction of the Wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem . . . considering the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions".<sup>131</sup>

Contesting the ICJ's jurisdiction, Israel did not participate meaningfully in the proceedings. The factual record for the purpose of the Separation Wall and its impacts was supplied by parties' briefings and special rapporteur reports.<sup>132</sup> Assessing the Separation Wall in its entirety, the ICJ held that international law prohibited the Wall for (1) violating Palestinians' right to self-determination by creating a structure that gives expression to Israel's illegal confiscation and destruction of property and construction of settlements, and (2) violating international human rights conventions by impeding Palestinian freedom of movement, right to work, access to health, access to education, and right to an adequate standard of living.<sup>133</sup>

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130. Susan C. Breau, *The Humanitarian Law Implications of the Advisory Opinion on the Legal Consequences of the Wall in the Occupied Palestinian Territory*, in TESTING THE BOUNDARIES OF INTERNATIONAL HUMANITARIAN LAW 191 (Susan C. Breau & Agnieszka Jachec-Neale eds., 2006).

131. G.A. Res. ES-10/14, *supra* note 4, ¶ 23.

132. For an example of the factual findings of the Special Rapporteur, *see, e.g.*, John Dugard (Special Rapporteur of the Commission on Human Rights), *Question of the Violation of Human Rights in the Occupied Arab Territories, Including Palestine*, U.N. Doc. E/CN.4/2004/6 (Sept. 8, 2003).

133. ICJ Advisory Opinion, 2004 I.C.J. 136, ¶ 134 (July 9). As researchers have noted, the ICJ decision is not free from criticism. *See, e.g.*, GROSS, *supra* note 21, at 274–77 (disagreeing with the ICJ's reasoning that Article 51 of the UN Charter is not applicable because it is reserved for an armed attack by one state against another); Ardi Imseis, *Critical Reflections on the International Humanitarian Law Aspects of the ICJ Wall Advisory Opinion*, 99 AM. J. INT'L L. 102, 110 (2005) (lamenting the ICJ's lack of explanation for the nonapplicability of military necessity and the duty of third-party states not to recognize the illegal situation); David Kretzmer, *The Advisory Opinion: The Light Treatment of International Humanitarian Law*, 99 AM. J. INT'L L. 88, 94 (2005) (arguing security interests of civilians in illegal settlements could be a legitimate measure of military necessity). Regarding the ICJ's ruling that Article 51 does not apply in the context of military occupation, Gross acknowledges that allowing an occupying power to operate militarily against an occupied territory would give more power to an occupying power than the law of occupation intended. *See* GROSS, *supra* note 21, at 275 (noting Judge Kooijmans includes this explanation in his separate opinion).

## 1. Humanitarian Law Violations

In reaching its first holding, the ICJ reviewed Israel's obligations to respect private property and the prohibition on settlement.<sup>134</sup> The ICJ found the confiscation and destruction of Palestinian property resulting from the Separation Wall's construction violated protections of private property under Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.<sup>135</sup> Article 46 of the Hague Regulations states, "[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected. Private property cannot be confiscated."<sup>136</sup> There is no qualifying provision within this article which allows for violations due to military necessity.<sup>137</sup> Article 52 of the Hague Regulations states requisitions shall not be demanded of municipalities or inhabitants of an occupied territory, except for the needs of the army of occupation.<sup>138</sup> Article 53 of the Fourth Geneva Convention prohibits the destruction of personal property except "where such destruction is rendered absolutely necessary by military operations."<sup>139</sup> The Court did not believe Israel's motivations for constructing the Separation Wall met the high standard of absolute necessity.<sup>140</sup> Judges Hisashi Owada and Pieter H. Kooijmans clarified in their separate opinions that under the conditions of proportionality, no substantiation of military need could justify the extent of damage caused to Palestinian property by the Separation Wall.<sup>141</sup>

134. Applying Article 6 of the Fourth Geneva Convention, the ICJ limited its consideration of humanitarian law violations caused by the Separation Wall because the occupation had extended beyond a year. *See supra* note 114 (discussing that Additional Protocol I removed the time limit on the application of certain Geneva Conventions provisions); *see also* DINSTEIN, *supra* note 114, at 283 (calling the ICJ's statement, that fewer provisions of the Geneva Conventions apply one year after the start of the occupation, "bewildering").

135. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 132. The ICJ's discussion on the confiscation and destruction of private property and lack of military exigency, in particular, has been criticized for lacking adequate explanation. *See* GROSS, *supra* note 21, at 274 ("Concerning the handling of such issues as military exigency, proportionality of the limitation of rights in the name of national security and public order, and the question of 'necessity,' hardly any explanation can be found for the ICJ's conclusions."); Imseis, *supra* note 133, at 111–12 (arguing the ICJ missed an opportunity to contribute to the development of law on military necessity in that military necessity relates strictly to the security interests of the military forces of the occupying power not to settlers).

136. Hague Regulations of 1907, *supra* note 105, § 3, art. 46.

137. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 135.

138. The majority opinion did not explain its reasoning as to why Art. 52 did not apply in this context. *See* Kretzmer, *supra* note 133, at 99.

139. Fourth Geneva Convention, *supra* note 104, art. 53.

140. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 135.

141. *See id.* ¶ 24 (opinion of Owada, J.) ("Furthermore, these impacts are so overwhelming that I am ready to accept that no justification based on the 'military exigencies,' even if fortified by substantiated facts, could conceivably constitute a valid basis for

The ICJ also assessed the presence of settlers in the West Bank under Article 49(6) of the Fourth Geneva Convention.<sup>142</sup> The ICJ clarified this provision includes acts taken by the occupying power to encourage transfers of parts of its population into the occupied territory.<sup>143</sup> While the Court did not consider the legality of the settlements themselves, the construction of the Separation Wall to surround the settlements gave “expression in loco to the illegal measures taken by Israel with regard to Jerusalem and the settlements” which “severely impedes the exercise by the Palestinian people of its right to self-determination, and is therefore a breach of Israel’s obligation to respect that right.”<sup>144</sup> Concerned the Separation Wall would not be a temporary measure, the Court believed the Wall’s construction to encompass the settlers constituted annexation of territory.<sup>145</sup>

The Court also explained Article 23(g) from Section II of the Hague Regulations, which allows the seizure or destruction of property as necessary for war, is inapplicable to the West Bank because only Section III of the Hague Regulations applies to occupied territory.<sup>146</sup> Section II of the Hague Regulations applies during military

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precluding the wrongfulness of the act on the basis of the stringent conditions of proportionality.”); *id.* ¶ 34 (opinion of Kooijmans, J.) (“And in my view it is of decisive importance that, even if the construction of the Wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test. The route chosen for the construction of the Wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court.”); *see also* Gross, *supra* note 21, at 274.

142. Fourth Geneva Convention, *supra* note 104, art. 49(6).

143. *See* ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 120.

144. *Id.* ¶ 122.

145. *See id.* ¶ 121.

146. *Id.* ¶ 124–25; Hague Regulations of 1907, *supra* note 105, § 2, art. 23(g); *see* Kenneth Watkin, *Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict*, 98 AM. J. OF INT’L L. 1, 28 (2004). Both Kretzmer and Arai-Takahashi argue that during protracted violence, the sharp distinction between occupation and conflict cannot be sustained. Kretzmer argues Article 23(g) could apply to the Separation Wall by extending the Hague Regulations section on hostilities through analogy to the occupied territories, or by accepting the Israeli authorities invented classification of the situation in West Bank and Gaza as “armed conflict, short of war.” Kretzmer, *supra* note 133, at 95–96; *see infra* note 150. Yutaka Arai-Takahashi argues the structure of international humanitarian law never intended to maintain a strict dichotomy between the regulations which apply to occupation and the regulations which apply to armed conflict, and that occupation law needs to be reconceptualized to include, as a rule, the provisions governing conduct during hostilities under the Hague Regulations. YUTAKA ARAI-TAKAHASHI, *THE LAW OF OCCUPATION: CONTINUITY AND CHANGE OF INTERNATIONAL HUMANITARIAN LAW, AND ITS INTERACTION WITH INTERNATIONAL HUMAN RIGHTS LAW* 52–53 (2009).



operations, which ended in the West Bank in 1967.<sup>147</sup> The law of occupation was constructed primarily for the benefit of the occupied population.<sup>148</sup> Therefore, distinctions between the law of armed conflict and the law of occupation should be guarded to prevent security rationales from overriding an occupying power's obligations to the occupied population, including to employ standard law enforcement measures instead of resorting to military force.<sup>149</sup> Where prolonged occupation complicates adherence to occupation law, as here where the occupation endures for decades and cycles of resistance and repression are recurrent without rising to armed conflict, occupation law's preservationist framework works to limit the occupant's power and incentivize an end to the occupation.<sup>150</sup>

## 2. Human Rights Law Violations

The ICJ's second holding concerned protection of Palestinian human rights in the occupied territory. The Court affirmed humanitarian law is *lex specialis*, such that international human rights law dictates the obligations of the occupying power where international humanitarian law is otherwise silent.<sup>151</sup> International human rights law applies extraterritorially where an occupying power has effective control of the territory.<sup>152</sup>

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147. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 124–25.

148. See BENVENISTI, *supra* note 79, at xi.

149. See the Expert Report produced by the International Committee of the Red Cross for discussion on complications of applying a conduct of hostilities model in an occupied territory compared to the usual police enforcement model. INTERNATIONAL COMMITTEE OF THE RED CROSS, EXPERT MEETING: OCCUPATION AND OTHER FORMS OF ADMINISTRATION OF FOREIGN TERRITORY 15, 109 (2012), <https://www.icrc.org/en/doc/assets/files/publications/icrc-002-4094.pdf> [<https://perma.cc/V33H-67YB>]. The experts found it is unclear, under humanitarian law, when the conduct of hostilities model could apply, necessitating an evaluation of whether the conflict rose to the level of a noninternational armed conflict under Article 3 of the Geneva Conventions and whether the confrontations pertained to the original armed conflict or a new conflict. See *id.* at 15.

150. Israel created the category of “armed conflict, short of war” to circumvent the need to distinguish between conflict and protest. See ERAKAT, *supra* note 24, at 187. Israel used this category to justify applying military force to the events of the Second Intifada instead of using law enforcement. See *id.*; see also Amos Barshad, *Extraordinary Measures*, INTERCEPT (Oct. 7, 2018), <https://theintercept.com/2018/10/07/israel-palestine-us-drone-strikes> [<https://perma.cc/YBW6-KPF4>] (discussing Gabriella Blum's experience using “armed conflict, short of war” as Israel's legal justifications for drone warfare and targeted assassinations as military necessity).

151. See ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 106; see also Lubell, *supra* note 107, at 318 (citing the ICJ *Advisory Opinion* as recognition that international human rights apply in peace and conflict).

152. As will be demonstrated by the HCJ decisions, the incorporation of human rights law into the legal framework of occupation may not, in practice, broaden individual protections but may create legal vagueness that facilitates further control over the occupied

The ICJ reviewed violations of international human rights law under the International Convention on Civil and Political Rights (ICCPR), the International Convention on Economic, Social and Cultural Rights (ICESCR), and the UN Convention on the Rights of the Child (CRC).<sup>153</sup> The ICJ viewed Israel's duties under these three human rights conventions as following the State's territorial jurisdiction.<sup>154</sup> Citing the 2003 decision by the Human Rights Committee, which monitors implementation of the ICCPR, the ICJ concluded Israel remained responsible for protecting Palestinian human rights due in part to Israel's longstanding presence in the OPT and ambiguity over the future status of the territories.<sup>155</sup> The ICJ's decision focused on violations under Article 12 (freedom of movement) of the ICCPR, Articles 6 and 7 (right to work and working conditions) of the ICESCR, and similar provisions under the CRC.<sup>156</sup> The ICJ stated the closed areas between the Green Line and the Separation Wall, and the accompanying permit regime, restrict Palestinian freedom of movement, particularly in urban areas where, as in the city of Qalqiliya, individuals could only leave through a single military checkpoint. The Court also recounted the Separation Wall's "serious repercussions for agricultural production" through confiscation of fertile lands, destruction of olive and citrus groves, and loss of access to water wells.<sup>157</sup> Finally, Israel's obligation to protect Palestinians' right to work includes a duty to refrain from restricting their access to employment through construction of the Wall.<sup>158</sup>

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population. See Gross, *supra* note 21, at 346. Benvenisti argues occupation law should recognize an occupying power will pursue security of military forces above the human rights obligations owed to an occupied population. See BENVENISTI, *supra* note 24, at 75. Noam Lubell alternatively states while certain civil and political rights may be violated during a military operation (through derogation under the ICCPR), economic and social rights, like the rights to health, education, and employment should always be observed as they are fundamental to individual livelihood. See Lubell, *supra* note 107, at 330.

153. The human rights provisions that the ICJ assessed, include: ICCPR Articles 12 (freedom of movement) and 17 (freedom from arbitrary interference); ICESCR Articles 6 (right to work), 7 (working conditions), 10 (protections for families and children), 11 (adequate standard of living), 12 (health), 13 (education), and 14 (compulsory free primary education); and under the CRC Articles 16 (privacy), 24 (health), 27 (standard of living), and 28 (education). See ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 128, 130–31.

154. *Id.* ¶ 109, 112, 113.

155. *Id.* ¶ 109–11.

156. *Id.* ¶ 128–31.

157. See *id.* ¶ 133.

158. See *id.* ¶ 112, 133. The ICJ decision should not be viewed as an antihegemonic perspective on international law, as evidenced by the popular interpretation of the Court's ruling that it reinforces Israel's ability to construct a barrier on its borders. See, e.g., Richard Falk (Special Rapporteur on the Situation of Human Rights in the Palestinian Territories), *Report of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territories Occupied since 1967*, ¶ 11, U.N. Doc. A/HRC/25/67 (Jan. 14, 2014) ("The crucial point

### 3. Proportionality of Violations

Finding the violations of humanitarian law resulting from the Separation Wall's route "cannot be justified by military exigencies or by the requirements of national security or public order," the ICJ did not assess the proportionality of the humanitarian law violations against the alleged Palestinian security threat.<sup>159</sup> However, in regards to human rights, the ICJ acknowledged the ICCPR permits limitations on freedom of movement.<sup>160</sup> The Israeli military authority may limit Palestinians' movements for the sake of national security, but the imposition "must be the least intrusive instrument."<sup>161</sup> The ICJ determined the construction of the Separation Wall is not proportional, because it is not enough for the measures taken to be directed at providing security but must also be necessary to do so.<sup>162</sup> Rights under the ICESCR are also subject to restrictions that are "compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."<sup>163</sup> Construction of the Separation Wall fails to meet this condition because of the extent of restrictions on Palestinian enjoyment of their economic, social, and cultural rights.<sup>164</sup> Finding construction of the Separation Wall to be illegal, the ICJ proposed for relief dismantling the Separation Wall, reparations to those harmed by its construction,

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is that it would not have been unlawful for Israel to build a security wall on an established international border, but to encroach unilaterally on territory occupied in 1967 was a flagrant violation of international law."). For example, the ICJ's analysis of Palestinians' right to work focuses primarily on agricultural production and lost access to farmland but does not discuss the impact of the Separation Wall on the cross-border commercial labor market that Israel cultivated. *See supra* text accompanying notes 29–32. As Israel facilitated the creation of an economically dependent relationship with Palestinians in the West Bank, instituting policies which impaired development of a self-reliant, postoccupation Palestinian economy, the construction of a wall even on the Green Line would have detrimental impacts on the rights and interests of Palestinians in the West Bank. *See* U.N. CONFERENCE ON TRADE AND DEV., *supra* note 39, at 15. This reinforcement of international laws' regime of border control demonstrates Balakrishnan Rajagopal's insight that, "human rights discourse has also turned out to be a core part of hegemonic international law, reinforcing pre-existing imperial tendencies in world politics." Balakrishnan Rajagopal, *Counter-hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD Q.* 767–83, 768 (2006). For a discussion of how the ICJ's decision could have provided more support for Israel's human rights obligations as the occupying power, see Breau, *supra* note 130, at 191.

159. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 137.

160. G.A. 2200A (XXI), International Covenant on Civil and Political Rights, art. 12(3) (Dec 16, 1966).

161. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 136; *see also* Lubell, *supra* note 107, at 331.

162. ICJ *Advisory Opinion*, 2004 I.C.J. ¶ 136–37.

163. *Id.* ¶ 136.

164. *Id.*

and all UN Member States' recognition of the illegal situation resulting from the Separation Wall.<sup>165</sup>

#### B. HCJ Separation Wall Decisions: Beit Sourik and Mara'abe

The HCJ issued its first opinion on the legality of the Separation Wall in 2004 in *Beit Sourik Village Council v. The Government of Israel*, just nine days prior to the ICJ *Advisory Opinion*. In that case, the HCJ determined the segment of the Wall under consideration was illegal as constructed, requiring the Israeli military (Israel Defense Forces, "IDF") to reroute to an alternative path to cause less harm to the local Palestinians.<sup>166</sup> Despite what appears as a favorable ruling for the Palestinian petitioners, the decision validated the underlying project of constructing the Separation Wall and provided the HCJ with its own body of precedent, to apply even after the ICJ issued its advisory opinion, regarding the scope of military necessity and the relevance of Article 43 of the Hague Regulations to the protection of settlers.<sup>167</sup>

The next challenge the HCJ heard against a segment of the Separation Wall was *Mara'abe v. The Prime Minister of Israel* concerning the portion of the Wall built around Alfei Manashe, a settlement built over two miles east of the Green Line. The HCJ's analysis again legitimized construction of the Wall and created a framework to apply to subsequent challenges of the Separation Wall. Under this framework, the Separation Wall is legal, even where it encompasses settlements, as long as it was built for a security purpose and the Court finds the harm to Palestinians is proportional to the security threat mitigated.<sup>168</sup>

Critically, and as is being repeated in law school casebooks such as *International Law: Norms, Actors, Process* by Dunoff, Ratner, and Wippman, the HCJ claimed its decisions in *Beit Sourik* and *Mara'abe* were founded on similar normative principles as the ICJ decision, but the different factual materials presented to the courts explain the difference in outcomes.<sup>169</sup> The HCJ stated, "[d]espite the fact that the data which each court received regarded the same wall/fence, the difference

165. *Id.* ¶ 151–52, 159.

166. See HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 807, ¶ 85 (2004).

167. See Geoffrey R. Watson, *The "Wall" Decisions in Legal and Political Context*, 99 AM. J. INT'L L. 6, 8 (2005); see also SHARON WEILL, *THE ROLE OF NATIONAL COURTS IN APPLYING INTERNATIONAL HUMANITARIAN LAW* 36 (2014).

168. See HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* 60(2) PD 477, ¶¶ 110–16 (2005).

169. See *id.* ¶¶ 60–62. The factual differences referenced by the court include: (1) Israel's security-military justification for the Wall, (2) the sources of information the ICJ used, and (3) the ICJ considering the entire Wall in its investigation. *Id.*

between each set of data is deep and great. This difference is what ultimately led to the contrary legal conclusions.”<sup>170</sup> However, the difference between the cases is not in the factual difference, but in the framing of the issues.<sup>171</sup> By obscuring these differences, the HCJ promoted the perception of Israel’s compliance with international legal norms.<sup>172</sup>

For example, at the outset of its decisions, the HCJ declined to decide whether the Fourth Geneva Convention applies fully to the OPT, a view in contrast with international opinion. Israel’s position was that the Fourth Geneva Convention does not apply *de jure* to the OPT because Palestine was not considered a sovereign state prior to Israel’s occupation of the territory.<sup>173</sup> The HCJ states it is enough, for the purposes of its review, that the Court voluntarily applies the humanitarian provisions of the Fourth Geneva Convention to the construction of the Separation Wall.<sup>174</sup> The HCJ’s selection of which provisions of occupation law to apply in the OPT demonstrates the Court’s manufactured ambiguity of the Palestinian position under international law.<sup>175</sup> Because Palestine was not viewed as a sovereign state prior to being occupied, the HCJ claims the Fourth Geneva Convention’s protections do not apply as a matter of law.<sup>176</sup> In denying the application of occupation law to the West Bank, the HCJ draws on the exclusionary reasoning of the European colonial and mandate powers that occupation law was reserved for those “civilized nations” that had achieved sovereignty.

The normative positions the HCJ claimed to hold in common with the ICJ included: (1) Israel holds the West Bank as the belligerent occupying power; (2) the occupying state is not permitted to annex the occupied territory; (3) the occupying state must act according to

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170. *Id.* ¶ 61.

171. See Nimer Sultany, *Activism ad Legitimation in Israel’s Jurisprudence of Occupation*, 23(3) SOC. & LEGAL STUD. 315, 315–39 (2014).

172. Citing Watson, the HCJ stated, “The basic normative foundation upon which the ICJ and the Supreme Court in *The Beit Sourik Case* based their decisions was a common one.” HCJ *Mara’abe* 60(2) PD ¶ 57 (citing Watson, *supra* note 167). However, the HCJ misstates Watson’s argument. Watson argues, “The *Wall* advisory opinion and the *Beit Sourik* decision[s] share a few characteristics, but on the whole they reflect fundamentally different judicial approaches to the problem of the security fence. Of course, some of these differences derive from the different procedural postures of the cases and from the very different characteristics of the courts in question. But most of the differences are deeper . . . The differences between the opinions outweigh the similarities.” Watson, *supra* note 167, at 21, 24.

173. See Watson, *supra* note 167, at 12.

174. HCJ *Mara’abe* 60(2) PD ¶ 14.

175. See GROSS, *supra* note 21, at 171–72.

176. ERAKAT, *supra* note 24, at 10 (“Occupation law cannot apply itself. Its meaning and application are mediated by interpretation”).

the Hague Regulations and the Fourth Geneva Convention (4) human rights law and humanitarian law apply in the occupied territory;<sup>177</sup> (5) the legality of the Separation Wall is determined by Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention; (6) the Wall impedes several Palestinian rights; and (7) the harm to Palestinian residents would not violate international law if the harm was a result of military necessity, national security, or public order requirements.<sup>178</sup>

But several of the normative similarities cited by the HCJ are exaggerated or falsely declared. The HCJ asserted Israel complies with (2) the nonannexation requirements, while also permitting the transfer of Israeli settler populations into West Bank, in direct violation of the Fourth Geneva Convention and the ICJ's opinion.<sup>179</sup> The HCJ also claimed to (5) apply only Articles 46 and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention, but proceeds to argue Article 23(g) of the Hague Regulations applies to allow seizure of property as a necessity of war, a provision the ICJ expressly determined was not relevant in the context of occupation.<sup>180</sup> Finally, the HCJ claimed (7) harm to Palestinian residents does not violate international law if the harm was caused as a result of military necessity, national security or public order requirements.<sup>181</sup> However, the ICJ stressed the inverse point, that military necessity, national security and public order could not justify the extent of the harm being caused to Palestinians by the Separation Wall.<sup>182</sup>

### 1. On Annexation and Settlement

In *Mara'abe*, the HCJ facially agreed annexation is prohibited under Article 49(6) of the Fourth Geneva Convention. However, the Court excused the presence of settlers in the West Bank under the presumption that they, and the Separation Wall built to surround them, are subject to the temporary nature of occupation.<sup>183</sup>

Notably, the HCJ cited Article 43 of the Hague Regulations and the duty of the IDF military commander to "take all measures within his

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177. This issue was not raised in *Beit Sourik*. See HCJ *Mara'abe* 60(2) PD ¶ 27.

178. *Id.* ¶ 57.

179. *Id.* ¶ 18.

180. *Id.* ¶ 17.

181. *Id.* ¶ 18.

182. ICJ Advisory Opinion 2004 I.C.J. 136, ¶¶ 136–37 (July 9).

183. See HCJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) PD 807, ¶ 27 (2004) ("This Court has emphasized time and time again that the authority of the military commander is inherently temporary, as belligerent occupation is inherently temporary.").

power to restore, and, as far as possible, to ensure public order and life, respecting the laws in force in the country.”<sup>184</sup> Despite acknowledging that under the Fourth Geneva Convention this provision is meant to apply only to “protected persons,” or the *occupied* population, the HCJ asserted a duty is also owed to Israeli settlers in the OPT.<sup>185</sup> The HCJ referenced Professor David Kretzmer for support of this proposition: “[A] theory that posits that the fact that civilians are living in an illegal settlement should prevent a party to the conflict from taking any measures to protect them would seem to contradict fundamental notions of international humanitarian law.”<sup>186</sup> However, if the occupying power’s concern is security, other less damaging means of protecting settlers are available. For example, as Kretzmer argues, Article 49(6) would have permitted the Israeli military authority to relocate the settler population out of the West Bank.<sup>187</sup>

The HCJ’s ruling that settlers are not “protected persons” creates instead a separate legal category of protection outside the scope of occupation law. In creating this extralegal category, the HCJ diminishes protection of Palestinian rights by repositioning Palestinians outside full application of the Fourth Geneva Convention.<sup>188</sup> Including settlers under the duty of the IDF military commander places the rights and protections of settlers in direct contention with the rights and protections of Palestinians, through the proportionality test, discussed below.<sup>189</sup> This shift in the proportionality framework places the onus for settlers’ rights directly on the Palestinian “protected” population and inverts the protections granted to individuals living under occupation under international law.<sup>190</sup>

## 2. Military Necessity

Referencing the reasoning in *Beit Sourik*, that the Separation Wall has a military purpose as an obstacle “intended to take the place of combat military operations,” the HCJ again found justifiable the

184. HCJ 7957/04 Mara’abe v. The Prime Minister of Israel 60(2) PD 477, ¶ 17 (2005).

185. *Id.* ¶ 18.

186. *Id.* ¶ 20 (citing Kretzmer, *supra* note 133, at 93).

187. See Kretzmer, *supra* note 133, at 94 (citing the Fourth Geneva Convention, *supra* note 104, art. 49); see also Breau, *supra* note 130, at 216.

188. David Kretzmer, *The Law of Belligerent Occupation in the Supreme Court of Israel*, 94 INT’L REV. RED CROSS 207, 226 (2012) (acknowledging the HCJ ruling weakened protections afforded to protected persons under international law).

189. Gross argues the HCJ grounds its determination on the scope of the IDF military commander’s responsibility in Israeli constitutional law and Israeli Basic Laws, contrary to Article 43 of the Hague Regulations. See Gross, *supra* note 21, at 353.

190. See *id.* at 297.

construction of the Separation Wall as a military necessity.<sup>191</sup> The HCJ decision begins with a description of the violence of the Second Intifada, emphasizing the impact of the conflict in which 1000 Israeli citizens died and describing the nature of the Palestinian attacks as “mega-terrorism.”<sup>192</sup> The Court did not similarly detail the impact of the violence on Palestinians—that as of November 2005, 3366 Palestinian died and 29,000 had been wounded.<sup>193</sup> The HCJ’s one-sided discussion places the Separation Wall cases within a longstanding narrative invoking a Palestinian threat to justify employing emergency measures.<sup>194</sup> By categorizing all Palestinian methods of resistance as terrorist infiltration of Israeli population centers,<sup>195</sup> the Court shifts the focus from the “absolute necessity” standard required by occupation law to a generalized reference to “security” for settlers and Israeli citizens.<sup>196</sup>

The Court’s rhetoric also blurs distinctions between occupation law and the law of armed conflict to support the seizure of Palestinian land in the West Bank for construction of the Wall.<sup>197</sup> The HCJ asserted Article 23(g) of the Hague Regulations applies to the context in the West Bank,<sup>198</sup> unlike the ICJ that found this provision, which appears in Section II of the Hague Regulations, only applicable during an armed conflict.<sup>199</sup> However, the HCJ stated Israel need not rely on Article 23(g).<sup>200</sup> The HCJ claimed the Wall is a necessity of war, and to that end, confiscation of Palestinian private property is permitted under Articles 23(g) and 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention.<sup>201</sup> However, as Professor Yoram Dinstein points out, and as the ICJ notes, Article 52 of the Hague Regulations and Article 53 of the Fourth Geneva Convention cannot alone justify construction of the Separation Wall. According to Dinstein, Article 52

191. See H CJ 7957/04 Mara’abe v. The Prime Minister of Israel 60(2) PD 477, ¶ 17 (2005).

192. *Id.* ¶ 1.

193. See GROSS, *supra* note 21, at 278–79.

194. See REYNOLDS, *supra* note 10, at 211.

195. H CJ Mara’abe 60(2) PD ¶ 1.

196. See *id.* ¶¶ 17–19.

197. Similar to previous colonial settlers, some Israeli nationalists consider their occupation of the West Bank to be an introduction of Israeli governance and civilization and a liberation of the OPT, from the hands of dangerous Palestinian terrorists. See Gross, *supra* note 21, at 9.

198. H CJ Mara’abe 60(2) ¶ 17.

199. ICJ Advisory Opinion, 2004 I.C.J. 136, ¶ 124 (July 9).

200. H CJ Mara’abe 60(2) ¶ 17.

201. *Id.* ¶¶ 34, 74. The HCJ applied Article 23(g) of the Hague Regulations in *Beit Sourik*. H CJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) PD 807, ¶ 32 (2004).



of the Hague Regulations concerns requisitions in kind and services, not immovable property, and Article 53 of the Fourth Geneva Convention discusses only the destruction of property, not seizure of land.<sup>202</sup>

Instead, the HCJ emphasized the violence of the Second Intifada to support its determination that the law of armed conflict applies, and the confiscation of Palestinian property is permitted as a military necessity. The Court's reasoning demonstrates Israel's repeated use of emergency powers, to govern Palestinians under the state's authority. Israel employed emergency powers first against Palestinians living within Israel's 1948 boundaries, then to the OPT after 1967.<sup>203</sup> In those instances, Israel's policies for dispossessing Palestinians of their lands or freedom cited national legislation, laws from the British Mandate, and even Ottoman law.<sup>204</sup> Here, the Court adapted international humanitarian law to justify settler expansion through military necessity.

### 3. Proportionality Test

Unlike the ICJ *Advisory Opinion*, the HCJ's finding that the Wall qualifies as a military necessity led the HCJ to employ a proportionality test to determine if the route of this segment of the Separation Wall was legal. The three subtests of the proportionality test include: (1) Whether the purpose of the Wall rationally relates to the means, (2) whether the path of construction is the least harmful for its objective, and (3) whether the harm to individual Palestinians is proportional to the security benefit.<sup>205</sup> In assessing the first and second subtests, the Court defers to the decisions made by the IDF military commander.<sup>206</sup> Ultimately, the HCJ ruled that while the Separation Wall was an appropriate security measure under international law, the route of the segment at issue failed under the second subtest. Believing a less harmful alternative route was available, the Court ordered the military commander to consider other possible routes that would not cut off five Palestinian villages in an enclave, but that could still deviate from the Green Line to encircle Alfei Manashe.<sup>207</sup>

Despite not reaching the final question on whether the harm to Palestinians caused by this segment of the Wall was proportionate to the security benefit, in both *Beit Sourik* and *Mara'abe*, the HCJ sharpened

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202. DINSTEIN, *supra* note 114, at 250.

203. REYNOLDS, *supra* note 10, at 224–27.

204. *Id.* at 219, 236.

205. See HCJ *Mara'abe* 60(2) PD ¶ 30.

206. See *id.* ¶¶ 31–32.

207. See *id.* ¶¶ 115–16. The *Mara'abe* Court discussed without deciding whether the third subtest was satisfied by the Wall's route. *Id.*

its proportionality framework. The HCJ used the principal of proportionality in earlier cases concerning the occupation.<sup>208</sup> In the Separation Wall cases, the HCJ cast its proportionality test from Israeli constitutional law into the language of international law, and incorporated settlers within that framework as a legitimate security interests of the state.<sup>209</sup> The resulting proportionality framework authorizes the IDF military commander to balance the security interests of the state, army, and settlers within the occupied territory against the individual rights of the local Palestinian population.<sup>210</sup>

The proportionality test is a rational legal device that gives the appearance of neutrality in balancing the rights of similarly situated persons.<sup>211</sup> However, its use obscures the asymmetric rights enjoyed by settlers and Palestinians within and outside the Court. This imbalance results, in part, from the ICJ's holding, discussed above, that international humanitarian law is *lex specialis*, i.e., international human rights law applies if not displaced by the law of occupation.<sup>212</sup> The HCJ's decisions capitalized on the "indeterminacy of rights" to redefine the boundaries of applicable law and assert the rights of the settlers against the rights of the protected occupied population.<sup>213</sup>

The HCJ's treatment of human rights law undermines the rights of the Palestinian population in the West Bank, concealing the structural inequalities of occupation behind the principle of proportionality.<sup>214</sup> In weighing settlers' security against Palestinian assertions of rights, the

208. *Id.* ¶ 30.

209. *See id.* ¶¶ 19, 20, 23; *see GROSS, supra* note 21, at 283; Sultany, *supra* note 171, at 320.

210. HCJ *Mara'abe* 60(2) PD ¶ 28; *see GROSS, supra* note 21, at 298. The HCJ's reasoning overlooks how Israeli settlers might also oppose the Wall. For example, testimony from residents of Mevasseret Zion, located on the Israeli side of the Green Line, stated the route of the Separation Wall, separating Palestinian residents of Beit Sourik (on the Palestinian side of the Green Line) from their farm lands could damage the good relations the neighbors enjoyed. *See* HCJ 2056/04 Beit Sourik Village Council v. Government of Israel 58(5) PD 807, ¶ 69 (2004).

211. *See GROSS, supra* note 21, at 283 (noting the HCJ's proportionality framework derives from Israeli constitutional and administrative law, intended to balance the rights of citizens for the collective good); *see also WELL, supra* note 167, at 32; Sultany, *supra* note 171, at 332. Gross describes some obvious ways in which Israeli settlers in West Bank enjoy rights Palestinians do not, such as the opportunity to participate in the selection of the government of the occupying power and not being subject to the permitting regime which inhibits Palestinian freedom of movement or access to healthcare, education, and employment. *See GROSS, supra* note 21, at 273, 298.

212. *See GROSS, supra* note 21, at 348–49, 371.

213. Sultany, *supra* note 171, at 318; *see also GROSS, supra* note 21, at 376 (stating the innate abstraction and universality of human rights assists in the legitimization of invoking Israeli human rights to violate Palestinian rights).

214. *See GROSS, supra* note 21, at 349.

test weaponizes the presence of settlers in the occupied territories. This version of proportionality upends the logic of Article 43 of the Hague Regulations and the principle of trusteeship under occupation law, by limiting the rights of the occupied for the sake of the settlers.<sup>215</sup> Settlers are thereby reframed as the native occupant threatened by the intruding violence of Palestinian resistance.

Invoking a proportionality test also provides flexibility for the Court to validate the underlying project of the Separation Wall while only curbing the most extreme abuses resulting from the IDF military commander's discretionary authority.<sup>216</sup> The HCJ's analytical scope into the harms to Palestinians is intentionally limited by the practice of assessing only a single segment of the Separation Wall at a time. The Court does not account for collective harms against Palestinians, further decontextualizing the HCJ's analysis from the systemic harms of occupation.<sup>217</sup> Additionally, due to the court's deference to the military commander in determining the appropriate route, the most effective way for Palestinian petitioners to demonstrate they experience disproportionate harm is by identifying an alternative route that causes them less harm. This leads only to redirecting the Separation Wall instead of delegitimizing its construction.<sup>218</sup> While the HCJ *Mara'abe* decision garnered attention for ordering the military commander to change the route of the Separation Wall, the decision's legacy ultimately was the legitimation of the Separation Wall and creation of a proportionality framework whereby Palestinian rights are sacrificed for the maintenance of the settler project.<sup>219</sup>

#### IV. IMPACTS OF THE HCJ BEIT SOURIK AND MARA'ABE DECISIONS

The HCJ decisions validated Israeli policy regarding the Separation Wall. *Beit Sourik* and *Mara'abe* now serve as precedent for their articulations of the need for security against Palestinians; the authority of the IDF military commander to act in the interest of Israeli settlers;

215. See *id.* at 361; PERUGINI & GORDON, *supra* note 51, at 102 (discussing the use of human rights language by courts and NGOs to defend settler activity in the West Bank).

216. See Sultany, *supra* note 171, at 332; see also GROSS, *supra* note 21, at 11, 36 (calling the idea of an independent IDF military commander a "fiction" in the context of the occupied territories, when they clearly operates as the "long arm of the government" and its policies).

217. See GROSS, *supra* note 21, at 316.

218. See HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* 60(2) PD 477, ¶ 116 (2005); HCJ 2056/04 *Beit Sourik Village Council v. Government of Israel* 58(5) PD 807, ¶ 85 (2004) ("There is no escaping, therefore, a renewed examination of the route of the fence, according to the standards of proportionality that we have set out.").

219. See GROSS, *supra* note 21, at 313.

and the proportionality test. These cases support Israel's state practice which challenges the framing of modern occupation law as articulated by the ICJ and which is being repeated in scholarship and in other international judicial bodies.

#### A. Legitimization of the Separation Wall

Arguably, the *Mara'abe* litigation created a framework to restrain construction of portions of the Separation Wall, by making available to individual petitioners a path to challenge arbitrary seizure of land.<sup>220</sup> HCJ petitions have successfully reduced the amount of Palestinian land appropriated for the Separation Wall—from 16 percent of the West Bank to 8 percent.<sup>221</sup> However, the HCJ's legal reasoning ensures any land appropriated by the Israeli military is justified by this same framework.<sup>222</sup> Ilan Katz, a retired IDF Colonel and former Deputy Military Advocate General (2000–2003) stated, “at the end of the day I think that, thanks to the court, many of the military's actions are legitimized. The very fact that the court permits a certain action, gives the action a legal seal of approval, and makes it possible to keep doing it under the restrictions set by the Supreme Court.”<sup>223</sup>

As a result, very few petitions filed by Palestinians against the Wall are heard, much less succeed in rerouting the Wall.<sup>224</sup> The *Mara'abe* precedent has supported the construction of the Separation Wall in more than 150 attempted challenges.<sup>225</sup> Seeking relief at the HCJ further requires petitioners to present arguments which will be viewed favorably by the justices of the Israeli Court. For example, in *Beit Sourik*, attorney Muhammad Dahleh presented a proposal for an alternative route which still passed on the Palestinian side of the Green Line, leaving aside Israel's right to build the Wall in the OPT, to argue the proposed route needlessly seized Palestinian land without a sufficient security rationale.<sup>226</sup>

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220. See Sfar, *supra* note 28, at 22 (“We sometimes manage to get justices to put pressure on the military, resulting in the prevention or mitigation of the harm in the specific case before the court, which, it has to be said, is no small matter.”).

221. *Id.* at 328.

222. The HCJ took a similar approach in upholding underlying practice, while invalidating the example before them, in considering instances of torture. See Sultany, *supra* note 171, at 319, 331.

223. Ra'anana Alexandrowicz, *The Justice of Occupation*, N.Y. TIMES (Jan. 25, 2012), [https://www.nytimes.com/2012/01/25/opinion/the-justice-of-occupation.html?\\_r=0](https://www.nytimes.com/2012/01/25/opinion/the-justice-of-occupation.html?_r=0) [https://perma.cc/H6MC-N7H8].

224. See SFARD, *supra* note 28, at 328 (listing petitions from Alfei Menashe, Beit Sourik, Azzun, and Bil'in as the petitions which successfully rerouted the Separation Wall).

225. See *The Separation Barrier*, *supra* note 2.

226. See SFARD, *supra* note 28, at 291–92.

Court procedures themselves also play a role in legitimating violative practices.<sup>227</sup> Palestinian access to Israeli courts supports the appearance of justice and due process in providing Palestinians the opportunity to appeal orders from the IDF military commander for seizure of land. If the IDF military commander rejects the initial appeal, a claimant only has seven days to refer the appeal to the HCJ. If a claimant does appeal, there is no way to ensure the HCJ accepts the case. When the HCJ decided *Mara'abe*, the Court had received eighty petitions challenging seizure orders for the Separation Wall.<sup>228</sup> And although about half of petitions are withdrawn after a compromise is reached between petitioners and the IDF military commander, it is uncertain what those compromises entail.<sup>229</sup>

In *Mara'abe*, the HCJ also formalized use of factfinding methods, like deference and burden of proof, to further support Israel's operations in the OPT. The HCJ defers to the IDF military commander's determination of necessary measures for protecting Israeli settlers, the appropriate route of the Separation Wall, and whether the route of the Wall is the least harmful to Palestinians' rights, stating it "assigns special weight to the opinion of the military commander, with whom the responsibility for security lies," and "[it has] no basis for doubting" the reliability of the government's decisions.<sup>230</sup> Deference to the administrator of the occupied territory is a judicially created convention which assists in obscuring any politically motivated decisionmaking.<sup>231</sup> The military may not even abide by the Court's existing efforts to curb abuse of discretion by the military commander, with cases arising before the HCJ for contempt of court for failure to reroute a portion of the Wall following a court order.<sup>232</sup>

Burden of proof lies with the Palestinian petitioner to demonstrate the route of the Separation Wall is politically motivated rather than for security, without ever indicating how a petitioner proves political motivation.<sup>233</sup> The Court rejects arguments that the Wall is politically

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227. See WEILL, *supra* note 167, at 7.

228. See HCJ 7957/04 *Mara'abe v. The Prime Minister of Israel* 60(2) PD 477, ¶ 5 (2005).

229. See *id.*

230. *Id.* ¶¶ 35, 100.

231. C.f. WEILL, *supra* note 167, at 17, 34–35 (referring to the "dominant factor" test).

232. See HCJ 8414/05 *Ahmed Issa Abdallah Yassin v. Government of Israel* ¶ 35 (2007).

233. See HCJ *Mara'abe* 60(2) PD ¶ 33 ("Indeed, petitioners did not carry the burden and did not persuade us that the considerations behind the construction of the separation fence are political rather than security-based."). The difficulties of demonstrating political motivations continue as Israeli politicians openly assert the settlements are permanent.

motivated if constructed within the West Bank, stating the IDF military commander has a responsibility to protect Israeli settlers. In *Beit Sourik*, the HCJ even suggested the Wall would appear more political if constructed on the Green Line because it serves as the location of a political boundary.<sup>234</sup>

The difficulties of challenging the decisions of the IDF military commander through the domestic legal system raises concerns for petitioners as to whether the chance for a positive determination is worth facilitating the development of Israel's colonial logic.<sup>235</sup> Permitting Palestinians to submit petitions to the HCJ helps control Palestinian efforts to seek reform by funneling them through the judicial processes largely structured for their failure. Even the HCJ's approach of considering segments of the Separation Wall piecemeal reinforces that the Court will only redress individualized harms, and not collective harms as might be possible if the Court were to review the Separation Wall in its entirety. Professor Nimer Sultany attributes this to the Israeli Court's technique of masking the colonial project through decontextualization.<sup>236</sup> The full history of Israel's occupation and the exploitative relationship cultivated with the Palestinian population is obscured by only accounting for the harm to Palestinians resulting from construction of smaller segments of the Separation Wall.

Through its reasoning, the HCJ portrays construction of the Separation Wall as operating within the rule of law. This legitimization of the Court's rulings contributes to their domestic impact, assisted by the high degree of confidence the Israeli public has in the HCJ.<sup>237</sup> In particular, the Court uses precedents from the Separation Wall cases in other challenges against Israel's occupation policies.

#### B. Israeli Precedent after Beit Sourik and Mara'abe

The *Beit Sourik* and *Mara'abe* precedents are not limited to petitions against sections of the Separation Wall. The HCJ repeatedly cites *Beit Sourik* and *Mara'abe* in subsequent legal decisions that are

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President Benjamin Netanyahu stated, "[t]here will be no more uprooting of settlements in the land of Israel. We will deepen our roots, build, strengthen and settle." Yotam Berger, *Netanyahu Vows to Never Remove Israeli Settlements from West Bank: 'We're Here to Stay, Forever'*, HAARETZ (Aug. 29, 2017), <https://www.haaretz.com/israel-news/netanyahu-vows-to-never-remove-west-bank-settlements-we-re-here-to-stay-1.5446461> [https://perma.cc/Q4SX-ZHM?type=image].

234. C.f. HCJ *Beit Sourik* 88(5) PD 807 ¶ 30 (2004).

235. See Sultany, *supra* note 171, at 316.

236. *Id.* at 325.

237. See *id.* at 333.

translated into English,<sup>238</sup> for their description of the violence during the Second Intifada and the need for security; the IDF military commander's duty and discretion to protect the interests of Israeli settlers; and, the proportionality test.

The HCJ's use of *Mara'abe* and *Beit Sourik* as a reference to the violence of the Second Intifada lends support to arguments for security and military necessity.<sup>239</sup> Through these references, the Court codifies the perspective that measures taken in the OPT, such as the Security Wall, are necessary preventative measures and not politically motivated.<sup>240</sup> In HCJ 7052/03 *Adalah v. Minister of Interior* (2006), a challenge against Israel's Citizenship and Entry Law, which blocked family reunifications with residents of the OPT, the Court reflected, "the opinion of the court was consistent and clear: it is the right of the State to protect itself and its residents against the terror onslaught."<sup>241</sup> This narrative condenses the totalizing context of life under occupation to center on the immediacy of security for the Israeli state and civilian settlers, and evades reference to the racial, economic, and political subordination of Palestinians. The result is the HCJ's formulation that Palestinians are constant and inevitable threats.

The discretion allocated to the IDF military commander in *Beit Sourik* and *Mar'abe* leads to further expansion of the scope of "military necessity" and settlers' protectable security interests. The Court's unwillingness to interrogate the decisions of the military commander grants the IDF flexibility in implementing policies in the OPT. For example, the Court's discretion to the IDF military commander facilitated extending the concept of military necessity beyond considerations for

238. Only a limited number of HCJ decisions are translated into English. One such case, *Beit Sourik*, was translated immediately in apparent hope of impacting the upcoming ICJ decision. *Id.* at 327. Separation Wall cases translated into English include *Beit Sourik*, *Mara'abe* and *Yassin*, all of which had favorable outcomes for petitioners. *See* HCJ 8414/05 Ahmed Issa Abdallah Yassin v. Government of Israel (2007); HCJ *Mara'abe* 60(2) PD ¶¶ 91, 113; HCJ *Beit Sourik* 88(5) PD ¶ 85. There is no policy determining which cases are translated, but the selection to date suggests some consideration behind which cases to present to an international audience.

239. *See, e.g.*, HCJ 2150/07 Ali Hussein Mahmoud Abu Safiyeh v. Minister of Defense (2009) (challenging the military commander's closure of Road 443 to Palestinians); HCJ 7025/03 *Adalah v. Minister of Interior* (2006) (challenging the Citizenship and Entry Law, prohibiting all Palestinians from the OPT of a certain age from living with Palestinian citizens of Israel within Israel); HCJ 8276/05 *Adalah v. Minister of Defense* (2005) (challenging a law denying Palestinians the right to sue for compensation as a result of injuries caused by security forces within the OPT).

240. *See* SEARD, *supra* note 28, at 308 ("The justices needed the security argument, which is inherently an issue of fact and professional expertise, rather than a matter of law, to issue rulings that would remain legally sound.").

241. HCJ 7052/03 *Adalah* ¶ 14.

the immediate need for security. In HCY 8414/05 *Yassin v. Government of Israel*, the Court suggested, while the IDF military commander needed to reroute the segment of the Separation Wall near the Palestinian village of Bil'in, he could include planned expansions of the Modi'in Illit settlement to determine the route.<sup>242</sup> The HCJ's only restriction on this authority was to require there to be existing plans for the construction of the expansion for it to qualify as a military necessity.<sup>243</sup>

This decision reflects the expansionist project of the Separation Wall, in allowing the military commander to act for the sake of the settlement's future despite the HCJ's insistence that the occupation is only temporary. The economic interests at stake in construction of the Wall are incorporated into the proportionality test, to consider financial investments by settlers and construction firms made in the development of the area.<sup>244</sup> Investment becomes another settler interest which the IDF military commander weighs against Palestinians' basic rights, like freedom of movement. This decision promotes the IDF military commander's ability to shape conditions for Palestinians in the OPT around the consequences of settlers' presence on the land, treating property as a commodity rather than a right protected under international occupation law.<sup>245</sup>

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242. See HCY 8414/05 Ahmed Issa Abdallah Yassin v. Government of Israel ¶ 37 (2007).

243. *Id.* ("Considering the lack of certainty regarding construction of phase B of the neighborhood, and considering the temporary nature of the fence, it is not at this time absolutely necessary by military operation.").

244. See *id.* ¶ 37 ("It is uncontroversial that more than forty buildings have been built in the 'East Mattityahu' neighborhood, including hundreds of apartment units. Tens of apartments have already been inhabited, but the construction is solely in the western part of the neighborhood. In the eastern part no development or construction work has been carried out."). For a similar discussion on ways Israel and its citizens profit from the ongoing occupation of the West Bank in the Palestinian village of Dir Kadis, see Gross, *supra* note 21, at 321–23.

245. The recent Mitzpeh Kramim ruling demonstrates further the extent settler economic interests are shaping the legal doctrine applied to the West Bank. Mitzpeh Kramim is an outpost illegally constructed in the West Bank in 1999, built on land seized by the military without compensation to the Palestinian owners. The Settlement Division of World Zionist Organization, a semistate organization, granted away the land despite not possessing rights to it and knowing it was private Palestinian land. See Yotam Berger, *Israel Knowingly Gave Private Palestinian Land to West Bank Outpost*, HAARETZ (Sept. 25, 2018, 2:06 PM), <https://www.haaretz.com/israel-news/.premium-israel-knowingly-gave-private-palestinian-land-to-west-bank-outpost-1.6508830> [https://perma.cc/PEF6-R5UM]. A Jerusalem District Court decided in August 2018 the court could retroactively legalize the outpost through the "market overt theory," qualifying the outpost for further development. See *id.* Israel's market overt theory protects good faith purchasers of land when sold by someone other than the owner, or if the land was stolen. See *Motion to Join Proceedings In The Appeal Against the District Court's Decision in Mitzpeh Kramim As Amicus Curiae*, YESH DIN (Mar. 20, 2019), <https://www.yesh-din.org/en/>



Since *Beit Sourik* and *Mara'abe*, the HCJ has applied the proportionality test to other disputes arising from the OPT.<sup>246</sup> With protections of Israeli settlers incorporated within the proportionality test, the HCJ invoked this framework in later challenges against Israeli legislation regarding family reunification,<sup>247</sup> segregated access to roads in West Bank,<sup>248</sup> targeted killings,<sup>249</sup> IDF liability for injuries,<sup>250</sup> and limiting Palestinian access to lands.<sup>251</sup> The extension of the proportionality test to other aspects of life in the OPT similarly demonstrates the HCJ's justification of underlying oppressive policies while restricting only excessive action.<sup>252</sup> In HCJ 2150/07 *Abu Safiyeh v. Minister of Defense* (2009), the Court employed the proportionality test to rule the absolute closure of Route 443 to all Palestinians since 2002 was a disproportionate prohibition on travel.<sup>253</sup> The road that connects Jerusalem to areas throughout the West Bank was closed to Palestinians allegedly to protect the security of Israeli drivers during and after the Second Intifada.<sup>254</sup> To comply with the Court's ruling, but still deter Palestinian

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motion-to-join-proceedings-in-the-appeal-against-the-district-courts-decision-in-mitzpe-kramim-as-amicus-curiae [https://perma.cc/E8VV-F2NY]. The District Court's use of the market overt theory relates back to a legal opinion by Attorney General Avichai Mandelblit and a HCJ decision from 2017 finding the IDF could create a temporary living area on private Palestinian land for evacuees from the Amona outpost while they waited for construction of a new settlement. See Jacob Magid, *Attorney General Okays Seizure of Private Palestinian Land For Outpost Road*, TIMES OF ISRAEL (NOV. 15, 2017, 6:02 PM), <https://www.timesofisrael.com/attorney-general-okays-seizure-of-private-palestinian-land-for-outpost-road/> [https://perma.cc/JX7P-C4Z2]. In that case, the HCJ ruled the IDF military commander's duty to protect settlers superseded legal violations of Palestinian rights in the appropriation of land, as long as the owners were compensated. In Mitzpeh Kramim, the IDF military commander's duty to protect settlers in the occupied territory removed the dispute from the context of occupation. The Jerusalem District Court legalized the outpost by applying Israeli law, in the market overt theory, without regard for the special status of the occupied territory and the occupied population's right to property under international law. If upheld by the HCJ, this ruling will serve as precedent for legalizing additional illegal outposts, permitting further expansion of settler lands in the West Bank and facilitating annexation of Palestinian property through judicial action. See Jacob Magid, *Court Okays Legalization of West Bank Outpost, Possibly Paving Way For More*, TIMES OF ISRAEL (Aug. 28, 2018, 10:20 PM), <https://www.timesofisrael.com/court-okays-legalization-of-west-bank-outpost-paving-way-for-dozens-more/> [https://perma.cc/8NAX-8456].

246. See GROSS, *supra* note 21, at 314; Kretzmer, *supra* note 188, at 230.

247. See HCJ 7025/03 Adalah v. Minister of Interior (2006).

248. See HCJ 2150/07 Ali Hussein Mahmoud Abu Safiyeh v. Minister of Defense (2009).

249. See HCJ 769/02 The Public Committee Against Torture v. Government of Israel 2006(2) IsrLR 459 (2006).

250. See HCJ 8276/05 Adalah v. Minister of Defense 2006(2) IsrLR 352 (2006).

251. See HCJ 9593/04 Rashed Morar v. IDF Commander 2006(2) IsrLR 56 (2006).

252. See Sultany, *supra* note 171, at 324.

253. HCJ 2150/07 *Abu Safiyeh* ¶ 39.

254. *Id.* ¶ 3.

use of the road, the IDF opened only two entry and four exit points for Palestinians across the entire length of Route 443, placing roadblocks across access points to other major roads.<sup>255</sup> The HCJ's ruling projected the narrative that Israel abides by the rule of law in the OPT, while allocating to the IDF discretion to continue an oppressive and discriminatory policy. The HCJ's use of the proportionality test has expanded the occupying power's control, through apparent rule of law, over different aspects of life in the OPT.

The *Beit Sourik* and *Mara'abe* rulings have had broad implications on Israeli policy in the OPT. Their precedents concerning the IDF military commander's discretion, military necessity, and the proportionality framework continue to affect conditions of life for the occupied Palestinian population. The Separation Wall cases also have an international impact, through reproduction of their normative outlook by other courts, international institutions, and legal scholars.

### C. Global Perspectives on Occupation Law

Sources of international law include treaties, customary law, principles recognized by "civilized nations", judicial decisions, and scholarship from highly qualified publicists.<sup>256</sup> Treaties, such as the Geneva Conventions, are binding through consent of a state. Conversely, customary international law is automatically binding on states and can address gaps in treaty law. Customary international law is identified from state practice and *opinio juris*, or norms with which a state believes they have an obligation to conform.<sup>257</sup> International law can change through the development of new norms, which often result from violations of previous customary laws.<sup>258</sup> Customary international law's focus on state practice demonstrates an entrenched bias in international law towards the conduct of sovereign states in evaluating shifts in legal norms.<sup>259</sup> Emerging customary rules also consider

255. See *The Illusion of Rule of Law on Route 443*, ACRI (May 25, 2010), <https://law.acri.org.il/images/road443mapeng.jpg> [<https://perma.cc/BH7Y-SYCJ>].

256. See Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 1060, T.S. No. 993.

257. See *North Sea Continental Shelf Cases* (Federal Republic of Germany v. Denmark and Netherlands), 1969 I.C.J. 3, ¶ 37 (Feb. 20); JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES* xxxviii (2005), <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf> [<https://perma.cc/8TKF-RD79>] (citing the ICJ *Continental Shelf Case* as guiding study of customary international law).

258. Daniel Reiser, head of the IDF International Legal Department, stated, "If you do something for long enough the world accepts it . . . . International law progresses through violations." See Barshad, *supra* note 150.

259. See ANGHIE, *supra* note 72, at 54.

the practice of states whose interests are specifically affected by a legal norm.<sup>260</sup> This leads to states that engage more frequently in certain activities (such as Israel or the United States in occupation of a foreign territory) having greater influence over the development of customary legal norms on that topic.

Noura Erakat explains how developments in the legality of targeted killings illustrate the pattern of change in customary international law.<sup>261</sup> Targeted killings through small arms or unmanned aircraft were previously considered extrajudicial killings.<sup>262</sup> Following the Second Intifada, Israel's international legal department developed the conflict classification "armed conflict, short of war," a concept without legal meaning under international law.<sup>263</sup> This category was used to target direct participants in hostilities, later extended to include mere membership in a designated terrorist organization.<sup>264</sup>

The classification armed conflict, short of war gave "legal cover" to the actions of the IDF.<sup>265</sup> The targeted killings thesis was endorsed by the HCJ in, HCJ 769/02 *The Public Committee against Torture in Israel v. The Government of Israel (PCATI)*. In that decision, the HCJ found targeted killings were legal but the duty of proportionality (citing *Mara'abe* and *Beit Sourik*) required that a committee review the targeted killing in the event of civilian casualties to determine payment of reparations or other consequences.<sup>266</sup> The committee does not participate in the decision to make a strike, which is in the discretion of the IDF, but only in determining steps to take after a targeted strike has taken place.<sup>267</sup> Every targeted killing is legal prior to being challenged

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260. See *North Sea Continental Shelf*, 1969 I.C.J. ¶ 73 (describing the Specifically-Affected States Doctrine).

261. ERAKAT, *supra* note 24, at 178.

262. See *id.*

263. See *supra* note 150. Israel sought to avoid any established legal framework by "deliberately exceptionalizing" nonexceptional confrontations to selectively apply the law of armed conflict or the law of occupation to the OPT. See ERAKAT, *supra* note 24, at 179. Israel invoked the right to self-defense to justify the use of force but denied the resulting legal consequence of needing to recognize Palestinian fighters' belligerent status, which would allow Palestinians to legally use lethal force against Israeli armed forces. See *id.*

264. ERAKAT, *supra* note 24, at 185–94, 200–01.

265. Barshad, *supra* note 150; see also WEILL, *supra* note 167, at 7 ("The US and Israel are states bound by the idea of the rule of law—even at the international level—as evidenced by the numerous legal opinions penned by their legal experts in an attempt to provide legal legitimacy to their acts.").

266. HCJ 769/02 *The Public Committee Against Torture in Israel v. The Government of Israel* 2006(2) IsrLR 459, ¶¶ 58–59 (2006) (imposing upon the use of this authority the condition of a proper balance between that security and the rights, needs, and interests of the local population).

267. See *id.* ¶ 59.

and is reviewed based on its individual merits (like sections of the Separation Wall). The Obama Administration later justified using drone strikes against individuals suspected of participating in terrorism by citing directly to the IDF's arguments in the *PCATI* case.<sup>268</sup> Much of the international opposition to the certain targeted killing practices has since faded.<sup>269</sup>

Despite the stark prohibition on civilian settlement in Article 49(6) of the Fourth Geneva Convention, similar arguments persist for broadening the scope of an occupying power's authority to protect settlers' security and human rights in an occupied territory. Legal scholarship in humanitarian law support the legal norms in *Beit Sourik* and *Mara'abe* that extend the IDF military commander's authority under Article 43 of the Hague Regulations to protect the rights of settlers living in the OPT and that invoke the laws applicable to armed hostilities in the context of occupation. For example, Kretzmer asserts the HCJ contributed to the development of occupation law by expanding the interpretation of Article 43 of the Hague Regulations to include protections for the settler population and by articulating a proportionality test to account for settlers' interests.<sup>270</sup> Dinstein, in support of the HCJ decision, argues for application of the law of armed conflict in the context of escalated violence in an occupied territory and criticizes the ICJ for failing to recognize the ongoing hostilities in the West Bank.<sup>271</sup> Additionally, Dinstein refers to the HCJ's positioning of human rights law to protect settlers as "irreproachable," citing the 1995 Interim Agreement and the decision to leave the issue of settlements to the final status negotiations as evidence the construction of the Separation Wall around the settlements meets Israel's responsibility for security in the meantime.<sup>272</sup>

Consideration of settlers' rights reemerges particularly regarding the right to property. In *Demopoulos v. Turkey* (2010), the European Court of Human Rights (ECtHR) disregarded the rights of persons under occupation law to protect the property interests of

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268. Barshad, *supra* note 150. See ERAKAT, *supra* note 24, at 190–94 (discussing the United States' reciprocal use of Israeli precedent to justify the American targeted killing program and counterterrorism operations).

269. ERAKAT, *supra* note 24, at 192.

270. Kretzmer, *supra* 188, at 236 ("In stressing the centrality of Article 43 of the Hague Regulations, in ruling that military commanders must find a balance between military needs and the welfare of the local population, and in subjecting this balance to the test of proportionality, the Court has helped to develop the law of belligerent occupation.").

271. DINSTEIN, *supra* note 114, at 101.

272. *Id.* at 257.

settlers.<sup>273</sup> Turkey's illegal occupation of Northern Cyprus in 1974 displaced Greek-Cypriots who later challenged the allocation of their homes and property to Turkish settlers under the rights to property and home in the European Convention on Human Rights.<sup>274</sup> The ECtHR found petitioners needed to exhaust domestic remedies before the Immovable Property Commission (IPC), established by Turkey to hear property claims, prior to petitioning the ECtHR.<sup>275</sup> The ECtHR neglected to apply occupation law, overlooking the structural inequities of occupation. Petitioners argued restitution of their property should be automatic, where not impossible, and the dispossessed property owners should not be forced to undergo procedures before a body set up by the occupying power. The IPC placed significant restrictions on restitution, including where property had been transferred to another person.<sup>276</sup>

The ECtHR decision looked at the right to property in the context of an ongoing occupation. However, it did so by way of highlighting the number of settlers arriving in Cyprus and the degree to which property changed hands.<sup>277</sup> The ECtHR decision opened with a detailed discussion of the UN's "Plan for a Comprehensive Solution to the Cyprus Problem" (the "Annan Plan"). The Annan Plan called "for the property rights of Greek Cypriots to be balanced against the rights of those now living in the homes or using the land, some of them Turkish-Cypriot refugees from the south of the island who had lost homes of their own, but many others of them Turkish settlers."<sup>278</sup> The Annan Plan, ultimately rejected by Greek-Cypriots through referendum, made adjustments for the treatment of property claims based on such factors as whether the dispossessed owner built the home and the length of time the "current user" lived there.<sup>279</sup> The ECtHR's emphasis on the length of the occupation, the interim investment of settlers, and efforts to negotiate peace served as pretext, paradoxically, for not applying occupation law or mentioning the prohibition against settlement under Article 49(6) of the Fourth Geneva Convention.<sup>280</sup>

273. *Demopoulos and Others v. Turkey*, App. No. 46113/99, Eur. Ct. H.R. (2010).

274. COUNCIL OF EUR., EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, AS AMENDED BY PROTOCOLS NOS. 11 AND 14, ETS 5, arts. 1, 8 (Nov.1950).

275. *Demopoulos*, App. No. 46113/99 ¶ 133.

276. *See* GROSS, *supra* note 21, at 379, 381.

277. *Demopoulos*, App. No. 46113/99 ¶ 87; *see* GROSS, *supra* note 21, at 380.

278. *Demopoulos*, App. No. 46113/99 ¶ 10; *see* GROSS, *supra* note 21, at 380.

279. *Demopoulos*, App. No. 46113/99 ¶ 12, 13.

280. GROSS, *supra* note 21, at 381.

Abstracting from occupation law, the ECtHR legitimized the property interests of settlers by viewing claims to property as individual rights to a commodity, instead of protections for the dispossessed under occupation law.<sup>281</sup>

The Separation Wall cases have contributed to state practice, scholarship, and judicial decisions supporting expanded powers of an occupying power and rights of settlers. All are potential sources for identifying changes to customary international law. Accepting and normalizing these shifts to existing legal norms regarding military necessity and settlers' rights threatens to weaken the protections granted to an occupied population under international humanitarian and human rights laws.

### CONCLUSION

International law can be used as a tool for resistance and for oppression. While some international institutions appear committed to the illegality of settlement, the enforcement of law at the state and regional levels can still result in the dispossession of an occupied population.<sup>282</sup> As a result of efforts to deny Palestinians the ability to exercise their self-determination and sovereignty, Palestine's participation at the international level remains limited despite its classification by the UN as a Non-Member State. Palestine's ongoing exclusion from full participation as a member of the "Family of Nations" operates on individual Palestinians to deny their protections under international law.

This Comment discusses the history of the occupied West Bank and the development of the international law of occupation to illustrate how the practice of settler-colonial dispossession can recreate itself through contemporary international law. While the HCJ *Beit Sourik* and *Mara'abe* decisions assert compliance with the ICJ *Advisory Opinion*, they in effect reinterpret Israel's obligations as an occupying power under international occupation and human rights laws to legalize annexation of territory, support settlement in the West Bank, and limit protections owed to the occupied Palestinian population. The HCJ leverages international law to legitimize the Court's proportionality test

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281. *Id.*

282. In 2020, the UN Human Rights Council published a list of businesses operating in settlements in the West Bank whose work raises concerns of human rights violations, in aiding the commission of a war crime. See *UN List Targets Firms Linked to Israeli Settlements*, N.Y. TIMES (Feb. 12, 2020), <https://www.nytimes.com/aponline/2020/02/12/business/ap-ml-un-israel-settlements.html>.

and the IDF military commander's expanded powers to uphold other colonial policies affecting Palestinians' lives in the OPT. The HCJ precedents receive support from legal scholars and in law school classrooms. The legal norms they embrace are also repeated in other judicial fora. These policies and practices at the sub-international level facilitate oppression of occupied populations and influence the trajectory of international law. Questioning the seemingly neutral tool of law is essential to understanding how Israel's enforcement of international law in these cases can result in the enduring dispossession of the occupied Palestinian population.